The international trading regime and the regulation of trade in energy resources. Is reform necessary and is a new Energy Agreement within the WTO framework the way to go?

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Abstract

Although the WTO does not address energy as a distinct sector, numerous suggestions have been made, so far essentially in scholarly writings, to adopt a sectoral agreement dealing with energy issues. This contribution argues that a new Energy Agreement (EA) within the WTO framework would raise more problems than it would offer solutions. If such an Agreement were to be added to the WTO framework, several fundamental choices would have to be made in advance, e.g. will this new EA be plurilateral or multilateral; what will the scope of its provisions be, etc.?

It may be argued that the sectoral approach is not new in itself, as it has already been used on several occasions. However, a comparative teleological analysis of these agreements proves that the issues in these sectors are substantially different from those concerning trade in energy resources. The model of existing sectoral agreements is therefore hard to transpose to the energy sector. Even if new rules were to be designed and Members reached an agreement as to the scope ratione materiae and ratione personae of such an EA, its integration into the WTO framework would have to be carefully regulated. Given all these complexities, combined with the current difficulty in reaching consensus, proposals for an Energy Agreement may hit a dead end, at least for several years to come.

However, there are less problematic alternatives, such as the addition of an Annex, a Reference Paper, or the adoption of an Interpretation decision. Arguably, all these solutions offer only partial adjustment of the existing framework. Major adjustment efforts will however prove to be futile, as most of the existing provisions are already either adjusted to deal with energy issues or sufficiently flexible to allow for an interpretation that will take into consideration sectoral specificities.

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Introduction

Trade in energy resources is unique in many regards: energy resources are unevenly distributed and this makes for a clear division between net importing and net exporting countries. Traditional energy resources (oil and gas) are exhaustible, and the peak in their production, although usually almost impossible to predict with certainty, may have already been reached or not be very far along the way. This makes it all the more relevant for public policies to promote ways of limiting production and consumption. In this vein, environmental considerations are also of utmost importance in the sector and State involvement is crucial, both for internalizing environmental externalities[2] and for promoting more environmentally friendly energy sources. Representing a business worth $6 trillion a year[3], the market of energy is extremely politicized[4]. All of these specificity features are inevitably reflected into different energy policies replicating a will to reduce energy dependence and either ensure auto-sufficiency when energy resources are imported, or maximize the economic rent when energy resources are exported.

The singularity of the energy sector has been used to uphold arguments as to the inapplicability of WTO rules to trade in energy resources. Legally, this argument consists in finding a kind of tacit gentlemen's agreement among the trading nations excluding of the energy sector from the framework of the world trading system[5].

The argument of such a gentlemen's agreement is very difficult to sustain and seems to only be supported by a very limited number of WTO members. Its existence is largely contested in legal

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[2] See on this issue PEARCE, D., "Energy policy and externalities : an overview", *Externalities and Energy Policy: The Life Cycle Analysis Approach*, Workshop proceedings, Nuclear Energy Agency and OECD, 2001 (http://www.oecd-nea.org/ndd/reports/2002/nea3676-externalities.pdf) and BAUMOL, W.J., "On Taxation and the Control of Externalities", *American Economic Review*, 1972

[3] "The power and the glory – A special report on Energy", *The Economist*, Juin 2008 (http://www.economist.com/node/11565685)

[4] COSSY, M., "Energy Trade and WTO rules: reflexions on sovereignty over natural ressources, export restrictions and freedom of transit", *European Yearbook of International Economic Law*, 2012, vol. 3 (1), pp. 281–306

[5] See SHIH W. S., "Energy Security, GATT/WTO, and Regional Agreements", *Natural resources journal*, 2009, vol. 49, pp. 433–484, p. 439, HARKS, E., "The International Energy Forum and the Mitigation of Oil Market Risks", in GOLDTHAU, And., WITTE, J. M.et REINICKE, W., *Global energy governance*, Global Public Policy Institute; Brookings Institution Press, 2010, pp. 247–267, p.248, SCHORKOPF, Fr., "Energie als Thema des Welthandelsrechts" dans LEIBLE, S., LIPPERT, M. et WALTER, C., *Die Sicherung der Energieversorgung auf globalisierten Märkten, Tübingen*, Mohr Siebeck, 2007, 184 p.; pp. 93-115

scholarship[6] and recent cases that have been brought before the Dispute Settlement Body (DSB)[7] prove that the energy sector falls undoubtedly within the scope of application of the main WTO disciplines.

This much seems to be as far as consensus goes today. But the issue of applicability differs from questions related to actual application. While it may be true that WTO-rules apply to trade in energy resources, the way in which the specificities of the sector should be reflected in the application of these rules is to be debated. It has indeed been suggested that WTO-rules, such as they exist now, are not fit to properly tackle issues related to the liberalization of trade in energy resources and that it may be advisable to adopt a separate agreement on energy trade.

This contribution has the modest objective of examining these proposals and of evaluating their practical viability. It argues that a new Energy Agreement (EA) within the WTO framework would raise more problems than it would give solutions and that there are alternative options to be considered if consensus were to develop as to the inadequacy of currently existing rules[8]. In order to evaluate the adequacy of the "sectoral approach" to treat trade in the energy sector, it first provides a brief overview of the experience so far, focusing on the possibility to use existing models for designing a new Energy Agreement (**Section 1**). It proceeds to examine whether this approach could be adequately transposed to the energy sector, given all of its above-mentioned specificities. This analysis is made under two different angles - a more general one, evaluating the potentiality of a new sectoral agreement within the general framework (**Section 2**), and a more technical one, analyzing what the terms of such an agreement would be and whether they could use the mould of preexisting texts (**Section 3**). Finally, we will examine alternative ways of adapting the general framework which may prove to be less difficult to put into practice (**Section 4**).

Section 1. The "sectoral approach"

The multilateral trading system has always been fragmented. Arguably, this fragmentation was the reason for its survival as much as for its allure. Behind the rhetoric of the single undertaking one

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[6] See among others MARCEAU, G., "The WTO in the Emerging Energy Governance Debate", *Global Trade and Customs Journal,* 2010, vol. 5, n° 3, pp. 83–94 ; SELIVANOVA, Y., "The WTO and Energy: WTO Rules and Agreements of Relevance to the Energy Sector", *ICTSD Trade and Sustainable Energy Series*, Issue paper 1, August 2007, 57 p.

[7] The recent Appellate Body report in the case *Canada - Certain Measures Affecting the Renewable Energy Generation Sector* (WT/DS412/AB/R and WT/DS426/AB/R) is certainly the first of many. Several other disputes have been filed contesting the WTO-law compatibility of measures in the energy sector – cf. the request for consultations recently filed by the Russian federation concerning the EU "Third energy package" (*European Union and its Member States - Certain Measures Relating to the Energy Sector*, WT/DS476/1) or the on-again-off-again biodiesel dispute between the EU and Argentina (cases DS459 and DS473

[8] This premise is taken here merely as a basis for comparison and is not to be considered a settled matter. On the contrary, the author considers that most WTO rules are flexible enough to address all these issues and that potential lacunae can be filled with cooperation with other *fora.*

can find nowadays a host of different agreements[9]. Some of them, such as the WTO Agreement on Implementation of Article VI of the GATT 1994 (Anti-dumping agreement), the Agreement on Subsidies and Countervailing Measures (SMC Agreement) or the Agreement on Preshipment Inspection, expand and further develop existing rules in order to clarify their application. Others use the flexibilities of the legal framework and adjust the rules to the singularities of certain fields. This second group of agreements is namely the result of what we will call "the sectoral approach". The expression reflects a process of designing specific rules regulating trade in a predefined set of goods (sector), regardless of whether these disciplines apply alternatively or cumulatively with the general rules.

It may be suggested that this "sectoral approach" is not new *per se*, as it has already been used on several occasions throughout the history of the multilateral trading system.

1. Brief historical background of the sectoral approach within the multilateral trading system

At the outset, the goal of the GATT was to establish rules of general application for trade in all goods. The text, in its initial form stemming from the Havana Charter, "contained very few references to particular products or sectors"[10]. From the very first cycles of negotiations, however, reductions of tariffs were negotiated on a product-by-product basis[11]. Once the first massive tariff cuts were made, this method was no longer satisfactory and, during the Kennedy Round, Contracting Parties began discussing the possibility of applying tariff cuts across the board on all tariff lines[12]. On the other hand, several sectors remained too specific and the need was felt to be treat them apart : (1) either by means of exceptions, or (2)via the establishment of specific negotiation groups (Committee on Agriculture, Groups on Cereals, Meat, and Tropical Products, and Pilot Group on Dairy Products), or, (3) finally, in the form of special plurilateral agreements (Memorandum of Agreement on Basic Elements for the Negotiation of a World Grains Arrangement and Agreement relating principally to chemicals).

With the paradigm shift towards further liberalization during the Tokyo Round, sectoral negotiations were seen as a way of addressing all types of barriers (tariff and non-tariff) in specific sectors. A Negotiating group i.e. "Sectoral Approach" was established pursuant to a Background note by the Secretariat suggesting that "the main general aim of the sector approach should be to go beyond the standards of liberalization prescribed in the agreed general liberalization formulae"[13].

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[9] For a systemic approach - see WTO, Negotiating group on market access, Sector specific discussions and negotiations on goods in the GATT and the WTO, Note by the Secretariat, 24 January 2005, TN/MA/S/13

[10] *Ibid.*, p. 3

[11] See HODA, A., T*ariff negotiations and renegotiations under the GATT and the WTO : Procedures and practices*, Cambridge, 2001, pp. 37, 38, 44 to 52

[12] WTO, Negotiating group on market access, S*ector specific discussions and negotiations on goods in the GATT and the WTO*, Note by the Secretariat, 24 January 2005, TN/MA/S/13, p. 5

[13] GATT, Multilateral negotiations, *Group 3 (c) - The sector approach*, Background note by the Secretariat, 3 february 1975, MTN/3C/1, 21 p., p. 10, § 36

The group's work was quite problematic. The sectoral approach fell victim to its prenatal deficiencies: the Contracting parties could agree neither on the sectors to be discussed, nor on the product coverage within the sectors. The risk that "the sector approach might also be used to justify a level of liberalization below the norm set by the general formulae"[14], did indeed materialize. The Working group did not manage to push the negotiations forward and was later-on dismantled. This failure should be attributed to a fallback in the negotiations conjuncture rather than to flaws inherent to the technique itself. The sector approach did indeed prove to be effective during the Tokyo Round - it resulted in the adoption of several sectoral agreements (the International Bovine Meat Agreement, the Agreement on Trade in Civil Aircraft and the International Dairy Agreement).

In the beginning of the Uruguay Round proposals were made to adopt a sector approach on some issues. This was indeed the case for the bargaining process for tariff reductions[15]. The reigning spirit of unity, which resulted in the "single undertaking approach", and the rejection of the "GATT *à la carte*" made it impossible to adopt or even negotiate many sectoral agreements. As a result, most sectoral bargains were embodied in the Parties' schedules. However, some fields, that were already considered excluded from the general framework, still remained "special" as no consensus could be reached on their normalization. This lead to the signature of the Agreement on Agriculture and the Agreement on Textiles[16].

In the post-Uruguay era only one sectoral initiative resulted in the adoption of a special agreement: the Information technology agreement entered into force on 1 July 1997. Several other proposals were put forward during the preparation of the Seattle Ministerial, in particular one on the initiative of ASEAN countries that included, among others, the energy sector[17]. Its failure could certainly be attributed to the misadventures of the Seattle Ministerial, but the absence of subsequent proposals in the same vein shows that the trading nations were not convinced in the first place about the need of such a sectoral agreement. In sum, the energy sector has so far never been discussed within the sectoral approach.

2. Cursory systematization of the sectoral experience

This brief chronological summary clearly demonstrates the diversity of the models that can be found within the broader concept of the sectoral approach. In some cases the results of sectoral negotiations are included in the Members' schedules. Although it substantiates the specificities of certain sectors, this technique is merely "an instrument for modifying the Schedules of concessions

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[14] *Ibid.*, p. 10, § 37

[15] the so-called "zero-for-zero" agreements

[16] see *infra*

[17] WTO, *APEC's "Accelerated Tariff Liberalization" (ATL) Initiative: Communication from New Zealand (Addendum): Accelerated Tariff Liberalization Initiative: An Outline of the Proposals Developed in the Eight ATL Product Areas*, 22 april 1999, WT/GC/W/138/Add.1, 36 p., in particular pp. 5 et s.

or for eliminating a specific non-tariff barrier"[18], and it should not be taken for a sectorization process as the sectors remain solely within the framework of the general disciplines.

If the adoption of special rules is what defines the "sector approach", this broad idea can in turn refer to different techniques. First, some sectoral agreements are designed in order to organise cooperation between exporting and importing nations, mainly by fixing sale and purchase obligations within maximum and minimum price ranges. For instance, the Kennedy round saw the adoption of such agreements in the cereals sector (plurilateral Memorandum of Agreement on Basic Elements for the Negotiations of a World Grains Arrangement[19]). This type of arrangements, as suggestive of the sectoral specificities as it may be, were scarcely integrated into the general framework of the multilateral trading system and this only for convenience reasons. It seems that at the time the approach successfully maintained some issues within the GATT, but the model is now quite obsolete.

A further degree of sectorization within the general system can be found in the case of agreements that organize the monitoring and the regulation of markets, such as the International Bovine Meat Agreement and the International Dairy Agreement. These two plurilateral agreements, legacy of the Tokyo Round, put into place monitoring bodies that are to evaluate the world offer and supply and provide for a forum for periodical consultations on all issues concerning trade in these sectors. The two agreements were scrapped in 1997[20], mainly because "countries that had signed the agreements decided that the sectors were better handled under the Agriculture and Sanitary and Phytosanitary agreements"[21]. The short life span of these agreements should not be attributed solely to a conviction of the inadequacy of the technique chosen for managing all particular issues related to the sectors. It is rather due to circumstantial factors and to the obvious doubling in *ratione materiae* coverage with the Agricultural Agreement and the SPS Agreement.

The sectoral approach is more palpable in the case of certain agreements aiming at a further liberalization in sectors already covered by the general rules. The first agreement that followed this rationale concerned the chemical sector. The Agreement Relating Principally to Chemicals is "usually referred to as a "harmonization" agreement, because participants included in their Schedules the same levels for different groups of products."[22]. An analogous logic is found in the design of the Civil Aircraft Agreement and the Sectoral on Pharmaceuticals. More recently the ITA

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[18] WTO, *Negotiating group on market access, Sector specific discussions and negotiations on goods in the GATT and the WTO*, Note by the Secretariat, 24 January 2005, TN/MA/S/13, p. 13

[19] for further developments see EISEMANN, P.M., *L'organisation internationale du commerce de produits de base*, Bruylant Bruxelles, Paris, 1982, 409 p., pp. 196 et s. and REHM, J.B., « The Kennedy round of trade negotiations », *American Journal of International Law*, vol. 62, 1968, pp. 420-427

[20] The end of these agreements "*s'est effectuée dans l'anonymat le plus total par simple notification de leur retrait par chacune des parties en application de l'article 67 de la convention de Vienne sur les traités"* (RUIZ FABRI, H. and MONNIER, P., "L'Organisation mondiale du commerce – droit institutionnel", *Jurisclasseur de droit international*, Fasc. 130-10, 2009, § 94)

[21] http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm#dairyandbeef

[22] WTO, Negotiating group on market access, Sector specific discussions and negotiations on goods in the GATT and the WTO, Note by the Secretariat, 24 January 2005, TN/MA/S/13, p. 9

had a similar objective[23] although it remains mainly a tariff reduction mechanism. We will examine the adequacy of these models to address the particular issues of trade in energy *infra*.

The highest degree of sectorization identifiable is embodied in two agreements which aim at bringing two sectors, that had come to be *de facto* excluded from the GATT disciplines, back into the multilateral trading system.

First, the agricultural sector, although initially regulated by the GATT[24], was progressively excluded and remained essentially outside the general framework until the end of the Uruguay round. The reasons for this exclusion are quite complex, but they are essentially related to the political importance of the sector and the unwillingness of influential Contracting parties to subject farm trade to rules that may have appeared too stringent. They chose instead "to take exemptions from or to outright disregard free trade"[25] in the sector. This choice was, at the time, a political one[26]. The GATT did in fact provide sector-specific rules for farm trade[27]. However, the USA requested and obtained a waiver in 1955[28]. The example was followed by other Contracting parties. When we add to the equation the creation of the European Common agricultural policy (CAP), the agricultural

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[23] for further developments see WUNSCH-VINCENT, S., *WTO, E-commerce and Information Technologies : from Uruguay Round through the Doha Development Agenda : a report to the UN ICT Task Force*, United Nations ICT Task Force, New York, 2005, 175 p., pp. 39 et s. ; WUNSCH-VINCENT, S., T*he WTO, the Internet and trade in digital products: EC-US perspectives*, Hart Publishing, 2006, 326 p., surtout pp. 81 et s.; BACCHETA, M., LOW, P., MATTOO, A. et a., *Le commerce électronique et le rôle de l'OMC*, OMC, Dossiers spéciaux 2, 1998, 84 p., disponible sur http://www.wto.org/french/res_f/booksp_f/special_study_2_f.pdf, pp. 52 et s. and WTO, 1*5 Years of the Information Technology Agreement Trade, innovation and global production networks*, Geneva, 2012, 117 p. (http://www.wto.org/english/res_e/publications_e/ita15years_2012full_e.pdf)

[24] TANGERMANN, St., "Agricuture on the way to firm international trading rules", in KENNEDY, D. et SOUTHWICK J., *The political economy of international trade law : Essays in Honor of Robert E. Hudec*, Cambridge University Press, 2002, 696 p., pp. 254-282, p. 257. See also DAVEY, W., "The rules for agricultural trade in GATT" in HONMA, M., SHIMIZU, A. et FUNATSU, H., *GATT and trade liberalization in Agriculture*, Otaru Hokkaido, 1993, 311 p., pp. 3-60, p. 59 : "the GATT rules on international trade were always intended to apply to agriculture. As drafted, they had the inherent capacity to regulate trade in agricultural products effectively"

[25] According to P. Mavroidis, "farm trade was one area where influential GATT contracting parties opted to take exemptions from or to outright disregard free trade" (MAVROIDIS, P., Trade in goods: the GATT and the other WTO Agreements regulating trade in goods, Oxford University Press, Oxford, 2013, 2e édition, 899 p., p. 744)

[26] As R. Hudec put it, "it would seem difficult to make a case that the GATT's problems with agricultural trade are attributable to weaknesses in the general rules of GATT" (HUDEC, R., "Does the Agreement on agriculture work ? Agricultural disputes after the Uruguay Round", *International Agricultural Trade Research Consortium*, Working paper 98-2, 1998, 47 p., p.8)

[27] Art. XI:2 provides for an exception to the general rule of prohibition of quantitative restrictions (art. XI:1). Art. XVI:3 regulates export subsidies for farm products, allowing subsidization in some cases. However, these texts "changed faces over the years and turned, through a combination of factors, into a green light for agricultural protectionism" (MAVROIDIS, P., *Trade in goods : The GATT and the other agreements regulating trade in goods*, Oxford University Press, 2007, 506 p., p. 203)

[28] The waiver had an unlimited duration and was subject to periodical reports that "simply served to underline the extent of the damage that had been inflicted on the GATT" (McMAHON, J., *The WTO Agreement on agriculture: a commentary*, Oxford University Press, Oxford, 2006, 333 p. ; p. 3)

sector was *de facto* excluded from the multilateral trading system[29]. It was not until the Uruguay Round that arguments of normalization finally made it to the negotiations agenda[30] and resulted in the adoption of the Agreement on Agriculture (AG)[31]. In a nutshell, this Agreement aims at creating a more competitive environment in the sector before ultimately bringing it back to the general framework[32].

Similarly, the textiles sector was initially subject to the general GATT rules but trade in textiles took place outside the GATT disciplines. Following a proposal by the USA, a separate textile-specific agreement was put into place. The Multi-fiber agreement (MFA) entered into force in 1974, covering a GATT-incompatible situation of discriminatory restrictions that had been developing since 1961[33]. This agreement was a sort of "mini-GATT" with its own different principles, logic, rules and institutions[34]. So when the Uruguay Round was launched, "the textiles and clothing sector was barely touched by GATT"[35]. The sectoral negotiations lead to the adoption of an Agreement on Textiles and Clothing (ATC), a transitional text providing for an integration agenda and progressive elimination of existing quotas. The agreement was clearly aimed at breaking with the past[36] and the

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[29] DAVEY, W., "The rules for agricultural trade in GATT" in HONMA, M., SHIMIZU, A. and FUNATSU, H., *GATT and trade liberalization in Agriculture*, Otaru Hokkaido, 1993, 311 p., pp. 3-60, p. 6: ethe GATT rules that were in fact applicable to agricultural imports were not enforced ; the GATT rules applicable to export subsidies were interpreted so as to make them largely meaningless". See also CARREAU, D. and JUILLARD, P., *Droit international économique*, Précis DALLOZ, 4th edition, 2010, Paris, 770 p., p. 158, § 373

[30] Throughout the years some contracting parties did try to apply general rules to trade in agriculture but with no success - see McMAHON, J., *The WTO Agreement on agriculture: a commentary*, Oxford University Press, Oxford, 2006, 333 p. ; p. 8. However, "achieving liberalization in this area would clearly require addressing the underlying domestic policy regimes, quantifying or estimating their trade distorting impacts, and instigating their reform – not an easy or simple matter. There was no political will to do that. (…) Absence of willingness to reform the domestic market (very much a reality, especially as far as the EC was concerned) emerged as the key reason for lack of progress in terms of liberalization of agricultural trade during the GATT years. Even those practices that could potentially be eliminated through recourse to dispute settlement, continued to be tolerated since it was perceived that legal challenges would not bear any results" (MAVROIDIS, P., *Trade in goods : The GATT and the other agreements regulating trade in goods*, Oxford University Press, 2007, 506 p., p. 204)

[31] For comments see DESTA, M., *The law of international trade in agricultural products : from GATT 1947 to the WTO Agreement on Agriculture*, Kluwer, The Hague, 2002, 468 p., McMAHON, J., T*he WTO Areement on agriculture: a commentary,* Oxford University Press, Oxford, 2006, 333 p. ; HUDEC, R., "Does the Agreement on agriculture work ? Agricultural disputes after the Uruguay Round", *International Agricultural Trade Research Consortium,* Working paper 98-2, 1998, 47 p.; ANDERSON, K., "Bringing discipline to agricultural policy via the WTO" in HOEKMAN, B. and MARTIN, W. (ed.), *Developing countries and the WTO: a pro-active agenda*, Blackwell Publishing, Oxford, 2001, pp. 25-57

[32] RUIZ FABRI, H., "Le cadre de l'organisation mondiale du commerce", in BEGUIN,, J. et MENJUNCQ, M. (ed.), *Droit du commerce international*, 2e édition, Lexis Nexis, Paris, 1293 p., pp. 91-123, p. 113, §156

[33] for an analysis see MAVROIDIS, P., *Trade in goods: the GATT and the other WTO Agreements regulating trade in goods,* Oxford University Press, Oxford, 2013, 2nd edition, 899 p., p. 784

[34] See CARREAU, D. and JUILLARD, P., *Droit international économique*, Précis DALLOZ, 4e édition, 2010, Paris, 770 p., p. 182, § 440

[35] RAFFAELLI, M. and JENKINS, Tr., *The drafting history of the Agreement on textiles and clothing*, ICTB (International Textiles and Clothing Bureau), 1995, Genève, 177 p., p. 2

[36] As the Panel stated in *US - Underwear* : "the overall purpose of the ATC is to integrate the textiles and clothing sector into GATT 1994" (Panel Report, *United States — Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/R, 8 November 1996, § 7.19

integration process was indeed successful: at the end of the initial 10-year transition period the ATC ceased to exist (1 January 2005) and trade in the sector is now governed only by general disciplines.

The objective of the present contribution is not to analyse in detail the AG and the ATC. We will only focus on investigating whether the pattern could be appropriately used for addressing trade in energy. A brief general observation seems necessary in order to assess the sectoral experience of the GATT and the WTO, however. The diversity of these initiatives makes it hard to draw a general conclusion as to the success or failure of the sectoral approach. Different levels of sectorization reflect different problems and sometimes different political situations. This rarely allows for an objective analysis. The extreme ends of the "sectorization spectrum" are less than conclusive: sectoral negotiations leading to changes in the parties' schedules were only useful in the beginning of the trading system; and sectorization pushed to the maximum (AG and ATC) corresponds to a somewhat perverse logic: it provides for a legal form of justification *ex post* of a common and permanent violation of the legal rules initially applicable to the sector. This process has proven to be limited and ultimately leading back to the reintegration of the sectors. Striking a balance between the two extremities is the adoption of sector-specific regimes that don't exclude the application of the general rules but provide for further liberalization. This model is, however, based on a consensus that general rules are to be respected in the sector, something which could not be further away from reality as far as the energy sector is concerned[37].

Section 2. Is the sectoral model adjusted to trade in energy resources?

A. Proposals for sectoral agreements on energy

Recently proposals have been proliferating, essentially in legal scholarship, suggesting the adoption of a sectoral agreement dealing with energy issues. Some of these proposals mark a preference for an integrated approach : J. Pauwelyn mentions for example a sort of "General Agreement on Trade in Energy"[38]; T. Cottier and his collaborators also opt for a similar "Framework Agreement on Energy within WTO law"[39]. Others are limited to the linkages between energy trade and environmental issues - J. Bacchus suggests for example a "Sustainable Energy Trade Agreement"[40]. The modalities and the names vary with the angle of attack, but these projects are all based on the general idea that such a sectoral agreement would be the solution to the archetypal problem in the area: the inadequacy of the general framework of the multilateral trading system to address the specificities of the trade in energy resources.

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[37] see *supra*

[38] PAUWELYN, J., « Global Challenges at the intersection of trade, Energy and the Environment: an introduction » in PAUWELYN, J., Global Challenges at the intersection of trade, Energy and the Environment, op.cit.,, pp. 1-8, p. 7

[39] COTTIER T., MALUMFASHI G. e.a., « Energy in WTO law and policy », op. cit.).

[40] BACCHUS, J., « A way forward for the WTO » dans MELENDER-ORTIZ, R., BELLMANN, Chr. et RODRIGUEZ MENDOZA, M., The future and the WTO: confronting the challenges (A collection of short essays), ICTSD Programme on global economic policy and institutions, Genève, juillet 2012, 220 p., pp. 6-9, p. 9).

The ideas suggest that an EA would offer a sort of a comprehensive framework for trade in energy, both for goods and services, thus avoiding the classic division of the Marrakech Agreement. This framework would also suggest alternative ways of taking into account environmental concerns avoiding the negative approach of the exceptions mechanism of Art. XX GATS. A separate EA would also address sector-specific problems, such as transit and third-party access, price fixation, double pricing, production restrictions etc., in a specific manner, while these issues are now left to the general rules "which were not negotiated with the specificities of the energy sector in mind"[41].

Surprisingly, very few of these proposals have been sufficiently laid out. This makes it hard to argue with the general intellectual constructions. But it is this absence of details that makes us wonder, first, whether the sectoral model is adjustable to the dynamics of energy trade, and, second, what would the terms of a new Energy Agreement be.

B. Is the energy sector "suitable for WTO agreement"[42]?

Although the sectoral approach has always been lurking in the background of trade negotiations, not many proposals using this model have made it to the negotiating table only very few have been seen through, leading to the adoption of sectoral agreements. The success of such initiatives is not only subject to the conjuncture of the market, which undoubtedly has an important role to play, but also to a sequence of political considerations that can be labelled as "criteria for a new WTO agreement"[43].

The first criterion is related to a shared belief among WTO Members that a new trade agreement will lead to an increase in world economic welfare[44]. In this case the new rules are seen by Members as evolutionary compared to the pre-existing regulation. Although the energy sector is undoubtedly of utmost importance for the development of world economy, this criterion can prove to be highly problematic in the area. Each Member assesses independently whether further liberalization of trade in the sector will increase welfare[45] and each Member has a different idea of what "world economic welfare" is. There is a risk that conclusions will vary, highlighting the discernible hiatus between importers and exporters. This criterion will therefore not provide for

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[41] MARCEAU, G., "The WTO in the Emerging Energy Governance Debate", *Global Trade and Customs Journal*, vol. 5 (3), 2010, pp. 83–94, p. p. 91

[42] The concept of "suitability for WTO agreement" was coined by Br. Hindley in a 2002 contribution. The analysis hereafter will be based on Br. Hindley's "criteria for a new WTO agreement" as laid out in HINDLEY, B., "What subjects are suitable for WTO agreement?", in KENNEDY, D. and SOUTHWICK J., *The political economy of international trade law,* Cambridge University Press, 2002, 696 p., pp. 157–171

[43] *Ibid.*, p. 165

[44] *Ibid.*, p. 165

[45] According to Br. Hindley, "(t)hat a new agreement would lead to an increase in world welfare is not a sufficient foundation to support its introduction into the WTO. The gain in world welfare may derive from the change that a WTO agreement would force in the policies of particular countries and the economic gains stemming from that change may accrue largely or completely to those countries. In the nature of the case, moreover, the gains are likely to be available through unilateral action on the part of the own-foot shooters, which, however, they have decided not to take. In these circumstances, the case for using the WTO to force abandonment of the policies seems weak." (*Ibid.*, p.166)

sufficient political incentive to promote the adoption of an EA.

A new agreement can also be the result of a group of trading nations trying to avoid or correct "illegitimate transfers" of wealth towards nations with more flexible rules in the sector[46]. This theory, attractive as it may appear, is also highly antithetical as it relies on the accord of countries with opposing interests[47] and it only allows for the-lowest-common-denominator results. Furthermore, as far as the energy sector is concerned, this accord seems only to exist concerning the need to adopt further environmental rules. If an EA is based exclusively on this logic, it will fall into a double trap: first, the participation of all or even of the majority of WTO members will be almost impossible to guarantee; second, even the participation of some will be contingent upon important compromises, concerning either the substance of the obligations or their binding force.

A third criterion can be found in the somewhat distorted vision that some Members share as to the role of the WTO needing to regulate as much of world trade as possible. But as Br. Hindley puts it, this argument is a merely bureaucratic one, "based on the assumption that if something moves, it should be regulated"[48]. Even if this remark can be nuanced, the argument is clearly weak and insufficient to serve as grounds for an agreement in a sector where the law is put on the back burner by politics ever so often.

Finally, some WTO Members value what they would refer to as "the modernizing mission" of the organization, which may also push them towards accepting the adoption of new agreements. These Members see the WTO as "a means of pushing countries – in particular, developing countries – to reject "bad" policies and accept "good" policies"[49]. But if a new EA were to be based on this rationale, the first step would consist in finding a convergence of opinions on the question of what "good" policy in the energy sector is. The problem of finding consensus here does not lie with the specificities of the sector *per se* but with the quasi-universal nature of the organisation itself. This makes it next to impossible to use mechanisms based on ideas of "good" and "bad" economic behaviour. And the important divergences in the energy sector do not make this endeavour any easier.

Section 3 - The terms of a new Energy Agreement

Even if, despite all of the above-mentioned conceptual hurdles, the doctrinal projects to adopt a new Energy Agreement are taken up by a group of WTO Members and proposals are made as to the adoption of such an agreement, several questions will need to be answered in advance, regardless of the technical provisions of the new text.

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[46] *Ibid.*, p. 168

[47] "If one country loses by an illegitimate transfer, another gains -- and the gainer is unlikely to see its gain as illegitimate. Of course, the gaining country could be persuaded to give up its gains for a suitable price -- but the notion of ''illegitimate" transfer often carries the implication that there should be no reward for abandoning the activity" (*Ibid*., p.168)

[48] *Ibid.*, p.169

[49] *Ibid.*, p. 169

A. The actors

Projects for the adoption of an EA are rarely effusive concerning its *ratione personnae* coverage. Naturally, preference goes to multilateralism, the only formula that would take into account all different interests and manage to maintain all discussions on energy trade within the WTO framework. However, in the intellectual allure of the formula resides its fundamental weakness - a multilateral agreement needs the acceptance of all members[50]. The energy sector, though, seems to be one of those issues "*sur lesquels un accord global est manifestement impossible*"[51].

It seems more realistic to opt for the plurilateral technique : the EA would thus only take legal effect for those Members that accept it pursuant to art. II:3 of the WTO Agreement. Naturally, there will always be the possibility of multilateralizing at a later stage[52]. The plurilateral model would ensure that certain initially suspicious Members don't block further liberalization and / or regulation in the energy sector[53]. Discussions will thus remain within the general framework of the multilateral trading system and although the new EA will be *à la carte*, this is still preferable to complete vacuum.

The option of adopting a plurilateral agreement is not univocal: the formula has indeed several varieties. First, parties to the new agreement can agree that only Members who have accepted the agreement will benefit form the liberalization, in a sort of a closed club. This option makes a new EA much more acceptable and attractive as it eradicates the problem of free riders. On the other hand, the initiative will be much more hard to accept for other Members. Second, the agreement can also contain a general MFN clause extending its benefits to all Members, parties or not, while the obligations would only bind those who have accepted the EA. Such a "plurilateral plus"

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[50] As M. Kennedy puts it, "additions are amendments" (KENNEDY, M., "Two single undertakings – can the WTO implement the results of a round?", *Journal of International Economic Law*, vol. 14 (1), 2011, pp. 77-120, p. 92)

[51] RUIZ FABRI, H., "Qui gouverne l'OMC et que gouverne l'OMC?", *En temps réel* (Association pour le débat et la recherche), vol. cahier 44, 2010, p. 17

[52] According to Al. Geslin plurilateral agreements are never conceived to remain plurilateral (GESLIN, Al., "Les traités plurilatéraux: quelle(s) utilité(s) dans le système commercial multilatéral?", dans V. TOMKIEWICZ, *Les sources et les normes dans le droit de l'OMC*, Pedone, Paris, 2012 p., pp. 57–69; p. 61)

[53] As J. Bacchus put it, "Would the consensus required for adding plurilateral trade agreements to Annex 4 of the WTO treaty prove to be a political obstacle? No, it should not be. Why should some WTO Members object if other WTO Members wish to negotiate WTO-plus obligations that will not bind them unless they choose to be bound by them? Should not all WTO Members, who share a common stake in the ongoing success of the WTO-based world trading system prefer that new trade agreements among WTO Members be made part of that overall system? Would that not be one good way to ensure the security and predictability of the system and otherwise to enhance it? » (BACCHUS, J., "A way forward for the WTO" dans MELENDER-ORTIZ, R., BELLMANN, Chr. et RODRIGUEZ MENDOZA, M., *The future and the WTO: confronting the challenges (A collection of short essays)*, ICTSD Programme on global economic policy and institutions, Genève, juillet 2012, 220 p., pp. 6-9, p. 8).

agreement[54] will definitely have a more mitigated altering effect on the global system as "(t)he basic superstructure of the WTO could thus remain the same – one common roof to lodge all agreements – but part of the rulebook would be different, involving deeper and wider commitments for those willing to subscribe to them"[55]. However, it should not be assumed that this would make such an EA easier to agree upon: it will still need cooperation between states with converging interests[56] who will also have to be willing to extend their obligations with no counterpart.

Although further discussions are definitely needed, it seems that the plurilateral approach might prove to be an innovation laboratory[57] and will allow willing Members to further develop the liberalization process in the energy sector. The initiative will however need to surmount numerous hurdles, setting aside the general institutional critique towards all plurilateral agreements as their nature itself contradicts *mantra* of the single undertaking.

First, a plurilateral EA will only make sense if the main importing and exporting nations in the energy sector take part. This means that these Members have to be willing "(i) to accept a level of obligations higher than that accepted by other Members; (ii) to apply those obligations to the trade of the other Members to the extent required by the most-favoured-nation rules; and (iii) to enforce those obligations through DSU procedures"[58]. In the current state of affairs such a will is hard to find - a plurilateral initiative in the energy sector will most probably attract only Members with convergent interests: the new EA will become a forum either for net exporters or for net importers. This type of agreements however already exist outside the framework of the WTO[59] and their duplication will be of little use in the search for a comprehensive sectoral agreement.

Yet another institutional hurdle is related to the integration of the new plurilateral EA within the WTO framework which would need to respect art. II:3 and X:9 of the WTO Agreement. Pursuant to

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[54] RODRIGUEZ MENDOZA, M., "Toward plurilateral plus agreements" in MELENDER-ORTIZ, R., BELLMANN, Chr. et RODRIGUEZ MENDOZA, M., *The future and the WTO: confronting the challenges (A collection of short essays)*, ICTSD Programme on global economic policy and institutions, Genève, juillet 2012, 220 p., pp. 27-32, p. 30

[55] Van GRASSTEK, Cr. et SAUVE, P., "The consistency of WTO rules : can the single undertaking be squared with variable geometry?", *Journal of International Economic Law*, vol. 9 (4), 2006, pp.837-864, p. 851

[56] "These agreements are normally entered into by groups of "like minded" or interested countries that decide to establish among themselves a common set of rights and obligations to deal with a particular subject matter or sector." (RODRIGUEZ MENDOZA, M., "Toward plurilateral plus agreements" dans MELENDER-ORTIZ, R., BELLMANN, Chr. et RODRIGUEZ MENDOZA, M., *The future and the WTO: confronting the challenges (A collection of short essays)*, ICTSD Programme on global economic policy and institutions, Genève, juillet 2012, 220 p., pp. 27-32, p. 30

[57] as Prof. Jackson put it, "certain innovations could occur with smaller groupings rather than the whole" (JACKSON, J., "The WTO "Constitution" and proposed reforms : the seven "mantras" revisited", *Journal of International Economic Law*, 2001, pp. 67-78, p. 75

[58] NOTTAGE, H. et SEBASTIAN, Th., "Giving legal effect to the results of WTO trade negotiations: an analysis of the methods of changing WTO law", *Journal of International Economic Law*, vol. 9 (4), 2006, pp. 989–1016, p. 1012

[59] The OPEC and the IEA

the latter of these texts[60], the procedures for the addition of a plurilateral trade agreement to Annex 4 of the WTO Agreement requires a consensus decision of the Ministerial Conference, that is of all Members, even if the plurilateral agreement is only binding on some of them. This requirement makes it hard enough to add new agreements, even in fields that are less politically charged than that of energy[61]. Finally, even if an EA manages to obtain the necessary accord, the compromises leading to it will undoubtedly have substantially reduced the level of obligations[62].

If neither the plurilateral nor the multilateral formulae work, one could envisage other options such as a critical-mass agreement "where Members agree to refrain from blocking consensus where a critical mass of them support a proposed change"[63]. This option is not less problematic though: the definition of the "critical mass" in the energy sector will be extremely difficult[64] and the attractiveness will yet again be contingent upon important compromise in the substance. Even if equilibrium were found, it would be extremely fragile and would make it impossible to follow quickly changing trends in energy trade (for instance, any modification of the list of covered products will need the same accord as the initial agreement).

It follows that with the crisis of the multilateral approach, almost sacrificed on the road to universalism, the inherent insufficiency of the plurilateral approach that seems to be inadequate for issues in the energy sector and the uncertainties of intermediary regimes, the adoption of an EA will face major institutional hurdles.

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[60] For a critical approach to this text see PAUWELYN, J., "The transformation of world trade", *Michigan Law Review*, 2005, pp.1-70, pp. 65-66 : "The need for consensus amongst all WTO members to add a plurilateral agreement to the WTO treaty, even if such agreement is binding only on some WTO members, must be revisited. Even within the E.U., with its far mo<re homogeneous membership, this strict requirement for differentiation no longer applies.235 Although some control by the entire WTO membership over new agreements is useful, for example to make sure that plurilateral agreements do not harm the rights of third parties, a single member ought not have a veto to block further WTO progress by others."

[61] The experience of the EU proposal for a plurilateral agreement on investments is a perfect example of the difficulties of this procedure: "The insistence of the European Communities' delegation on commencing negotiations for a plurilateral agreement relating to trade and investment, despite the lack of an explicit consensus from the membership to do so, is largely blamed for the failure of the Cancún Ministerial Conference." (FOOTER, M., *An Institutional and Normative Analysis of the World Trade Organization*, Martinus Nijhoff, Leiden, 2006, 373 p. ; p. 141-142); see also ISMAIL, F., "A Development Perspective on the WTO July 2004 General Council Decision, *Journal of International Economic Law*, vol. 8, 2005, pp. 377-404, especially pp. 396-398.

[62] As H. Ruiz Fabri and P. Monnier put it, the only reason why plurilateral initiatives were so successful during the Tokyo Round is because "*le fait que ces accords ne visent en réalité qu'un petit nombre de pays industrialisés, ensuite par le fait qu'on reste à leur propos dans l'esprit qui avait prévalu lors du cycle de Tokyo, à savoir des accords essentiellement incitatifs, faiblement contraignants*." (RUIZ FABRI, H. et MONNIER, P., "L'Organisation mondiale du commerce – droit institutionnel", *Jurisclasseur de droit international*, Fasc. 130-10, 2009, § 34)

[63] FOOTER, M., *An Institutional and Normative Analysis of the World Trade Organization*, Martinus Nijhoff, Leiden, 2006, 373 p. ; p. 161

[64] See PEREZ DEL CASTILLO, C., GIFFORD, M., JOSLING, T., MOEHLER, R. et RGUNAGA, M., *The Doha Round and alternative options for creating a fair and market-oriented agricultural trade system*, IPC Position Paper, Trade Negotiations Policy Series, International Food and Agricultural Trade Policy Council, Novembre 2009, 24 p., p. 7 : "The decision of how to define "critical mass" for any product will inevitably leave some countries dissatisfied. So the question arises as to whether the critical mass defines participation in the negotiations or the share of trade needed to reach an agreement."

B. The script - is "copy / paste" an option?

The terms of each provision of a potential future EA can be subject to long discussions. None of the proposals develop a comprehensive project as to the provisions of the new agreement, most of them preferring to remain rather vague and general. That is why any effort in this contribution to speculate on all possible provisions of a new EA, may prove to be completely useless in the long term. Instead, we suggest adopting a somewhat limited, but less speculative approach by examining whether the new EA could use the model of existing sectoral agreements, notably the AG and the ATC as they are the ones that reflect the most comprehensive efforts of sectorization.

Such a transposition is conditional upon a double convergence: first, symmetry between the rationale of the existing sectoral agreements and the underlying motivation for a new EA is the necessary premise for any transposition effort[65]; second, only some basic similarity between the issues that need to be addressed would justify such a transposition.

1. The rationale of the sectoral model

The AG and the ATC were negotiated in situations that appear *a priori* similar: both the farm and the textiles sectors were initially included, but subsequently excluded, first *de facto* and then *de jure,* from the general legal framework of the GATT. Both sectoral agreements are the result of an effort to bring the sectors back to the general disciplines. The *leitmotif* of the AG and the ATC is therefore analogous and can be resumed in the neologism of "normalization", a process that indirectly legitimizes or, at least, recognizes the preexisting exclusion.

The farm sector seems less prone to such a normalization. Therefore, the AG does not provide for a complete reintegration but creates a somewhat peculiar regime combining the application of the general ideas of WTO law with some sector-specific adjustments. Its utility is contested by some, appreciated by others[66]. Even today trade in agriculture is a category in itself: it still is the only area where export subsidies are explicitly permitted, three-digit tariff are still common and "a number of trade-distortive agricultural domestic support measures are still shielded from the remedies of the exemplary dispute settlement system of the WTO"[67]. The AG is rather a break with the *de facto* exclusion and an effort to organize it *de jure.* If we see the AG from this perspective (instead of the

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[65] The ITA would need to be excluded from the first stage of this analysis as it clearly obeys a logic of further liberalization and cooperation in a sector where the respect of the general rules is considered no longer sufficient by some countries. This logic supposes a prerequisite of complete consensus on the applicability of the general framework that clearly lacks in the energy sector.

[66] TANGERMANN, St., "Agricuture on the way to firm international trading rules", in KENNEDY, D. and SOUTHWICK J., *The political economy of international trade law : Essays in Honor of Robert E. Hudec,* Cambridge University Press, 2002, 696 p., pp. 254-282, p. 261: "*Was it necessary to agree on a separate text for agriculture, in order to bring agricultural trade on the main GATT track in this area? It probably was in order to make it crystal clear that everybody (...) had to move to bound tariffs in agriculture, irrespective where countries were coming from*".

[67] HUDEC, R., "Does the Agreement on agriculture work ? Agricultural disputes after the Uruguay Round", I*nternational Agricultural Trade Research Consortium*, Working paper 98-2, 1998, 47 p., p. 7

traditional approach of regarding it solely as a reintegration agreement), its model may be transposable to the energy sector. This transposition will, however, need to leave aside the need of legitimizing a preexisting exclusion: although suggestions have been made as to such an exclusion of the energy sector[68], a close examination of the negotiations proves that energy was always on the table.

The ATC obeys a logic that may initially seem similar but is in fact entirely different. The textiles sector was completely reintegrated into the general framework, although it may be argued that the success of the ATC is more detectable in theory than in practice[69]. The agreements concluded in 1969 and 1995 were the legal cover for the GATT-inconsistency of practices in the sector, but the ATC fervently condemns the idea of sectorization. Its Art. 9 prohibits to reopen the issue in the future without a consensual decision of the WTO, "which seems to be a remote possibility"[70]. Transposing this rationale to an EA would be absurd: it would consist in a sectorization with the sole objective of ultimately returning to normality.

2. The issues to be addressed

As mentioned *supra*, only some basic similarity between the issues that need to be addressed will justify using the model of the AG or the ATC for a new EA. Naturally, the provisions of any sectoral agreement are the reflection of problems of particular concern in the sector. For example, the AG is thus adjusted to regulate three main issues: access to import markets (tariff and non tariff barriers), export subsidies and domestic support. The first of these issues is of minimal importance for the energy sector as most restrictions to trade in the field are export barriers. The regulation of export subsidies might be of some relevance, especially if the concept of export subsidies is interpreted in

[68] see *supra.*

[69] As S. Bagchi puts it, "the end of derogations (…) does not mean that protectionism in the textile sector will be dead. The legacy of fifty years demonstrates that protectionism in the textile sector has always been combined with discrimination" (BAGCHI, S., « The integration of the textile trade into GATT », Journal of world trade, vol. 28, 1994, pp. 31-42, p. 41). See also BLOKKER, N., I*nternational regulation of world trade in textiles: lessons for practice, a contribution to theory*, Martinus Nijhoff, 1989,405 p., pp. 249; QUICK, R. *Exportselbstbeschränkungen und Artikel XIX GATT*, 1983, pp. 235-245; BERNIER, Iv., "Les ententes de restriction volontaire à l'exportation en droit international économique", *Annuaire Canadien de droit international*, 1973, pp. 48-86, in particular pp. 81-82

[70] BAGCHI, S., "The integration of the textile trade into GATT", *Journal of world trade*, vol. 28, 1994, pp. 31-42, p. 33

a broad enough manner to encompass the much debated practice of double pricing[71]. Export subsidies are however already prohibited under the SCM Agreement, the AG provides only for exceptions[72]. The general rules seem in this case better adapted than the transitional solution of the sectoral agreement. Export subsidies are common in the energy sector and if it were suggested that some of them would be legitimized in the new EA, contrary to the general principle of the ASMC, this would definitely result in an important obstacle to liberalizing trade in the sector.

Finally, as far as domestic support goes, this issue is arguably of utmost importance in the energy sector[73], especially when it comes to relating these policies to environmental objectives. However, the SMC Agreement seems to offer flexible enough solutions, while the rules in the AG have an extremely limited legal effect. It follows that in this particular case although a symmetry may be found between the two sectors, the sectoral approach does not suggest any specific rules that would be better adapted for the energy sector .

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[71] For developments on this issue see SELIVANOVA, Y., *Energy dual pricing in the WTO: analysis and prospects in the context of Russia s accession to the World Trade Organization*, Cameron May, 2008, 300 p.; POGORETSKYY, V.,"Energy Dual Pricing in international trade: subsidies and anti-dumping perspectives", in SELIVANOVA, Y. (ed.), *Regulation of energy in international trade law*, Wolters Kluwer, 2011, 416 p., pp. 181–228; SELIVANOVA, Y., "World Trade Organization rules and energy pricing: Russia's case", *Journal of world trade*, 2004, vol. 38 (4), pp. 559-602; POGORETSKYY, V. and BEHN, D., "The tension between trade liberalization and resource sovereignty : Russia – EU energy relations and the problem of natural gas dual pricing", contribution to the Conference Political Economy of Energy in Europe and Russia (PEEER), Université de Warwick, 3 september 2010; POGORETSKYY, V., "The system of energy dual pricing in Russia and Ukraine: the consistency of the energy dual pricing system with the WTO Agreement on anti-dumping", *Global Trade and Customs Journal*, 2009, vol. 10 (4), pp. 313-325; RIPINSY, S., "The system of gas dual pricing in Russia : compatibility with WTO rules", *World Trade Review*, 2004, vol. 3 (3), pp. 463-481; BEHN, D., "The effect of dual pricing practices on trade, the environment and economic development: Identifying the winners and the losers under the current WTO Disciplines", *Centre for Energy, Petroleum, and Mineral Law and Policy*, 2007; TARR, D.G. and THOMSON, P.D., "The merits of dual pricing of Russian natural gas", *The World Economy*, 2004, vol. 27, pp. 1173-1194; QUICK, "Export taxes and dual pricing : how can trade distortive government practices be tackled?" in PAUWELYN, J.(ed.), *Global Challenges at the intersection of trade, Energy and the Environment*, Graduate Institute of Geneva, Centre for trade and economic integration, 2010, 225 p., pp. 193-196

[72] As M. DESTA puts it, "some even feel that, by doing so, the Agriculture Agreement has set a bad example" (DESTA, M., *The law of international trade in agricultural products : from GATT 1947 to the WTO Agreement on Agriculture*, Kluwer, La Haye, 2002, 468 p., p. 213)

[73] See among others BIGDELI, S., "Incentive schemes to promote renewables and the WTO law of subsidies", in COTTIER, T. (ed.), *International trade regulation and the mitigation of climate change*, Cambridge University Press, Cambridge et New York, 2009, 456 p., pp. 155–192; BIGDELI, S., "Resurrecting the dead ? The expired non-actionable subsidies and the lingering question of "green space"", *Manchester Journal of International Economic Law*, 2011 (2), vol. 27, pp. 2-37 ; COSBEY, A., "Renewable energy subsidies and the WTO : the wrong law and the wrong venue", *Subsidy Watch*, vol. 44 (1), june 2011; HARMER, T., *Biofuels subsidies and the law of the WTO*, ICTSD Global Platform on Climate Change, Trade and Sustainable Energy, issue paper n°20, june 2009, 50 p.; LANG, K., I*ncreasing the momentum of fossil-fuel subsidy reform: developments and opportunities*, GSI – UNEP Conference Report, GSI (IISD) and UNEP, 2010, 74 p.; LODEFALK, M. et STOREY, M., "Climate measures and WTO rules on subsidies", *Journal of World Trade*, 2005, vol. 39 (1), pp. 11-23; RUBINI, L., "The subsidization of renewable energy in the WTO: issues and perspectives", *NCCR Trade Regulation, Working paper* n° 2011/32, june 2011, 45 p.; RUBINI, L., "Ain't waistin' time no more: subsidies for renewable energy, the SCM Agreement, policy space and law reform", *Journal of International Economic Law*, 2013, vol. 15 (2), pp. 525–579; STEENBLICK, R., "Subsidies in the traditional energy sector" in PAUWELYN, J. (éd.), *Global Challenges at the intersection of trade, Energy and the Environment*, Graduate Institute of Geneva, Centre for trade and economic integration, 2010, 225 p., pp. 183-192; WILKE, M., *Feed-in Tariffs for Renewable Energy and WTO Subsidy Rules*, ICTSD Global Platform on Climate Change, Trade and Sustainable Energy, issue paper n°4, 2011

As for the ATC, the issues it tackles are very different from those that need to be addressed in the energy sector. The main barriers in trade in textiles are related to protectionism by importing countries reflected in import quotas and discriminatory safeguard measures[74]. Protectionism in this traditional sense is not present in the energy sector: countries are on the constant search for diversification of their imports and import restrictions are extremely rare.

The ITA seems also practically impossible to transpose as issues are completely different: the IT sector has mainly import barriers and issues related to intellectual property. What's more, the ITA is the result of a huge compromise and its provisions are weakly ambitious as the attractiveness of the text needed to be compensated by a reduction of obligations[75].

C. The setting - organizing the legal relationship between a new EA and the general rules

If some, most, or, ideally, all Members were to agree upon the idea of adopting a separate agreement and even on its actual provisions, this new EA would need to clarify the terms of its integration into the general framework of the multilateral trading system. In other words, the relationship between this new agreement and already existing rules will need to be defined, sooner or later. In this vein, the question will be whether the EA could and should anticipate its unavoidable conflicts or at least its problematic coexistence with the preexisting texts[76].

Any further steps in the analysis will need to be based on the assumption that the new EA will be made part of WTO-law via its inscription in either one of the two lists of separate agreements: those of Annex 1A (if multilateralism is preferred), or those of Annex 4 (if the agreement is

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[74] BAGCHI, S., "The integration of the textile trade into GATT", *Journal of world trade*, vol. 28, 1994, pp. 31-42, p. 31

[75] WUNSCH-VINCENT, S., *WTO, E-commerce and Information Technologies, from Uruguay Round Through the Doha Development Agenda*, a Report to the UN ICT Task Force, p. 45

[76] For a presentation of the unavoidability of this sort of conflicts see PAUWELYN, J., C*onflict of norms in public international law: How WTO law relates to other rules of international law*, Cambridge University Press, Cambridge, 2003, 560 p.; pp. 23-24: "Obviously, the more legal instruments one is faced with, especially when these instruments were negotiated at different points in time, the greater the risk of conflict. (…)As autonomous legal instruments, created subsequently to the original GATT 1947, these Uruguay Round agreements sometimes derogated from, and often repeated, partly or fully, their parent GATT provisions. Only at a very late stage of the negotiations was it decided to bring all the results of the Uruguay Round together under one umbrella agreement, to be binding equally on all WTO members. This had the unintended result of creating repetitions, omissions and possible conflicts. No time was left to work out the complex interrelationship between the different legal texts. To reopen the negotiations for that purpose would have jeopardised the delicate consensus reached under each of these legal instruments. This separate consensus was, moreover, not always reached by the same negotiators."

[77] These categories are paradoxically alternative even though it may be possible for a plurilateral agreement to become de facto multilateral. See GESLIN, Alb., "Les traités plurilatéraux: quelle(s) utilité(s) dans le système commercial multilatéral?", in TOMKIEWICZ, V. (ed.), *Les sources et les normes dans le droit de l'OMC*, Pedone, Paris, 2012 p., pp. 57–69; p. 62

plurilateral)[77]. Only thus will the EA be a covered agreement under art. 1 of the DSU, falling under the *ratione materiae* jurisdiction of the panels and the Appellate Body[78].

Including the EA in the list of annexed agreements is just a premise, it does not provide for an actual solution to the problem of its relationship with the other agreements. Given the complexities of this issue[79], the acceptability of any new agreement would nowadays be contingent upon designing a precise and clear way of organizing its relationship with the other texts in order to avoid most of these problems that have already occurred in one form or another.

Two options are available to the adventurous designers of a new EA for dealing with this elephant in the room. First, there is a somewhat "passive" way of dealing with the elephant in the room: it can be left up to the to the judges to construct the solution. Some of the abovementioned agreements follow this rationale[80]. Second, the new EA could anticipate any possible incoherence and provide for a clear solution to the problem, much as art. 21:1 of the AG seeks to do[81].

In more conceptual terms, the relationship between a new EA and the other agreements may adhere to one of two paradigms - it could either be one of cumulation or one of exclusion.

1. The relationship of cumulation

The relationship of cumulation is the general principle as the Panel noted in *Turkey - Textiles*[82]*,* according to the doctrine of the *effet utile* (*ut res magis valeat quam pereat*)[83]. There is a general presumption against conflict[84]. However, this presumption is not irrefutable[85]. All it does is give some directions as to the interpretation of different provisions in order to avoid conflict where such avoidance is possible.

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[78] It should be noted that if the EA is plurilateral, the applicability of the DSU "shall be subject to the adoption of a decision by the parties to each agreement setting out the terms for the application of the Understanding to the individual agreement, including any special or additional rules or procedures for inclusion in Appendix 2, as notified to the DSB" (Appendix 1, *inline*, DSU)

[79] see on that for instance Appellate Body Report, *Brazil - Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, 21 february 1997, p. 15

[80] This choice was not necessarily a conscious one at the time - see MONTAGUTI, Is. and LUGARD, M., "The GATT 1994 and other Annex 1A agreements : four different relationships?", *Journal of International Economic Law*, vol. 3 (3), 2000, pp. 473–484, p. 474

[81] Art. 21:1: "The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement"

[82] Panel Report, *Turkey - Restrictions on Imports of Textile and Clothing Products,* WT/DS34/R, 31 may 1999, §9.92

[83] See Appellate Body Report, *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS113/AB/R, 13 october 1999, § 133

[84] See Panel Report, *Indonesia - Certain Measures Affecting the Automobile Industry*, WT/DS59/R, 2 july 1998, § 14.28

[85] See GUEVREMONT, V., "Traités multilatéraux : nouvelles perspectives relatives à l'articulation", in TOMKIEWICZ, V. (ed.), *Les sources et les normes dans le droit de l'OMC*, Pedone, Paris, 2012 p., pp. 27–57; p. 31

If the entire rationale behind a new EA is for it to have a strictly cumulative relationship with the other agreements, its having no articulation provisions whatsoever would not be a problem. Nonetheless, even in these cases interpretation is what determines whether there is conflict or not. And the solutions provided by the case law are so far quite ambiguous and incomplete as it would always be the case : the adjudicating process is in its essence supposed to give case-by-case solutions and avoid general observations.

The cumulative model is in itself ambivalent as it covers two different patterns of non-conflictual coexistence: overlap and complementarity[86].

Overlap occurs when two provisions have the same coverage and usually one of them deals more specifically with an issue. This will be the dialectic of those provisions of the EA that aim at clarifying the way general rules should be applied in the energy sector: for instance, the extent to which carbon emissions should be taken into consideration when evaluating the similarity of two products under art. I and III GATT; or what would "transit" mean in the case of fixed infrastructures under art. V GATT. In these cases the AB insists on examining the two provisions separately "to give meaning and effect to the distinct legal obligations arising under these two different legal provisions"[87]. The judges' approach may appear at first glance to adopt a sort of a two-tier test, although in reality it clearly gives prevalence to the special provision. The Appellate body suggests that it would first examine the special provisions and subsequently the more general ones[88]. If the measure violates the special text, judicial economy plays and the analysis stops here[89]. If the measure complies with the special rule, *a fortiori* it will also satisfy the general one. Any additional provision in the sectoral agreement, which would most probably envisage its prevalence over the general rules, would change nothing to this reasoning. Even in the presence of such provisions, such as Art. 21:1 of the AG, the AB follows the same logic in case of overlap[90].

The other aspect of the cumulative relationship, complementarity, covers situations where provisions cover the same broad matter without there being any overlap (much like art. XIX and the Safeguards agreement). This situation is not problematic at all, but unfortunately it is extremely rare and would only be of relevance for the energy sector if the new EA is quite limited in its approach. Adding a special provision to the sectoral agreement to manage such a situation is of little use.

Whether the cumulative relationship is one of overlap or one of complementarity, another particular issue will always be in need of further clarification, preferably by means of a special provision in that sense. It is related to the much-discussed possibility of using the general exceptions of art. XX GATT to cover non-compliance with other legal instruments. The AB has had to deal with this issue

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[86] see *ibid*.

[87] Appellate Body Report, *Chile - Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, 23 september 2002, § 188

[88] Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 9 september 1997, § 203

[89] *Ibid.*, § 204

[90] Appellate Body Report, *Chile - Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, 23 september 2002, § 190

twice, both in relation with China's Accession protocol[91]. In the first case, *China - Publications and Audiovisual Products*, it took it upon itself to interpret the introductory clause to section 5.1 of the Protocol ("Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement…"). Although the AB admitted that it would, in principle, be possible for a general exception to cover a violation of a special provision, even contained elsewhere than the general agreement[92], it made this possibility contingent upon the existence of a "gateway" in the special text. It was the absence of such a formula in art. 11.3 of China's Accession Protocol that served aslegal grounds for the Appellate Body's refusal to accept the use of art. XX exceptions in *China - Raw Materials*[93]. The AB is clearly reluctant to make any broad statements on this issue. Therefore, it seems preferable to add special provisions to any new agreement, either providing for such a gateway or excluding any deduction of its existence.

2. The relationship of exclusion

The relationship of exclusion is exceptional. It stems from a clear intention in that sense, expressly provided for in the sectoral agreement. The model is found either when new rules are clearly incompatible with the old ones (discrepancy *a posteriori*), or when there is an express derogation clause in a special agreement (discrepancy regulated *a priori*). In both cases what defines the relationship of exclusion is the fact that adherence to rule A makes it impossible to comply with rule B.

A new EA might contain rules that are so specific that complying with them would contradict the general rules: for instance, it may prohibit export tariffs, much as the NAFTA, while art. II GATT clearly does not provide for such a prohibition. In this case, the underlying conflict will not be prevented simply by choosing not to add a special provision envisaging the situation. On the contrary, such an absence would only allow for the issue to be dealt with pursuant to a general rule that institutes a "*sorte de hiérarchie de crise*"[94]. This rule is contained in the General Interpretative note to Annexe 1:A: "In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the "WTO Agreement"), the provision of the other agreement shall prevail to the extent of the conflict."

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[91] Appellate Body Report, *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, 21 December 2009 and Appellate Body Report, *China - Measures Related to the Exportation of Various raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R and WT/DS398/AB/R, 30 January 2012

[92] GUEVREMONT, V., "Traités multilatéraux : nouvelles perspectives relatives à l'articulation", in TOMKIEWICZ, V. (ed.), *Les sources et les normes dans le droit de l'OMC*, Pedone, Paris, 2012 p., pp. 27–57; p. 39

[93] for a commentary see GU, B., "Applicability of GATT Article XX in China – Raw materials : a clash within the WTO Agreement", *Journal of International Economic Law*, vol. 15(4), 2012, pp. 1007-1013

[94] NOUVEL, Yv., "L'unité du système commercial multilatéral", *Annuaire français de droit international*, vol. 46, 2000, pp. 654–670, p. 669

The special rules of an EA will prevail over the general ones if conflict is indeed found: "it is only where a provision of the GATT 1994 and a provision of another multilateral agreement on trade in goods are in conflict that the provision of the latter will prevail"[95]. The key concept of conflict is extremely complex. In a nutshell, it covers two situations : "(i) clashes between obligations contained in GATT 1994 and obligations contained in agreements listed in Annex 1A, where those obligations are mutually exclusive in the sense that a Member cannot comply with both obligations at the same time, and (ii) the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits"[96]. In other words, "the provisions (…) cannot be read as complementing each other"[97].

This narrow interpretation of the concept of "conflict"[98], avoids finding contradictions where such do not exist or are only deceptively apparent. Choosing to hand over all articulation to this Interpretative note may be a sensible solution. However this choice will most probably fall victim to the lacunae of the Interpretative note. The Note is indeed extremely limited as it only refers to conflicts between a special text and the GATT and does not address the question of the relationship between different special agreements. This conflict is however lurking in the background in the energy sector, especially considering suggestions that a new EA contain detailed disciplines on energy subsidies that may be in conflict with the more general rules of the SCM Agreement. One cannot but admit that if the EA does not contain an articulation provision, solutions will need to be found on a case by case basis and on the grounds of a conflict rule that is clearly insufficient.

If the EA were to manage *a priori* this conflictual relationship, it would fall into the category of the derogations. A derogation specifically permits Members to act inconsistently with the GATT in order to adhere to the sectoral agreement. The result is not very different from what would have happened if things were left to the Interpretative note concerning the GATT, but the sectoral agreement will have prevailed on the grounds of its own provisions. However, the situation would differ substantially concerning the other agreements, as any potential conflict will have been regulated *a priori*.

Such a derogation provision can use the mould of art. 21:1 of the AG: "The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply

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[95] van den BOSSCHE, P. and ZDOUC W., *The law and policy of the World Trade Organization*, Cambridge University Press, Cambridge, 3rd edition, 2013, 1045 p., p. 45

[96] Panel Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas - Complaint by the United States,* WT/DS27/R/USA, 22 may 1997, § 7.159. For further developments see the Panel Report, *Indonesia - Certain Measures Affecting the Automobile Industry*, WT/DS59/R, 2 july 1998, footnote 649 and PAUWELYN, J., *Conflict of norms in public international law*, Cambridge University Press, Cambridge, 2003, 560 p.

[97] van den BOSSCHE, P. and ZDOUC W., *The law and policy of the World Trade Organization*, Cambridge University Press, Cambridge, 3rd edition, 2013, 1045 p., p. 45

[98] "Since the notion of conflict is being interpreted so narrowly, it allows each of the different legal terms set out in either the GATT 1994 or in the Annex I A Agreement to have their full meaning, which should be considered a positive development for the effectiveness of the system. If a wider interpretation had been given to the notion of conflict, certain provisions could have lost their legal effect, thereby diminishing the content of the 'package' agreed upon in Marrakesh." (MONTAGUTI, Is. and LUGARD, M., "The GATT 1994 and other Annex 1A agreements : four different relationships?", J*ournal of International Economic Law*, vol. 3 (3), 2000, pp. 473–484, p. 476-7)

subject to the provisions of this Agreement". The ambiguity of this text has been haunting panels and the AB for years now[99], but the judges seem to have found and followed an interpretation method that shows a clear effort to maintain coherence especially where conflict is not inevitable. This logic is however related to the particular place of the AG and to its idea of reintegration. If a new EA were to contain a similar clause, this logic may not be transposable to its interpretation as its rationale will most probably not be one of reintegration. Most certainly, the formula used will not change the general idea that "whenever it is possible for a WTO Member to simultaneously comply with both (agreements), it should do so"[100]. However, the interpretation of the concept of "conflict" may be broader, in the search of a more appropriate regulation given the specificities of the sector. All of these possibilities (and dangers) need to be taken into consideration when designing the new articulation clause.

Section 4. Other possible ways to adapt the rules

The adoption of an entire new Energy Agreement is certainly the most radical method for dealing with any concerns as to the inadequacy of the existing disciplines to encompass all different aspects of energy trade. Nonetheless, as it was shown in the previous section, this is also the most difficult method and arguably one that will have to overcome important institutional and political hurdles and that may prove to be extremely problematic when it comes to designing the actual provisions.

However, there are other options - certainly less attractive, as they are more endogenous and do not have the allure of the far-reaching mission assigned to a new EA. These options may prove easier to put into practice and less problematic when it comes to securing the accord necessary for their integration into the general framework.

A. Amending the general rules

At the outset, the general rules could be adapted to the specificities of the energy sector by means of amendment. This amendment will consist in the addition of specific provisions covering only trade in the energy sector[101]. Amending the GATT or any other Annex I Agreement is subject to the

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[99] see for instance Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 9 september 1997 and Appellate Body Report, *United States - Subsidies on Upland Cotton,* WT/DS267/AB/R, 3 March 2005, § 530

[100] MAVROIDIS, P., *Trade in goods: the GATT and the other WTO Agreements regulating trade in goods*, Oxford University Press, Oxford, 2013, 2nd edition, 899 p., p. 753

[101] According to St. Charnovitz, adding a new issue into the WTO always comes to amending the WTO Agreements: "What does it mean for a new issue to be incorporated into the WTO? It means that governments would amend the WTO Agreements to include new obligations as part of the overall single undertaking. Such governmental obligations could then be covered by the WTO dispute settlement system and would be enforced in the same way as other WTO rules." (CHARNOVITZ, St., "Triangulating the World Trade Organization", *American Journal of International Law*, janvier 2002, vol. 96 (1), pp. 28-56, p. 29

meticulously detailed provisions of Art. X of the WTO Agreement[102]. This elaborate and somewhat cryptic provision is evidently the reflection of the traditional predicament of finding the balance between the respect of sovereignty and the practical need to adapt old rules to new economic and political situations[103]. The amendment procedure has rarely been put into practice[104] but it is self-evident that the cumbersome procedural requirements of article X risk considerable delays before an amendment takes legal effect[105].

Article X is based upon the distinction between provisions of fundamental, even constitutional, nature, and provisions that are considered somewhat less important. The first group of rules, listed in art. X:2 (Article IX of the WTO Agreement, Articles I and II of GATT 1994, Article II:1 of GATS and Article 4 of the Agreement on TRIPS) are the nucleus of the WTO obligations and they can only be amended if all Members agreed to it. If an amendment aims at adapting the general rules to the specificities of the energy sector, only some of these provisions would be relevant - an amendment may be envisaged of art. I and II of GATT and art. II:1 of GATS (for instance, prohibiting export tariffs and mentioned *supra*). These texts were obviously not conceived with special interest for the energy sector but the breadth of the formulae provides for flexibility in the interpretation that will allow to take into consideration such specificities of the energy sector as environmental concerns and natural preferences for certain types of energy resources. The flexibility of these articles will make it completely useless to go through the burdensome procedure of their amendment, especially when such an amendment is made contingent upon the acceptance of all members.

If adapting the general rules to the energy sector would mean amending other provisions (for instance, adding special paragraphs to certain articles referring to trade in the energy sector, either clarifying or excluding the application of the general rule), article X sets up a complicated

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[102] See GROTE, R., "Article X WTO Agreement", in WOLFRUM, R., STOLL P.-T. and KAISER, K., *WTO - Institutions and dispute settlement*, Martinus Nijhoff, Leiden, 2006, 671 p., pp. 123–136; FOOTER, M., *An Institutional and Normative Analysis of the World Trade Organization*, Martinus Nijhoff, Leiden, 2006, 373 p. ; p. 204.; NOTTAGE, H. et SEBASTIAN, Th., "Giving legal effect to the results of WTO trade negotiations: an analysis of the methods of changing WTO law", *Journal of International Economic Law*, vol. 9 (4), 2006, pp. 989–1016, p. 992

[103] GROTE, R., "Article X WTO Agreement", in WOLFRUM, R., STOLL P.-T. and KAISER, K., *WTO - Institutions and dispute settlement*, Martinus Nijhoff, Leiden, 2006, 671 p., pp. 123–136; p. 124

[104] See FOOTER, M., *An Institutional and Normative Analysis of the World Trade Organization*, Martinus Nijhoff, Leiden, 2006, 373 p. ; p. 212-214 and CHARNOVITZ, St., "A post-Montesqueieu analysis of the WTO", in COTTIER, Th. et ELSIG, M., *Governing the World Trade Organization*, Cambridge Univ. Press, Cambridge, op. 2011 p., pp. 265–288; p. 271

[105] NOTTAGE, H. et SEBASTIAN, Th., « Giving legal effect to the results of WTO trade negotiations: an analysis of the methods of changing WTO law », *Journal of International Economic Law*, vol. 9 (4), 2006, pp. 989–1016, p. 992. Voir en ce même sens la remarque de W. Davey : « Even if all members sign on to an amendment, the process of having them actually deposit a formal acceptance will be time-consuming. In the case of the WTO Agreement, some GATT parties deposited their acceptances of the agreement only after GATT had ceased to exist. » (DAVEY, W., « The WTO: looking forward », Journal of International Economic Law, vol. 9 (1), 2006, pp. 3–29, p. 28)

procedure that need not be presented in detail here[106]. Suffice it to say that this procedure can meet numerous obstacles on its way and, further, and more importantly, if it succeeds in obtaining the necessary consent of two thirds of the Members, will have a limited effect as the amendment will only take legal effect for those Members that have accepted it. Thus "changing WTO law through amendment procedures can have the unintended effect of creating a two-tier system of WTO obligations"[107]. This will undoubtedly make any amendments less attractive because of the constant risk of free-riders.

It could also be suggested that instead of an amendment, the changes could be integrated into the system by modifications of the Members' schedules of concessions annexed to the GATT 1994 and schedules of specific commitments annexed to the GATS. These schedules are integral parts of the respective agreements[108] and all obligations contained therein are part of the covered agreements and therefore can become basis of legal claims before the DSB. The modification of the schedules is less burdensome than the amendment of the entire agreements. Pursuant to Art. XXVIII GATT and Art. XXI GATS Members can unilaterally modify their schedules. This modification is however as limited as the role of the schedules is in the WTO legal system: in other words, adapting the disciplines by this method will result in a very partial adaptation. Moreover, the Appellate Body has always considered that a Member may yield rights and grant benefits, "but it cannot diminish its obligations[109]. The only way in which modifying a schedule in order to incorporate commitments specific to the energy sector would not constitute a "own-foot shooting"[110] would be if the initiative were almost unanimous. The option is therefore not much different than any idea of amendment pursuant to Art. X WTO Agreement.

B. Incorporating an additional document

1. An Annex on Energy

Considering key general disciplines insufficient in some sectors has been the rationale underlying the adoption of several Annexes to the GATS : the GATS Annex on Financial Services, the Annex on Telecommunications, the Annex on Air Transport Services and the Annex on Negotiations on Maritime Transport Services. If we were to take the examples of two of these Annexes that are more

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[106] for developments see GROTE, R., "Article X WTO Agreement", in WOLFRUM, R., STOLL P.-T. and KAISER, K., *WTO - Institutions and dispute settlement,* Martinus Nijhoff, Leiden, 2006, 671 p., pp. 123–136 and van den BOSSCHE, P. and ZDOUC W., *The law and policy of the World Trade Organization*, Cambridge University Press, Cambridge, 3rd edition, 2013, 1045 p., pp. 140-141

[107] NOTTAGE, H. et SEBASTIAN, Th., "Giving legal effect to the results of WTO trade negotiations: an analysis of the methods of changing WTO law", *Journal of International Economic Law*, vol. 9 (4), 2006, pp. 989–1016, p. 993

[108] see Art. II:7 of the GATT and Art. XX:3 of the GATS

[109] Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 9 september 1997, § 159

[110] HINDLEY, B., "What subjects are suitable for WTO agreement?", in KENNEDY, D. et SOUTHWICK J., T*he political economy of international trade law*, Cambridge University Press, 2002, 696 p., pp. 157–171; p. 161

elaborate and comprehensive than the others, the question would be whether their model can be used for designing a new Annex on Energy trade.

The Annex on Financial Services aims at completing GATS obligations and, in some cases, also at modifying their application in the sector[111]. It was designed to fill the lacunae of art. XIV GATS, especially its lack of reference to regulatory measures taken for prudential reasons[112]. The Annex contains specific rules for the sector. First, it develops certain terms, already used in the GATS, and adapts them to the specificities of the financial sector[113]. In doing so the Annex actually modifies the coverage of the GATS: it extends it in some cases[114] limits it in others[115]. The Annex also contains exceptions concerning prudential measures (the so-called "prudential carve-out"[116]).

The initial objective of the Annex on Telecommunications was to overcome a dead-end in the negotiations. The importance of the telecommunications sector for further development in other sectors is such that an impasse would have been an important hurdle to further liberalization as a whole. Waiting for an agreement on the liberalization of trade in telecommunication services, the Annex only sets forth "certain principles to make sure that concessions on other services would not be frustrated by a lack of progress on telecommunications negotiations"[117]. Its rationale is clearly one of juxtaposition and not of superimposition. In spite of this objective that may seem modest, the Annex is quite innovative in some aspects as it integrates into the GATS provisions that are not conditioned upon initial concessions made in schedules - Members are supposed to comply with

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[111] see DELIMATSIS, P. et SAUVE, P., "Financial services trade after the crisis : policy and legal conjectures" in COTTIER, Th., JACKSON, J. et LASTRA, R., *Inernational law in financial regulation and monetary affairs*, Oxford University Press, Oxford, 2012, 455 p., pp.288-306, p. 299 and ALEXANDER, K., "The GATS and financial services: liberalization and regulation in global financial markets", in ALEXANDER, K. and ANDENAS, M. (ed.), The World trade organization and trade in services, Martinus Nijhoff, Leiden, 2008, 977 p., pp. 561-601

[112] LEROUX, Er., "Trade in financial services under the World Trade Organization", *Journal of world trade*, vol. 36 (3), 2002, pp. 413–442, p. 430

[113] For instance, art. 1: b) of the Annex clarifies the meaning of the concept of "services supplied in the exercise of governmental authority" mentioned in art. I:3 b) GATS.

[114] For example, the notion of provider is here broader than the GATS: "(…) in order to be a financial service supplier under the GATS, for instance for the purpose of the application of the MFN treatment obligation, the person of a Member does not, in principle, need to be already engaged in the supply of financial services in the territory of that Member" (LEROUX, Er., "Trade in financial services under the World Trade Organization", *Journal of world trade*, vol. 36 (3), 2002, pp. 413–442, p. 429)

[115] The Annex excludes, for instance, certain measures taken by public authorities - see DELIMATSIS, P. and SAUVE, P., "Financial services trade after the crisis : policy and legal conjectures" in COTTIER, Th., JACKSON, J. and LASTRA, R., *International law in financial regulation and monetary affairs*, Oxford University Press, Oxford, 2012, 455 p., pp.288-306, p. 298

[116] See LEROUX, Er., "Trade in financial services under the World Trade Organization", *Journal of world trade*, vol. 36 (3), 2002, pp. 413–442, p. 430 et s. ; KAUFMANN, Chr. et WEBER R., "Reconciling liberalized trade in financial services and domestic regulation", in ALEXANDER, K. et ANDENAS, M., *The World trade organization and trade in services*, Martinus Nijhoff, Leiden, 2008, 977 p., pp. 411–427; p. 415

[117] BRONCKERS, M. and LAROUCHE P., "A review of the WTO regime for telecommunications services », in ALEXANDER, K. et ANDENAS, M., *The World trade organization and trade in services*, Martinus Nijhoff, Leiden, 2008, 977 p., pp. 319–381; p. 325. The Annex is a a sort of a "general insurance policy for suppliers of other services that they would have access to the requisite telecommunications networks and services in WTO countries" (*Ibid.*, pp. 325-326)

certain rules even if they have not liberalized the telecommunications sector. The adoption of the Reference Paper on Telecommunications[118] made the Telecommunications Annex somewhat obsolete, although it still has a residual importance as some of its provisions are less limited than the ones contained the Reference Paper[119].

Is the model of the Annexes on Financial Services and Telecommunications adapted for the energy sector? Before all else, it should be noted that nothing in the GATT or in the GATS prohibits adding annexes, the texts even have a special procedure (art. XXIX GATS and art. XXXIV GATT[120]). Annexes have been mainly used as a technique to fill regulation gaps which, given the negative logic of the GATS, occur essentially in trade in services. The adequacy of the GATS framework for trade in energy services has been broadly discussed[121]. There seems to be a general consensus, both in legal scholarship and within the Secretariat[122], that the GATS disciplines offer only partial remedies for some of the main issues in trade in energy services. A Note by the Secretariat suggests that "it might be useful to consider additional rules for energy services, which would complement specific commitments and help to ensure a level-playing field among suppliers"[123].

Second, as far as using preexisting models goes, the Annex on Telecommunications is to be excluded, as it was only a step towards the adoption of a Reference Paper - it is this more advanced method that will be considered *infra*. The example of the FSA seems more adequate as it consists in a clear adjustment of the GATS rules to better apply given the specificities of the sector. If we go beyond the clear dissimilarity between the issues in financial and the energy sector, an Annex on Energy may suggest ways of interpreting the general provisions that would take into consideration the particularities of the trade in energy resources. It could also suggest more detailed definitions anticipating interpretation problems and, as we saw it with the Annex on Financial Services, this could go as far as limiting or extending the coverage of the GATS in the sector.

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[118] see *infra.*

[119] BRONCKERS, M. and LAROUCHE P., "A review of the WTO regime for telecommunications services", in ALEXANDER, K. and ANDENAS, M., *The World trade organization and trade in services*, Martinus Nijhoff, Leiden, 2008, 977 p., pp. 319–381; p. 347

[120] See FOOTER, M., "Article XXXIV" in WOLFRUM, R., STOLL, P.-T. and HESTERMEYER, H., *WTO - trade in goods*, Martinus Nijhoff Publishers, 2011, 1225 p. ; p. 760-761

[121] see among others WTO, Council for Trade in Services, Energy Services, Background Note by the Secretariat, S/C/W/311, 12 January 2010; COSSY, M., "Energy services under the General Agreement on Trade in Services" in SELIVANOVA, Y. (ed.), *Regulation of energy in international trade law*, Wolters Kluwer, 2011, 416 p., pp. 149-180 ; COSSY, M., "The liberalization of energy services : are PTAs more energetic than the GATS?", in CHETTI, J.A. and ROY, M., *Opening markets for international trade in services*, Cambridge University Press, Cambridge, 2009, 784 p., pp. 405–434; EVANS, P. C., "Strengthening WTO member commitments in energy services", in MATTOO, A. and SAUVE, P. (ed.), *Domestic regulation and service trade liberalization*, Oxford University Press, Washington, 2003, 244 p.; MEGGIOLARO, Fr., "Energy services in the current round of WTO negotiations", *International Trade and Regulation*, 2005, vol. 11 (3), pp. 97–108; MUSELLI, I. and ZARRILLI, S., "Oil and gas services - market liberalization and the ongoing GATS negotiations", *Journal of International Economic Law*, 2005, vol. 8 (2), pp. 551–581

[122] see WTO, Council for Trade in Services, *Energy Services*, Background Note by the Secretariat, S/C/W/311, 12 January 2010, § 80

[123] *Ibid*., §82

In sum, adopting an Annex on Energy seems a better method for using the flexibilities of the multilateral trading system. Although this has only been done in the services department, nothing would prevent a more general application of the Annex to trade both in goods and in services. However, it should be noted that adding a new annex is institutionally and procedurally similar to the amendment procedure and needs the acceptance of a great number of Members, that may prove to be hard to find.

2. A Reference Paper on Energy

The technique of designing a Reference Paper is on the crossroads between the creation of a new document and the modification of schedules. It would consist in the incorporation of special provisions for the energy sector into an initially non-binding document. The binding force will subsequently stem from the Members' will to integrate this document into their services schedules.

Until now the technique was used only once, in the field of telecommunications services. The Reference Paper Regarding Telecommunications Services was a sort of a guide for the reform of the sector. Its provisions are the reflection of the main issues in the field, marked by a history of state monopolies[124], much like the energy sector. Designing a Reference Paper on Energy would follow the same rationale of dissatisfaction with the application of the GATS rules which regulate insufficiently important parts of trade in the sector. In order to fill these lacunae, the Reference Paper on Telecommunications provides the requisite safeguards in domestic law for market access and foreign investment commitments to be truly effective, and anchors these safeguards in the WTO system and thus making failure to implement them challengeable under the DSU[125]. It contains rules on anti-competition practices, interconnections, transparency in licensing procedures and independence of regulatory bodies.

Adopting a Reference Paper on Energy following this model might give an important push forward to regulation efforts in the energy sector. This type of document is arguably more than a simple clarification of how to apply the general rules to a particular sector. Rather it conveys a paradigm change, a "*changement de logique*"[126]. It could, for instance, impose obligations on private actors,

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[124] CAMERON, K., "Telecommunications and audio-visual services in the context of the WTO : today and tomorrow", in GERADIN, D. and LUFF, D., *The WTO and global convergence in telecommunications and audio-visual services*, Cambridge University Press, Cambridge, 2004, 435 p., pp. 21-34, p. 28

[125] BRONCKERS, M. and LAROUCHE P., "A review of the WTO regime for telecommunications services", in ALEXANDER, K. and ANDENAS, M., *The World trade organization and trade in services*, Martinus Nijhoff, Leiden, 2008, 977 p., pp. 319–381; p. 330

[126] MADDALON, Ph, "Le droit de l'OMC : quels liens avec la politique européenne de l'énergie", *Revue des affaires européennes*, 2009 – 2010, vol. 4, pp. 831–844, p. 837

essentially an obligation to open third-party access to infrastructures[127] (the Reference Paper on Telecommunications is indeed one of the first competition texts in the WTO framework[128] imposing positive obligations on governments to prevent anti-competitive practices[129]).

As D. Luff puts it, the provisions of the Reference Paper on Telecommunications are often cited as an example of the type of rules "*qu'il convient d'adopter pour accompagner la libéralisation dans les secteurs qui ont longtemps été dominés par des monopoles publics*"[130]. This adaptation method is flexible enough to avoid the problems related to the other models, its incorporation into the general framework is left to the will of each and every Member and the possibility to reject it contributes to its attractiveness[131]. The main problem of designing a Reference Paper on Energy is an institutional one: the text will bind only those Members that have incorporated it in their services schedules, coming back to the same "own-foot-shooting" problem mentioned *supra*.

C. Adopting a Ministerial Decision

Pursuant to Art. IV:1 of the WTO Agreements the Ministerial Conference, "the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member, in accordance with the specific requirements for decision-making". The Ministerial Conference generally adopts decisions without mentioning their legal basis which makes it hard to

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[127] see on this issue WALDE, T. et GUNST, Andr., "International energy trade and access to energy networks", *Journal of World Trade*, 2002, vol. 36 (2), pp. 191–218; AZARIA, D., "Energy transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade", *Journal of Energy and Natural Resources Law*, 2009, vol. 27 (4), pp. 559– COSSY, M., "Energy transit and transport in the WTO", in PAUWELYN, J. (ed.), *Global Challenges at the intersection of trade*, Energy and the Environment, Graduate Institute of Geneva, Centre for trade and economic integration, 2010, 225 p., pp. 113–121; COSSY, M., "Energy trade and WTO rules: reflections on sovereignty over natural resources, export restrictions and freedom of transit", *European Yearbook of International Economic Law*, 2012, vol. 3 (1), pp. 281–306; EHRING, L. and SELIVANOVA Y., "Energy Transit", in SELIVANOVA, Y. (ed.), *Regulation of energy in international trade law*, Wolters Kluwer, 2011, 416 p., pp. 49–104

[128] CARREAU, D. and JUILLARD, P., *Droit international économique*, Précis DALLOZ, 4e édition, 2010, Paris, 770 p., p. 364, §994

[129] BRONCKERS, M. and LAROUCHE P., "A review of the WTO regime for telecommunications services", in ALEXANDER, K. and ANDENAS, M., *The World trade organization and trade in services*, Martinus Nijhoff, Leiden, 2008, 977 p., pp. 319–381; p. 344

[130] LUFF, D., *Le droit de l'Organisation mondiale du commerce : Analyse critique*, Bruylant, Bruxelles, 2004, 1277 p., p. 678

[131] "this has the advantage of permitting the prompt renegotiation of the reference rules if circumstances or policy preferences change" (NOTTAGE, H. and SEBASTIAN, Th., "Giving legal effect to the results of WTO trade negotiations: an analysis of the methods of changing WTO law", *Journal of International Economic Law*, vol. 9 (4), 2006, pp. 989–1016, p. 1014)

define the limits of this quasi-normative power[132]. H. Nottage and Th. Sebastian count at least twelve legal instruments adopted on the grounds of art. IV:1[133]. The technique has also been used once in a sectoral approach (the Information Technology Agreement is formally a Ministerial Declaration on Trade in Information Technology Products). It can therefore be construed that energy issues could be dealt with separately: either in a special Ministerial Decision on trade in energy, or within a more general Ministerial Decision, containing *inter alia* special rules for the sector.

Art. IV:2 is deliberately elusive: it gives the Ministerial Conference, which is the "supreme body" of the WTO"[134], an almost-unlimited liberty. The requirement to adopt all decisions by consensus guarantees that a limited number of Members will not be able to abuse of this liberty. But it also makes it highly speculative to imagine the substantial rules contained in a prospective Ministerial Decision. We will therefore need to limit our analysis to two particular questions related to the availability of this option: what will the legal coverage and the effects of such a decision be and would trade in the energy sector benefit from such an initiative?

Art. IV:1 does not specify the extent to which decisions taken pursuant to it can alter the rights and obligations of Members[135]. The answer to this question will therefore be left up to the judges[136]. On the one hand, they could refuse the possibility for a Ministerial Decision to alter the rights and obligations of States. A convenient argument in this direction would be the secondary nature of the decision-making powers of the WTO bodies (or, for that matter, of the bodies of any international

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[132] According to P.J. Kuijper, "(t)he WTO presently abounds in « decisions » which have no legal basis whatsoever, are not presented in a standard legal format, but nevertheless purport to be "decisions"" (KUIJPER, P.J., "WTO institutional aspects", in BETHELEM, D., McRAE, D., NEUFELD, R. and van DAMME, Is., T*he Oxford Handbook of International Trade Law*, Oxford University Press, Oxford, 800 p., pp. 79–127; p. 106); "decisions are highly variegated (…): some state no legal basis, some have the legal basis at the beginning, some at the end of the preamble, sometimes there is no consistent reference to proposals made or reports forming the basis of the decision, often there is no consistent pattern of building the reasoning (the motifs), underpinning the decision etc. " (*Ibid*., p. 107)

[133] NOTTAGE, H. and SEBASTIAN, Th., "Giving legal effect to the results of WTO trade negotiations: an analysis of the methods of changing WTO law", *Journal of International Economic Law*, vol. 9 (4), 2006, pp. 989–1016, p. 1004

[134] van den BOSSCHE, P. and ZDOUC W., *The law and policy of the World Trade Organization*, Cambridge University Press, Cambridge, 3rd edition, 2013, 1045 p., p.121

[135] It should be noted that this question is different from the debate on the political or legal nature of the decisions: a decision can be a legal act even if has no effect on Members' rights and obligations - see CHARNOVITZ, St., "The legal status of the Doha declarations", *Journal of international economic law*, 2002, vol. 5 (1), pp.207-212 ; p. 210: "One might posit that the Ministerial Conference would be able to craft legal – as opposed to merely political – decisions that do not diminish the obligations of Members".

[136] The question has so far only been lurking in the background: " Traditionally, this question has been of limited relevance, as the overwhelming majority of Other Decisions adopted by the Ministerial Conference do not contain clauses that purport to impose enforceable obligations on Members or otherwise modify WTO legal obligations. These Other Decisions rarely contain binding language, and even when they do, they usually envisage further steps to give legal effect to the legal changes contemplated" (NOTTAGE, H. and SEBASTIAN, Th., "Giving legal effect to the results of WTO trade negotiations: an analysis of the methods of changing WTO law", *Journal of International Economic Law*, vol. 9 (4), 2006, pp. 989–1016, p. 1005)

organization)[137], combined with the absence of any explicit provision allowing for such a power for the Ministerial Conference[138]. If this position is upheld, a Ministerial Declaration on Trade in Energy will be limited in its effects and will not create enforceable claims or defences, although it would still suggest an interesting formula for clarifying the application of general rules to the energy sector. The situation will in that case be similar to that pursuant to Art. IX:2.

On the other hand, if Art. IV:1 is interpreted in a way that it would be possible for a Ministerial Decision to alter the rights and obligations of Members, the situation will change fundamentally. Such a position will definitely by criticized for excess of judicial activism, but it would have its practical explanation in the search for mechanisms to adapt WTO law in ways less complex than an amendment[139]. In that case, the possibilities are immense for the elaboration of particular rules in the Decision.

The second part of the above mentioned analysis of the legal status would be whether a Decision on Energy would be enforceable through the WTO dispute settlement mechanism. It is uncontroversial that this Decision will be of high relevance for interpreting WTO law, either on the grounds of art. 31 of the VCLT[140], or based on art. 32 of the VCLT. But are such decisions legally binding and enforceable through the DSU? Art. IV:1 is particularly ambiguous on this point and does not provide for an univocal answer. Art. 1 of the DSU, read together with Appendice 1, is, however, perfectly clear - the category of the "covered agreements" does not encompass Ministerial Decisions. It could be argued that the formality of this text does not block a dispute claim based on a Ministerial Decision. Such an argument could be based either on a particularly broad interpretation of the DSU[141] or on a somewhat unorthodox idea that the criterion for the enforceability of a text would not be a reference in that sense in the DSU, but a more conceptual benchmark - the fact that the Decision creates rights and obligations for Members[142].

Most authors seems paradoxically unwilling to take a clear stand on the issue of the enforceability of Ministerial Conference Decisions. P. van den Bossche, although initially uncertain on the

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[137] SCHERMERS, H.G. and BLOKKER, N.M., I*nternational Institutional Law : Unity within diversity*, Martinus Nijhoff, Leiden and Boston, 2011, 5th edition, 1273 p. ; p.825, § 1320 : "(a)s a general rule of modern international institutional law, it has been accepted that international organizations cannot take binding external decisions unless their constitutions expressly so provide."

[138] NOTTAGE, H. and SEBASTIAN, Th., "Giving legal effect to the results of WTO trade negotiations: an analysis of the methods of changing WTO law", *Journal of International Economic Law*, vol. 9 (4), 2006, pp. 989–1016, p. 1008: "Whenever the drafters of the WTO Agreement authorized a WTO body to alter rights and obligations under WTO law, they made this explicit".

[139] *Ibid.*, p. 1009

[140] See Appellate Body Report, *United States - Measures affecting the production and sale of clove cigarettes*, WT/DS406/AB/R, 4 april 2006, § 268

[141] It should be noted, though, that the Appellate Body is somewhat reluctant to adopt such broad interpretations and tends to read Appendice 1 quite literally - see for instance Appellate Body Report, *European Communities — Measures Affecting Importation of Certain Poultry Products*, WT/DS69/AB/R, 13 July 1998, § 79

[142] See EHLERMANN, Cl.-D. and EHRING, L., "The authoritative interpretation under article IX:2 of the Agreement establishing the World Trade Organization: current law, practice and possible improvements", *Journal of International Economic Law*, vol. 8 (4), 2005, pp. 803–824, p. 56

issue[143], asserts that "Decisions by the Ministerial Conference are binding on all Members"[144], while at the same time "whether these decisions can be enforced through WTO dispute settlement is another matter"[145]. P.J. Kuijper believes that all is possible although the ambiguity of art. IV:1 would make it harder to accept that the Ministerial Declaration has full binding force[146]. St. Charnovitz also underlines the ambiguity[147] and M. Footer considers any solution premature[148]. Only J. Pauwelyn seems to take a clear stand - according to him, "(o)nly claims under WTO covered agreements, not claims under acts of WTO organs, fall within this jurisdiction"[149]

H. Nottage and Th. Sebastian suggest that it would be more prudent to act under the assumption "that Members may not invoke Other Decisions of the Ministerial Conference as the basis of a legal claim or defence in WTO dispute settlement proceedings[150]. If such were the case, the technique of a Ministerial Decision would be of limited use for the purposes of adapting the general legal framework to the specificities of the energy sector. Even if it were binding, as P. van den Bossche suggests, this binding force will mean little in practice if it is not reflected in a possibility to enforce such a Decision through the DSB. However, this line of reasoning is restricted to the sole issue of the enforceability of the Decision. If the text were adopted on a broad consensual basis and contained clarifications and specifications on how the general rules need to be interpreted in the energy sector, enforceability would only be a minor issue and one that will not reduce the attractively of the technique.

D. The way of authoritative interpretation

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[143] see van DEN BOSSCHE, P., *The law and policy of the World Trade Organization*, Cambridge University Press, New York, 2008, 917 p. ; p. 123 : "(…) it is not clear whether this very broad power to make decisions, in fact, enables the Ministerial Conference to take decisions which are legally binding on WTO Members".

[144] van den BOSSCHE, P. and ZDOUC W., The law and policy of the World Trade Organization, Cambridge University Press, Cambridge, 3rd edition, 2013, 1045 p., p. 121

[145] *Ibid.*, p. 121, footnote 232

[146] "(i)n most international organizations such a broad decision-making power of the plenary organ does not normally produce binding decisions." (KUIJPER, P.J., "WTO institutional aspects", in BETHELEM, D., McRAE, D., NEUFELD, R. and van DAMME, Is., T*he Oxford Handbook of International Trade Law*, Oxford University Press, Oxford, 800 p., pp. 79–127; p. 82)

[147] CHARNOVITZ, St., "The legal status of the Doha declarations", *Journal of international economic law*, 2002, vol. 5 (1), pp.207-212, p. 211

[148] FOOTER, M., *An Institutional and Normative Analysis of the World Trade Organization*, Martinus Nijhoff, Leiden, 2006, 373 p. ; p. 326

[149] PAUWELYN, J., *Conflict of norms in public international law: How WTO law relates to other rules of international law*, Cambridge University Press, Cambridge, 2003, 560 p. ; p. 4

[150] NOTTAGE, H. and SEBASTIAN, Th., "Giving legal effect to the results of WTO trade negotiations: an analysis of the methods of changing WTO law", *Journal of International Economic Law*, vol. 9 (4), 2006, pp. 989–1016, p. 1009. The authors suggest, however that " the desire to develop mechanisms whereby WTO law can be adapted quickly to changing circumstances, together with a reluctance to set aside the consensus of the WTO membership on technical grounds, may tilt panels or the Appellate Body in the direction of giving legal effect to Other Decisions taken by consensus". (*Ibid.*)

In addition to its almost unlimited decision-making power pursuant to Art. IV:1, Art. IX:2 states that the Ministerial Conference (as well as the General Council) has "the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements". The decision to adopt such an authentic interpretation needs to be taken by a three-fourths majority of the Members.

Although it ultimately requires the same number of votes as any other decision of the Ministerial Conference[151], a decision to adopt an authentic interpretation seems institutionally and politically more acceptable as its nature of a "simple interpretation" creates an illusion of a somehow milder legal effect[152]. So far, the procedure of art. IX:2 has never been used[153] which makes all analysis that follows quite speculative. This can, as always, be explained by the requirement of a consensus, but if we go one step further in the analysis, the absence of decisions of authoritative interpretation is related to the stability of this type of decisions (compared to temporary derogations for example). This means that accord is needed in the long run, as well as guarantees that the authoritative interpretation will not be the result of changeable political circumstances. An Interpretative decision on Energy will therefore call for a broad participation, ideally for consensus. Support may be more or less enthusiastic, it could even disguise disapproval, as long as the latter remains discreet.

On top of the consensus-related hurdles, an art. IX:2 initiative may face the challenges of a reluctance associated to more conceptual arguments. Some Members may assert that an authoritative interpretation is not supposed to change the existing framework, not even to adapt it - its sole objective would be to clarify the meaning of the texts. The few proposals for adopting a decision pursuant to art. IX:2 have so far suggested that decisions of authoritative interpretation are seen as a way to resolve specific conjectural problems.

If these institutional hurdles are overcome, the possibilities hidden behind the yet under-politicized mechanism of art. IX:2 are immense. Contrary to judicial interpretation, which cannot add to or diminish the rights and obligations of the covered agreements[154], an authoritative interpretation may be able to do that. There is an ongoing doctrinal debate concerning this issue. The question is intricately related to a much more theoretical issue - the distinction between interpretation and amendment[155]. Doctrinal discussions on this issue are highly technical, but they can be resumed in a

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[151] arguably the decision-making procedure shall be the same as that of adopting a decision pursuant to art. IV:1, because of the horizontal application of the general requirement of consensus

[152] "An authoritative interpretation is made within the regime's institutional framework, predominantly out of the public eye". (PAN, Er., "Authoritative interpretation of agreements: developing more responsive international administrative regimes", *Harvard International Law Journal*, vol. 38, 1997, pp. 503–533, p. 510)

[153] for a presentation see EHLERMANN, Cl.-D. et EHRING, L., "The authoritative interpretation under article IX:2 of the Agreement establishing the World Trade Organization: current law, practice and possible improvements", *Journal of International Economic Law*, vol. 8 (4), 2005, pp. 803–824. The reluctance to use authoritative interpretations is in fact not specific to the WTO - see PAN, Er., "Authoritative interpretation of agreements: developing more responsive international administrative regimes", *Harvard International Law Journal*, vol. 38, 1997, pp. 503–533, p. 525 : "despite its many advantages, authoritative interpretation is still under-utilized by current regulatory regimes."

[154] Article 3:2 of the DSU

[155] the concept of interpretation is legally distinct from that of modification or amendment but in practice that "distinction is often rather fine" (BROWNLIE, I., Principles of Public International Law, Oxford University Press, 6e édition, New York, 2003, 742 p., p. 601)

cyclical argument that is impossible to solve: it depends on whether emphasis is put on the notion of "interpretation" or on that of "authentic". In the first line of thinking, it may be suggested that "only that which can be achieved by using the means outlined in articles 31 and 32 of the Vienna Convention on the Law of Treaties may be qualified as interpretations"[156]. This would substantially limit the possibilities of including special rules on energy trade in such a decision. Following the second line of thinking, there should be a gradation between interpretation by judges and authentic interpretation that implies stability and breadth. Authoritative interpretation in that case indeed alter rights and obligations - this seems to be the position of G. Sacerdoti[157], M. Footer[158] or Cl. D. Ehlermann and L. Ehring[159]. If these arguments were to be adopted by the AB, the possibilities for a decision of authoritative interpretation will be almost boundless, limited only by the concept of interpretation which, even broadly read, does not allow taking important distances with the initial text.

What's more, read together with art. 3.9 of the DSU this text makes it even possible for an authoritative interpretation to "correct" the interpretation suggested by the judges[160]. This

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156 WOLFRUM, R., "Article IX WTO Agreement", in WOLFRUM, R., STOLL, P.-T. and KAISER, K., WTO - *Institutions and dispute settlement*, Martinus Nijhoff, Leiden, 2006, 671 p., pp. 106–122; p. 113

157 SACERDOTI, G., "The Dispute Settlement System of the W.T.O.: Structure and Function in the Perspective of the First 10 Years", *Bocconi University Institute of Comparative Law "Angelo Sraffa" (I.D.C.) Legal Studies Research Paper Series*, Research Paper No. 07-03, 2003, 21 p., p.8 : "Such an interpretation, never resorted to up to now, is an authentic interpretation that might even entail a modification to any existing provision"

158 FOOTER, M., An Institutional and Normative Analysis of the World Trade Organization, Martinus Nijhoff, Leiden, 2006, 373 p.

159 EHLERMANN, Cl.-D. and EHRING, L., "The authoritative interpretation under article IX:2 of the Agreement establishing the World Trade Organization: current law, practice and possible improvements", Journal of International Economic Law, vol. 8 (4), 2005, pp. 803–824, p. 808 and 811; PAN, Er., "Authoritative interpretation of agreements: developing more responsive international administrative regimes", Harvard International Law Journal, vol. 38, 1997, pp. 503–533, p. 518. For a opposed position see GAZZINI, T., "Can authoritative interpretation under article IX:2 of the Agreement establishing the WTO modify the rights and obligations of Members?", International and comparative law quarterly, vol. 57 (1), 2008, pp. 169–181, p. 173.

160 EHLERMANN, Cl.-D. and EHRING, L., "The authoritative interpretation under article IX:2 of the Agreement establishing the World Trade Organization: current law, practice and possible improvements", *Journal of International Economic Law*, vol. 8 (4), 2005, pp. 803–824, p. 812 ; LESTER, S., "WTO Panel and Appellate Body Interpretations of the WTO Agreement in US Law", *Journal of world trade*, vol. 35, 2001, n°3, pp. 521-543, p. 532. It should however be noted that in spite of their criticism towards some AB decisions, Members have never used an authoritative interpretation to overrun such decision, preferring other reactions (such as adopting a waiver) - see EHLERMANN, Cl.-D. and EHRING, L., "The authoritative interpretation under article IX:2 of the Agreement establishing the World Trade Organization: current law, practice and possible improvements", *Journal of International Economic Law*, vol. 8 (4), 2005, pp. 803–824, p. 816. H. Ruiz Fabri considers it very unlikely that this possibility be used - see RUIZ FABRI, H., "Dispute Settlement in the WTO: on the trail of a court", in CHARNOVITZ, St., STEGER, D., van den BOSSCHE, P. and FELICIANO, F., *Law in the service of human dignity: Essays in honour of Florentino Feliciano*, Cambridge University Press, Cambridge, 2005 p., pp. 136–158; p. 150, footnote 55. P.J. Kuijper also mentions this possibility but warns agains an exaggeration of its actual importance: "(g)iven that such an authoritative interpretation would need three fourths of the votes of all Members in order to be validly adopted, it is obvious that Members will have recourse to it only in extreme situations, in which there is a widespread and very strongly held support for such an interpretation". (KUIJPER, P.J., "The Court and the Appellate Body: between constitutionalism and dispute settlement", in GAINES, S.E.n EGELUND OLSEN, Br. and SORENSEN, K.E., *Liberalising trade in the EU and the WTO: a legal comparison*, Cambridge University Press, Cambridge, 2012, 503 p., pp. 99–138; p. 107)

possibility should not be overestimated, though. The mechanism does indeed become an important instrument in the game of checks and balances[161]. Nonetheless, consensus would still be needed[162] and it would only be found before the issue has been subject to a dispute. Following a decision by the adjudicating bodies Members will certainly be divided into two camps, some supporting the posit of the judges while others rejecting the interpretation. Consensus will therefore be hard to find. Given the new cases brought before the DSB[163] there is only a small window left.

If an authoritative interpretation decision on energy trade is adopted, in spite of all these institutional hurdles, it is at least certain that the decision will be binding on all Members. The main argument in this direction is merely common sense: "(i)f an authoritative interpretation had no such binding effect on all Members, what would be the purpose of the General Council or the Ministerial Conference to adopt an authoritative interpretation?"[164].

In sum, the method of adopting an authoritative interpretation seems an appropriate, although limited, way of adapting general rules to the specificities of the energy sector. However, it may need to overcome as many hurdles as the other methods and may prove to be even more difficult to justify.

Conclusion

Trade in the energy sector is nowadays making, quite abruptly, its entrance (or, for some, its comeback) into the general framework of the multilateral trading system. However, WTO law may in some cases appear insufficiently flexible to take into consideration the specificities of this sector. The different methods suggested for its adjustment and discussed in this contribution offer ways of dealing with the elephant in the room. If a sectoral Energy Agreement is preferred, its provisions

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[161] ROESSLER, Fr., "The Institutional Balance between the Judicial and the Political Organs of the WTO" in BRONCKERS, M. and QUICK, R. (ed.), *New Directions in International Economic Law: Essays in Honour of John H. Jackson*, Kluwer Law International, 2000, 768p., pp. 325–45

[162] Some authors consider that the majority vote of art. IX:2 respects sufficiently the need to protect the interests of all Members and that the rule on consensus should be abandoned when it comes to adopting an authoritative interpretation - see GARCIA BERCERO, Ig., "Functioning of the WTO system : elements for possible institutional reform", *International trade law and regulation*, 103, 6, p. 109 ; EHLERMANN, Cl.-D, and EHRING, L., "Decision-making in the World Trade Organization: Is the consensus practice of the World Trade Organization adequate for making, revising and implementing rules on international trade?", *Journal of International Economic law*, vol. 8 (1), 2005, pp. 51–75, p. 74

[163] see *supra.*

[164] See EHLERMANN, Cl.-D. and EHRING, L., "The authoritative interpretation under article IX:2 of the Agreement establishing the World Trade Organization: current law, practice and possible improvements", *Journal of International Economic Law*, vol. 8 (4), 2005, pp. 803–824, p. 807. See also GAZZINI, T., "Can authoritative interpretation under article IX:2 of the Agreement establishing the WTO modify the rights and obligations of Members?", *International and comparative law quarterly*, vol. 57 (1), 2008, pp. 169–181, p. 169; STOLL, P.-T. SCHORKOPF, Fr. and WOLFRUM, R., *WTO - World economic order*, World trade law, Martinus Nijhoff, Leiden, 2006, 291 p. ; p. 29 and van den BOSSCHE, P., *The law and policy of the World Trade Organization*, Cambridge University Press, New York, 2008, 917 p. ; p. 145 : "This interpretation, by the highest political bodies of the WTO, is binding on all WTO Members and may affect their rights and obligations (although the right of interpretation should not be used so as to undermine the amendment provisions)."

will need to be carefully drafted in order to avoid as many interpretation predicaments as possible. However, the need of consensus on all of these issues will undoubtedly result in somewhat reduced obligations and there is still no guarantee that all possible complications will be resolved in advance. Other methods, discussed in this contribution, may prove to be easier to agree upon, but each one of them has its own inherent limitations. Arguably, any modification (in the broader sense) of the existing general framework will be insufficient. If we change the angle of attack and instead suggest that the flexibilities of the general rules, combined with some daring interpretations by panels and the Appellate body allow for sufficient consideration of the specificities of trade in energy, this will not only prove to be a less conflictual way of dealing with the problem, but also reinforce the system instead of fragmenting it.