TRADE AGREEMENTS, PETROLEUM AND ENERGY POLICIES

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CONTENTS

Page

PREFACE iv

EXECUTIVE SUMMARY 1

CHAPTER 1

THE IMPLICATIONS OF THE WTO AGREEMENTS FOR PETROLEUM POLICY AND TRADE IN PETROLEUM PRODUCTS 14

I. Introduction 14

II. Background 15

III. Petroleum and petroleum products in the Uruguay Round 16

IV. Petroleum and the WTO 22

1. Treatment of, and implications for, petroleum and petroleum products under the WTO Agreements 22
2. Dispute settlement under GATT 1947 and the WTO 43
3. Environment-related initiatives 51
4. Trade, investment, and competition policy 59

CHAPTER 2

THE ENERGY SECTOR IN REGIONAL AGREEMENTS 62

I. Introduction 62

II. Background 62

III. The North American Free Trade Agreement (NAFTA) 64

1. Introduction and background 64
2. Energy chapter 66
3. “Fair trade” provisions in the NAFTA 68
4. Investment provisions 71
5. Energy services sector 74
6. Government procurement 75
7. NAFTA and the environment 76
8. Technical standards 79

9. Intellectual property 82

10. Competition policy and state enterprises 84
11. Institutional arrangements and dispute resolution 85

IV. The Energy Charter Treaty 86

1. Introduction and background 86
2. Energy and trade: influence of GATT/WTO principles 86
3. Foreign investment under the ECT 88
4. Sovereignty over energy resources 89
5. Competition law and the energy sector 90
6. Environment and the energy sector 91
7. Dispute resolution 92
8. Other matters 93

V. Asia-Pacific Economic Cooperation (APEC) 94

1. Introduction and background 94
2. Energy Working Group (EWG) 102

CHAPTER 3

THE ENERGY TRADE POLICY OF THE UNITED STATES: SECURITY, EXPORT PROMOTION, AND ENVIRONMENTAL PROTECTION 108

I. Introduction 108

II. The three-dimensional nature of energy trade 109

1. Tensions between the economic and security dimensions 109
2. The third dimension: environmental issues 114
3. Three principles of U.S. energy trade policy 115

III. Issues for regional and multilateral negotiations 118

1. Market access and preferences 119
2. Measures taken for reasons of national security 122
3. Trade in energy-related services 126
4. Anti-dumping and countervailing duties 127
5. Investment 129

ANNEX

Table A. U.S. Exports of Selected Energy-Related Goods 132

Table B. U.S. Perception of Energy Security: Five Circle of Foreign Oil Suppliers 133

Table C. Net Oil Exporters: Production Data in Percentage of the Global Total at Year-End 1998 134

Table D. Tariff treatment of Selected Energy Products in the U.S. Market 135

Table E. U.S. Direct Investment Position, Total and Petroleum 137

Table F. OPEC Member Countries and Their Status in GATT and WTO 138

Table G. Non-OPEC Petroleum-Exporting Developing Countries and Economies in Transition and Their Status in GATT and WTO 139

Table H. Overview of the GATS Commitments in Energy Specific Services Sectors: Commercial Establishment 140

Table I. Overview of the GATS Commitments in Energy Specific Services Sectors: Cross-Border Supply 141

Table J. MFN Exemption in Energy Services 142

Table K. Tariff Treatment for Crude Oil 143

Table L. Tariff Treatment for Petroleum Products 146

Table M. Tariff Treatment for Hydrocarbons 149

Table N. Tariff Treatment for Plastics in Primary Forms 152

Table O. Tariff Treatment for All Petroleum Products 155

PREFACE

The idea for this book originated at a Seminar for Arab countries held in Casablanca in November 1994 to assess the implications of the Uruguay Round for Arab countries. It was at this meeting that the misconception that the WTO did not apply to petroleum became apparent. Chapter 1 was, therefore, prepared in response to a request to UNCTAD at the Casablanca meeting and was revised in light of discussion at the follow meeting in Bahrain (March 1996). It was discussed again at a workshop of Arab countries held in Chavannes-de-Bogis, Switzerland, in November, 1996, at a meeting hosted by the Islamic Development Bank in June, 1997, the national seminars in Algeria (1998) and Venezuela (1997 and 1999), a regional seminar for acceding Arab countries in Amman (May 1999), and again at another Chavannes-de-Bogis seminar of Arab countries in September 1999. Mr. Murray Gibbs, Head of the Trade Negotiations and Commercial Diplomacy Branch, prepared Chapter 1, with assistance from Mr. Xiaobing Tang and Ms. Simonetta Zarrilli, and contributions from Ms. Mina Mashayekhi, Mr. Victor Ognivtsev and Ms. Jolita Butkeviciene. Useful comments were received from Mr. Vijay Kelkar (presently Secretary of Finance of India), Mr. Reinaldo Figueredo (former Venezuelan Foreign Minister), and Mr. Sergio Delgado, now a staff member of the World Trade Organization.

It became evident, however, that an insight to possible future initiatives in WTO multilateral negotiations could be better gleaned from an analysis of the rules being designed for the energy sector, and the petroleum sector in particular, on regional agreements. Mr. Owen Saunders, Director of the Institute of Natural Resources Law of the University of Calgary, Canada, who had drawn attention to the relevance of such agreements, was recruited to prepare Chapter 2.

Chapter 2 suggested the crucial role that the United States plays as importer and exporter of energy-related goods and services. Therefore, and due to the possible implications that the United States' energy trade policy may have for multilateral and regional negotiations, Mr. Craig VanGrasstek, Professorial Lecturer at the School of International Service of the American University, Washington, D.C. and President, Washington Trade Reports, was asked to prepare Chapter 3.

Ms. Simonetta Zarrilli up-dated the existing material and was responsible for the final review and editing of the book.

Ms. Jocelyn Maximo typed and formatted the book and Mr. Diego Oyarzun designed the cover page.

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and Commodities

EXECUTIVE SUMMARY

The purpose of this study is to assist petroleum-producing countries in preserving their ability, in the context of future trade negotiations, to use their natural energy resources to promote their development and enhance their competitiveness in the world market, while defending and improving market access for their exports within the framework of the World Trade Organization (WTO).

At the regional seminar of Arab countries held in Casablanca in November, 1994, the question of the implications of WTO membership for trade in petroleum and petroleum products was raised. It was discussed again at the second regional seminar held under the auspices of the project RAB/95/005, in Bahrain, from 16 to 18 March, 1996, as well as a workshop of Arab countries held in Chavannes-de-Bogis, Switzerland, in November, 1996. It has also been discussed at a meeting hosted by the Islamic Development Bank in June, 1997, the national seminars in Algeria (1998) and Venezuela (1997 and 1999), a regional seminar for acceding Arab countries in Amman (May 1999), and again at another Chavannes-de-Bogis seminar of Arab countries in September 1999. This book has been prepared as the result of those discussions. It is, however, addressed to a broad range of countries, and not exclusively to petroleum-exporting countries, since it also addresses issues such as trade in energy services, environmental protection, and national security. The paragraphs that follow summarize the main findings of the book, especially with respect to:

- the potential constraints that WTO membership may impose on the policy options of petroleum-exporting states;
- the possibilities open to such states for defending their interests within the WTO framework;
- the evolving international trade agenda and its relevance for trade in petroleum and petroleum products;
- the relevance of initiatives at the regional level for this agenda; and
- the United States' energy trade policy and its possible implications in multilateral and regional fora.

The strategic importance of petroleum trade to the world economy has been such that in the past it has been treated as a special case, in a largely political context and not within the GATT multilateral framework of trade rules. It appears that there has been a "gentlemen's agreement" to this effect. In any case, until the 1980s, most of the developing country exporters of petroleum were not contracting parties to the GATT (with the exception of Gabon, Indonesia, Kuwait, and Nigeria). The general attitude of the petroleum exporting countries seems to have been that they had little to gain from GATT membership, as they exported one product where

market access was not the issue, while they had much to lose by being bound by the GATT rules with respect to both their policies in the petroleum sector and their import regimes in general.

However, immediately preceding and during the Uruguay Round, a number of OPEC and other petroleum-exporting developing countries (e.g., Mexico, Brunei Darussalam and Venezuela) acceded to the GATT and thus became original members of the WTO. A number of others are in the process of accession (e.g., Algeria, Azerbaijan, Kazakhstan, Oman, Russian Federation, Saudi Arabia and Uzbekistan) or have indicated an interest (e.g., Islamic Republic of Iran). Ecuador became the first country to accede to the WTO.

A major policy issue in the petroleum sector is "dual pricing" (or "two-tier pricing") practices for natural resources, whereby governments keep domestic prices lower (or export prices higher) than if they had been determined by market forces. This is of fundamental interest to petroleum producing countries as it enables them to use their natural resources to promote industrialization, through attracting investment and supporting the competitiveness of their industrial sector. The issue of dual-pricing, together with the related issue of export restrictions on the part of some major trading nations, was raised at the 1982 GATT Ministerial Meeting, and again in the course of the Uruguay Round negotiations, with a view to elaborating new rules to govern these practices. While dual-pricing as such is not inconsistent with WTO rules, problems arise in finding acceptable mechanisms to keep domestic prices lower than world prices and in controlling access to the lower-price energy; such mechanisms include (a) export restrictions, (b) export duties or taxes, and (c) the provision by the government of low-cost energy inputs. During the Uruguay Round negotiations, some participants sought to elaborate GATT Articles in such a way as to restrict policy options in the petroleum sector. The proposals were related mainly to "dual-pricing" and export restrictions. However, as noted below, the only relevant new obligations were those included in the Agreement on Subsidies and Countervailing Duties.

A fundamental principle of GATT 1994 is the prohibition of quantitative restrictions on trade, which in principle applies equally to exports and imports (Article XI). It is subject, however, to a number of exceptions. The most relevant exceptions with respect to petroleum trade are to be found in Article XX (general exceptions) and Article XXI (national security). Of special interest to petroleum-exporting states is Article XX (g), which generally exempts from normal GATT disciplines those measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption". Although this exception might appear to give a measure of comfort to petroleum producers, there is some question as to the extent of its scope. Indeed, the different views on its possible application are reflected in the differing approaches to this issue taken by Mexico and Venezuela upon their accession to the GATT. It might be anticipated, then, that initiatives to clarify and perhaps reduce the scope of this exception could arise in future trade negotiations, and perhaps in the negotiations on the accession of individual countries.

Article II of GATT 1994 maintains a symmetry between the treatment of export duties and import duties, in that while they are permitted, they must be applied on an unconditional MFN basis and can be bound against increase through inclusion in negotiated schedules of concessions.

Trade negotiations have focused on import duties, most of which have been bound in the WTO schedules, while only a few cases of bindings of export duties and taxes appear in the schedules. There are some instances, however, where countries currently applying for accession to the WTO are being requested to "bind" export duties at zero.

The Agreement on Subsidies and Countervailing Measures greatly increased the stringency and precision of disciplines in this area. The prohibition of export subsidies applies in principle to all countries, although developing countries enjoy special and differential treatment in some respects. The developing country exporters of petroleum and petroleum products fall into the category of those states that are obliged to eliminate export subsidies over an eight-year period (as from 1 January 1995), or over a two-year period for subsidized exports which total 3.25 percent of world trade in the product concerned.

The provision by governments of products or services for use in the production of exported goods, on terms or conditions more favourable than for goods for domestic consumption, is considered to constitute an export subsidy if such terms or conditions are more favourable than those commercially available on world markets to their exporters. This could imply that schemes to provide petrochemical exporters with energy inputs at prices lower than world prices could be claimed to constitute a prohibited export subsidy if the same advantages were not also available as inputs into the production of goods for domestic consumption.

Even if the energy inputs were not directly linked to exports, but available only to particular industries, they would still be considered "specific" and thus "actionable" under the Agreement, in that the downstream products could be subject to countervailing duties if they were deemed to cause material injury to domestic producers in importing markets. It is clear, however, that providing all domestic industries with energy below world prices is not a “specific” subsidy in the sense of the Agreement on Subsidies and Countervailing Measures, and is therefore not "actionable", although the determination of "specificity" may give rise to different interpretations and, thus, be open to challenge in certain cases.

The improved disciplines on "actionable subsidies" facilitate action against subsidies the effect of which is to displace or impede the exports of a like product of another WTO Member into the importing market or into a third-country market. This could eventually provide the basis for challenging subsidies for other energy products competing with petroleum or petroleum products.

Petrochemical products have also been targets for anti-dumping duties. The imposition of such duties is facilitated when sales of the products on the domestic market account for less than 5 percent of exports of the product to the country concerned, which is often the case for petroleum-producing countries.

The Uruguay Round did produce some significant reductions in most-favoured-nation (MFN) tariffs on petroleum products, and, in some cases, also resulted in a reduction in the degree of tariff escalation. Nevertheless, the tariffs on crude oil in the United States and Japan

remain unbound.

The General Agreement on Trade in Services (GATS) provides a framework for the negotiation of commitments on trade in services which can involve cross-border services (e.g., pipeline and maritime transport), commercial presence (e.g. foreign investment in oilfield services or distribution of gasoline, etc.) or movement of natural persons (e.g., the entry of foreigners to provide exploration or other oilfield services). In the context of negotiations under GATS, commitments can be negotiated to extend "market access" and/or "national treatment" in those sectors, but neither is a general obligation under GATS. However, all measures applied to trade in services must be extended on an unconditional MFN basis, unless applied in the context of a regional integration agreement which meets the criteria of Article V of GATS, or subject to a specific derogation under Article II:2. Commitments can be traded for commitments in trade in other services or in goods on the basis of reciprocity. It appears that developing petroleum-exporting countries have not made commitments on oilfield services, but may be requested to do so in future negotiations.

Apart from the substantive disciplines imposed on petroleum trade by GATT 1947, and subsequently by the WTO, an extremely important issue is the efficacy of the dispute-resolution mechanism that enforces the trade rules that have been agreed to in the WTO. This is an especially important question for less economically powerful states, which typically will not have sufficient economic and political influence to enforce obligations unilaterally. It is generally agreed that the WTO represents a significant advance over GATT 1947. In this context, it is particularly useful to examine the history of GATT/WTO dispute resolution with specific reference to the petroleum sector.

All three of the dispute-settlement cases in the history of the GATT/WTO that involved petroleum or petroleum products concerned measures relating to environmental protection, an aspect that makes them especially relevant in the light of the potential for future trade disputes in this area. In the first GATT case involving petroleum, the European Community (EC) objected to the U.S. "gas guzzler" tax on automobiles. The United States believed that the threshold in this tax created an incentive to purchase more fuel-efficient automobiles, which would normally lead to increased conservation. However, the EC argued that the tax violated Article III:2 of the GATT (national treatment with respect to internal taxation), since most of the cars affected by the tax were imported from the EC. The GATT Panel held that the fact that EC automobiles bore most of the burden of the tax did not mean that the measure had the effect of affording protection to domestic cars. It also held that fuel-inefficient imported automobiles were not "like" fuel-efficient domestic automobiles for the purposes of Article III:2, and therefore that different and less favourable treatment could be accorded to them.

The second GATT case, brought by Mexico, Canada and the EC against the United States, concerned a U.S. tax on petroleum designed to finance the cleaning up of hazardous waste sites (the "Superfund tax" case). While the GATT Panel found certain aspects of the Superfund legislation to be incompatible with the national treatment obligation of GATT Article III, it also accepted in principle that environmental taxes with purely domestic objectives can be brought to

bear on petroleum sector imports.

The first dispute resolved under the improved dispute-settlement mechanism of the WTO also involved the petroleum sector. Venezuela, together with Brazil, successfully challenged the United States over its regulation of fuels and fuel additives (the reformulated gasoline case), which favoured domestic refiners. The WTO Panel found that the United States had breached its national treatment obligation by imposing less favourable standards on imported gasoline. On appeal, the Appellate Body modified the Panel report with respect to the interpretation of GATT Article XX (g), but left the Panel's conclusion intact. It reconfirmed that Article XX contains provisions designed to permit important state interests -- including the conservation of exhaustible natural resources -- to be protected. WTO Members have the autonomy to determine their own environmental policies and objectives, and to implement the corresponding legislation. With respect to WTO, that autonomy is limited only by the need to respect the rules of the GATT and the associated agreements.

These cases demonstrate the utility of the dispute-settlement mechanism in dealing with discriminatory measures against imports of petroleum products, imposed under the guise of environmental protection. However, the possibility that amendments to the rules governing the application of environmental measures will be sought in future negotiations needs to be monitored closely.

The biggest challenge to petroleum-exporting countries in the area of environmental measures probably comes from the United Nations Framework Convention on Climate Change (UNFCCC). The Convention sets an ultimate objective of stabilising greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous man-induced interference with the climate system. It establishes a framework and a process for agreeing to specific actions at a later stage. Most members of the Organization for Economic Cooperation and Development (OECD) plus the states of Central and Eastern Europe -- the so-called Annex I countries -- have taken the commitment to adopting policies and measures aimed at returning their greenhouse gas emissions to 1990 levels by the year 2000. In December, 1997 in Kyoto, Japan, a protocol was adopted by consensus by the Parties of the Climate Change Convention. The Kyoto Protocol represents the first multilateral instrument which contains legally-binding obligations to reduce emissions. The Protocol also establishes emissions trading between countries and a range of other flexible mechanisms as valid tools to achieve reductions. Pending the entry into force of the Protocol, several OECD countries have taken a number of initiatives aimed at reducing carbon emissions, the most effective probably being the introduction of carbon/energy taxes.

Petroleum-exporting countries have traditionally considered that the high consumption and excise taxes imposed by importing countries on gasoline and other petroleum products undermine their ability to derive income from their own natural resources. As these taxes are imposed in a non-discriminatory manner on imports and domestic production (although in fact, the latter does not usually exist), they are not inconsistent with GATT obligations. However, this does not mean that they cannot be the subject of negotiated concessions (a precedent exists in the Tokyo Round

negotiations on tropical products). In the light of the various new proposals for extension of multilateral trade obligations further into the realm of domestic policy, there would seem to be no reason why the binding and reduction of these taxes could not be included in a WTO work programme for future negotiations.

The WTO Multilateral Trade Agreements (MTAs) contain provisions for future negotiations in a number of areas, including trade in services and the possible expansion of the Agreement on Trade-Related Investment Measures to include investment and competition policy. In this respect, the first WTO Ministerial Conference, held in Singapore in December, 1996, generated an ambitious work plan for Members to pursue over the next few years. In the lead up to the Third WTO Ministerial Conference, the EU and Japan have followed up by submitting specific proposals for negotiating new multilateral rules on investment and competition policy. Developing countries have responded with counter-proposals so as to ensure that issues that are of interest to them are included in any future trade agenda. These might include issues of particular relevance to the petroleum sector, such as the question of internal taxes or the problem of tariff escalation in the petrochemicals sector.

An insight into the possible future agenda for negotiations relating to energy issues and petroleum in particular can be gleaned from an examination of how these issues have been treated at the regional level. In many cases, the approaches taken in regional agreements have found their way to the multilateral stage. The agreements with the most obvious implications for petroleum-exporting states, and the demands they are likely to face in the event of either regional or multilateral trade negotiations, are the North American Free Trade Agreement (NAFTA), the Energy Charter Treaty (ECT), and the forum for Asia-Pacific Economic Cooperation (APEC).

The NAFTA holds considerable potential interest for petroleum exporting countries for at least three reasons. *First*, it is an agreement that includes both a major petroleum-importing country (the United States) and a major petroleum-exporting developing country (Mexico), as well as Canada which is also a major supplier to the United States. The NAFTA "package" may therefore have broader applicability in suggesting directions for other North-South bargains. *Second*, and related to the first point, the NAFTA in many respects reflected an attempt to reinforce and supplement GATT disciplines. *Third*, the NAFTA deals specifically with trade in energy in a separate chapter.

The approach of the NAFTA energy chapter is of “interpreting” GATT principles in such manner as to introduce new obligations. It interprets some GATT obligations more strictly than has been the case in the past, and even adds to such obligations, for example with respect to export duties and taxes, and export restrictions. One of the effects of this approach is to constrain the ability of NAFTA parties to use dual pricing as a means of encouraging domestic diversification in the petroleum sector (for example, into petrochemicals). The energy chapter also restricts recourse to certain GATT exceptions that have special importance for petroleum exporting countries. It is important to note, however, that Mexico has exempted itself from much of the scope of the energy chapter by means of annexes to the NAFTA.

Apart from the provisions in the energy chapter, the NAFTA includes many provisions elsewhere in the text that have special importance for the energy sector. One example is the NAFTA provisions on "fair trade" actions. The NAFTA introduces additional disciplines, beyond those imposed by the WTO, on certain measures allegedly aimed at the promotion of "fair trade" -- especially legislation relating to subsidies and dumping.

A major difference between the GATT 1994 and the NAFTA is the inclusion in the latter of provisions relating to foreign investment. There are four fundamental principles underlying the NAFTA treatment of foreign investment: (a) national treatment with respect to investment by NAFTA Parties; (b) MFN treatment for foreign investors of other Parties; (c) a minimum international standard of "fair and equitable treatment" for investments by investors of other Parties; and (d) a prohibition on the use of performance requirements with respect to NAFTA investors. While the investment provisions may seem to represent an almost total capitulation to the traditional agenda of capital-exporting countries with respect to facilitation of foreign investment, the NAFTA carries with it some important exceptions, especially for Mexico, where the agreement essentially leaves non-basic petrochemicals as the only area open to foreign investment in the Mexican oil and gas sector.

The NAFTA also includes a range of provisions dealing with trade and environment, although these are not gathered together in one chapter. A separate Agreement on Environmental Cooperation is nevertheless an important part of the NAFTA institutional structure. While the NAFTA environmental provisions are not specific to the oil and gas sector, they are important in striking a balance between trade and environmental considerations that may provide some indication of how this trade-environment nexus will be treated in such potentially thorny areas of dispute as climate change, which are of direct concern to petroleum exporting states.

The second regional arrangement examined in this book, the 1994 Energy Charter Treaty (ECT), establishes for the energy sector a regime for investment, trade, and transit. The signatories to the ECT include all the members of the European Community, several Central and Eastern European countries, Russia, all newly independent states of the former Soviet Union, Australia, and Japan. The ECT is rooted in the 1991 European Energy Charter, a non-binding declaration of policy designed to promote the development of an efficient energy market throughout Europe, which was negotiated in response to the collapse of the Soviet Union.

The ECT is reminiscent of the NAFTA in many respects, especially in its reference to GATT and WTO principles. This is of special significance for the ECT, given that (unlike the NAFTA Parties) not all ECT signatories are members of the WTO, with Russia being the most important exception in this respect. With respect to ECT parties that are also parties to the GATT there is a general provision that nothing in the ECT shall derogate from GATT obligations as between GATT parties *inter se*. Where one of the trading parties (such as Russia) is not party to the GATT, trade in energy materials and products is to be subject to the trade rules as represented by the pre-Uruguay Round GATT 1947.

Specific trade obligations and exceptions are found at various places throughout the

treaty. As with the NAFTA, these provisions follow the trends in GATT law and practice as reflected in the Uruguay Round, although there are some differences on how the NAFTA and ECT treat GATT obligations. While the NAFTA approach was to broaden the scope of GATT principles through interpretation and additions, this is not always the case for the ECT. For example, with respect to the GATT national security exception, the NAFTA narrowed the possible scope of this provision while the ECT arguably expands it.

The agreement on principles to govern foreign investment in the energy sector was a critical goal of Western states in the negotiations on the ETC. Unlike NAFTA, the foreign investment regime under the ECT makes a distinction between pre-investment (when the issue is one of access) and post-investment (when risk is assumed and the investor is vulnerable to the national policies of the host country) stages. The pre-investment stage is characterized by "soft law" undertakings to create an hospitable environment for foreign investment. The post-investment stage, however, brings with it "hard law" obligations more reminiscent of the NAFTA, which are enforceable by international arbitration. Investors are accorded full national treatment and most-favoured-nation treatment. Additionally, expropriation or nationalization is conditioned on the traditional requirements insisted on by capital-exporting States.

The ECT, unlike the NAFTA, includes a specific article on sovereignty over energy resources. This would appear to be an attempt to provide some counterbalance to the provisions regarding protection of foreign investors, although it is not clear that the article adds significantly to the substance of the treaty. The treaty essentially confirms that states retain broad rights to manage their energy resources, although this is balanced by what would seem to be a "soft law" commitment to facilitate access to energy resources in a transparent and non-discriminatory manner.

The ECT also includes a number of provisions on environmental aspects of the energy sector. As with the NAFTA, these provisions are primarily of a "soft law" character. However, their articulation, their modernity, and their extensiveness arguably represent improvements over NAFTA.

The third regional arrangement analysed -- the forum for Asia-Pacific Economic Cooperation (APEC) -- was created in 1989. It has evolved into the major governmental forum on the Pacific Rim for cooperating on trade and economic relations. In the 1994 Bogor meeting, APEC leaders adopted a Declaration of Common Resolve, which included a commitment to move toward free trade and investment in conformity with the GATT by 2010 for industrialized economies and by 2020 for developing economies.

The energy agenda of the APEC is carried out through the Energy Working Group (EWG), created in 1990 as one of ten sectoral working groups; it is assisted in its work by five Expert Groups. The EWG work plan reflects both the Energy Action Program, adopted as part of the Osaka Action Agenda, and any relevant decisions taken by APEC Leaders, trade ministers or energy ministers. More generally, it reflects the fourteen Non-Binding Energy Policy Principles agreed on by the Working Group in 1994, and endorsed by the APEC Energy Ministers at their

inaugural meeting in 1996.

The United States is the most likely proponent of initiatives to include new rules affecting energy policies and international trade, therefore, the third chapter of this book addresses the energy trade policy of that country. Energy is a very special sector in U.S. foreign economic policy, important aspects of which have thus far been isolated from the main currents of multilateral trade agreements. While U.S. negotiators now hope to negotiate multilateral and regional agreements that affect trade in energy-related goods and services, their objectives in these negotiations are limited. The goals of U.S. negotiators are complicated by the sometimes complementary and sometimes competing demands of three distinct areas in national policy: economics (which entails both export promotion and access to raw materials), security (the United States needs reliable supplies of strategic goods but also has conflicts with some oil-rich states), and environmental protection. In its efforts to balance these objectives, the United States seeks to retain the authority to impose restrictions on imports for reasons of security or environmental protection, while also promoting U.S. exports of energy-related goods, services, and capital. The United States will pursue some of its energy-related trade objectives in the new round of multilateral negotiations, but the commitments made in this forum will be neither absolute nor exclusive.

The U.S. policy on trade in energy has always reflected the tension between security and economics. Due to its special role in national security, this is a sector that is peculiarly resistant to full integration into the rules and disciplines of the global trading regime. “Energy security” for the United States entails three distinct considerations. One is the need to maintain secure access to a strategically vital commodity. The second concern relates to the leverage that oil producers may employ. The third consideration stems from the power that oil wealth can bring to currently or potentially hostile states.

Economic and security objectives are not always in conflict. In fact, these two aspects of U.S. objectives are entirely consistent on one key point: It is in the interests of the United States to encourage multiple sources of energy production around the world, diversifying the global portfolio both by commodity and by region. This promotes U.S. security objectives by preventing excessive dependence on any one country or region, while also advancing U.S. economic objectives by creating new opportunities for the exportation of goods, services, and capital. Economic and security objectives are generally in harmony when it comes to exports, but can clash over energy imports. It is in the *economic* interests of the United States to maintain relatively open access for imported energy, but the *security* implications of these imports are more complex. It remains a principle of U.S. policy that the country must have the ability to restrict energy imports whenever deemed necessary for reasons of national security.

The United States’ conception of energy security is based in large part on propinquity: The sources that are geographically closest are considered to be the most reliable, and hence have received the greatest attention, the most preferential treatment, and the negotiation of the strictest disciplines. One might perceive a series of more or less concentric circles of energy security, in which sources become more vulnerable to disruption as one moves farther away from the centre.

In oil trade, the first circle consists of Canada and Mexico, which supply over one fourth of U.S. crude oil imports. The second circle consists of producers in the rest of the Western Hemisphere. The perceived reliability of sources declines as one moves beyond these suppliers to the other circles. It is no coincidence that these circles roughly correspond to the trade agreements that the United States has negotiated or is now negotiating.

The strategically vital nature of energy, and especially oil, has led on several occasions to the imposition of import restrictions by the United States. These restrictions, which have variously been imposed on a global or country-specific basis, fall within a major "loophole" in GATT law. If challenged, the United States would justify these restrictions under the "national security" exception (GATT Article XXI). However, it is not clear whether the United States would seek to bring the national security exceptions in GATT/WTO rules, which countries have heretofore been allowed to invoke rather loosely, under the tighter discipline of NAFTA rules.

Energy is nevertheless an economic sector of vast importance, and one in which the United States cannot afford to forego market opportunities. While the country is often seen as a net energy importer, the U.S. dependence on foreign sources of hydrocarbons is counterbalanced by its status as an exporter of goods, services, and capital used in the production of energy.

The energy export-promotion aims of the United States are primarily targeted towards developing countries. One reason for this targeting is that there simply is more untapped potential for energy supply and demand in the developing countries. The same increment of economic growth will *ceteris paribus* produce more demand for energy in a developing country than it will in an industrialized country and hence encourage more trade and investment opportunities.

"Green trade" issues are among the highest-profile matters in contemporary trade policy. Nowhere is this more evident than in the case of energy and allied sectors, which are often identified as leading contributors to such environmental problems as oil spills, global warming, and potential nuclear disasters. The GATT and WTO have tackled this issue in some notable disputes, and it is possible that other U.S. environmental laws will be the subject of WTO dispute-settlement cases in the future.

As mentioned above, NAFTA provides what is sometimes called a "GATT-Plus" approach. The question now is whether NAFTA will set the model for agreements with other energy-exporting countries in the Western Hemisphere, or whether the United States will take a more cautious approach with countries that are geographically and politically more distant. The negotiations might provide for greater disciplines in this sector, giving Member countries of the planned Free Trade Area of the Americas (FTAA) certain advantages in terms of market access, but limiting the scope of policies designed to use energy as a stimulus to development. There is nevertheless reason to doubt whether other energy-exporting countries in the Americas will acquire the same status in U.S. policy as the two immediate neighbours.

The energy trade provisions in APEC may be less sweeping than those of the FTAA. The APEC countries have smaller quantities of exportable energy surpluses. The negotiations thus far

in APEC have aimed more at nondiscriminatory arrangements that will be globalized in the WTO than discriminatory arrangements in an FTA.

A limited scope of goods is currently subject to liberalization initiatives in APEC which will be completed in the WTO. The APEC list of goods does not include crude oil and derivatives, and a number of other products that fall within a reasonable definition of "energy" are also excluded. U.S. negotiators are interested primarily in reducing foreign tariffs on energy-related products and barriers to energy services, so as to create new opportunities for U.S. firms and investors. The United States has indicated that it considers energy services among the priority services for liberalization in the negotiations under GATS to begin in January 2000.

The U.S. tariffs on crude oil are very low but unbound. This means that there is no legal guarantee that this tariff will remain at such a low level; the United States could impose a much higher tariff rate without violating the WTO rights of oil exporters. Tariffs represent one area in which Canada and Mexico are in a more advantageous position than other oil exporters as they face zero duties on both raw materials and refined products. While their duty-free access to the U.S. crude oil market offers only a slight margin of preference, their duty-free rights are legally protected by the treaty obligations of NAFTA. Other exporters face at least the hypothetical threat of increased tariffs. The most likely scenario for the imposition of such tariffs would be for reasons of national security, although it is also possible that some future administration might consider imposing an oil-import fee either to raise revenue or to discourage the consumption of hydrocarbons.

While the General Agreement on Trade in Services (GATS) brought services within the WTO regime, it allowed countries to establish exceptions in specific sectors. The vast majority of the global energy services industry is not covered by GATS specific commitments. Planning for the new round of services negotiations is now underway in the United States. The U.S. negotiators have shown greater interest in the certain sectors, two of which -- engineering and environmental services -- are particularly important for the energy field.

The anti-dumping (AD) and countervailing duty (CVD) laws are a recurring source of friction between the United States and its trading partners. This has not previously been a key issue in the energy sector, but that could have changed with petitions filed in 1999 by a regional group of independent oil producers. If the U.S. Department of Commerce and U.S. International Trade Commission had granted the petitions against Venezuela, Mexico, Iraq, and Saudi Arabia, tariffs of between 33 and 170 percent could have been applied to oil imports. The case did not make it past the first formal step, which was a Department of Commerce determination that the petitioners lacked the necessary "standing" to file these petitions.

There are some energy-related aspects of the trade-remedy laws that might be reflected in WTO negotiations or in the FTAA negotiations. One such topic is the allegation that export restrictions on raw materials constitute a form of subsidy on downstream products. Under U.S. law and policy, restrictions on the exportation of raw materials can be treated as an indirect export subsidy to goods that are made from those materials. Variously referred to as "dual-pricing" or

“natural-resource subsidies,” this doctrine has been employed in such diverse cases as Mexican petrochemicals (where lower domestic prices of oil were alleged to constitute a subsidy to producers of carbon black feedstock), Argentine leather goods (where a ban on the exportation of hides was alleged to constitute a subsidy to the leather goods industry), and Canadian lumber (where the pricing practices of provincial authorities were alleged to constitute a subsidy to domestic softwood lumber producers). However, such actions could be challenged in the WTO.

The petroleum sector remains one of the leading areas for U.S. direct investment abroad, as well as foreign direct investment in the United States. Petroleum accounts for two-thirds of U.S. investment in Africa, more than one-quarter of U.S. investment in the Middle East, and significant shares of U.S. investment in Canada, Asia, and Europe. One anomaly in the data concerns Latin America, where oil projects account for less than ten percent of total U.S. investment. If accurate, these data suggest that the FTAA initiative -- if accompanied by privatization and liberalization of investment -- may open up major new opportunities for U.S. capital in the region.

The United States strongly encourages the privatization of state-owned enterprises, and the expansion of opportunities for foreign investors in specific stages of oil exploration, extraction, and refinement. As noted above, the EU, Japan and several other countries have proposed that multilateral rules on investment be negotiated in the WTO. The United States has not indicated that it supports this approach. However, in the FTAA, the investment working group is examining the issues of national treatment, most-favoured nation status, expropriation, repatriation of profits, performance requirements, and dispute settlement. The U.S. negotiators have also pursued their objectives through bilateral investment treaties, having reached 45 such treaties since the early 1980s. All of these treaties were reached with developing countries and economies in transition, including oil-exporting countries such as Ecuador, Kazakhstan, and Trinidad & Tobago.

CHAPTER 1

THE IMPLICATIONS OF THE WTO AGREEMENTS FOR PETROLEUM POLICY AND TRADE IN PETROLEUM PRODUCTS

I. Introduction

The Uruguay Round, which led to the creation of the World Trade Organization (WTO), GATT 1994, and various other agreements and Ministerial Decisions, resulted in strengthened and more comprehensive rules to deal with traditional international trade concerns. New rules were set up for areas of international economic relations previously not addressed by the GATT, including trade in services and protection of intellectual property rights. Many of the countries which became contracting parties to the GATT shortly before the conclusion of the Uruguay Round, or which are currently in the process of acceding to the WTO, are petroleum-producing and exporting countries, some of which are also Member countries of the Organization of the Petroleum Exporting Countries (OPEC)[1]. This fact underlines the need to explore the implications that the WTO Agreements will have for the flexibility of such countries in framing and implementing their petroleum-related policies. There is also a need to consider the consequences of this new international trade regime more generally for international trade in, and market access opportunities for, petroleum-based products and derivatives, including opportunities for export diversification. Conversely, these issues are equally important to developing and developed countries that rely on petroleum imports to power their economies.

At the same time, new issues have arisen which will influence trade in petroleum and petroleum products. The trade impact of environmental protection measures in this sector was the subject of the first case resolved under the dispute-resolution provisions of the WTO, and future negotiations on "trade and environment" issues will be of crucial interest to exporters in this sector. Investment and competition policy, which are also on the proposed future international trade agenda, also have important implications for producers and exporters of petroleum and petroleum products.

These general considerations must be borne in mind by petroleum-producing and

[1]The main aims of OPEC are to coordinate and unify petroleum policies of Member countries, to determine the best means of safeguarding their interests individually and collectively, and to devise means of ensuring stabilization of prices in international oil markets so as to eliminate harmful and unnecessary fluctuations, with due regard to the interests of producing nations and the necessity of securing a steady income for them; an efficient, economic and regular supply of petroleum to consuming nations; and a fair return to investors in the petroleum industry. To establish these objectives, OPEC Member countries use several instruments, including production quotas. The membership of OPEC comprises Algeria, Indonesia, Iraq, Islamic Republic of Iran, Kuwait, the Libyan Arab Jamahiriya, Nigeria, Qatar, Saudi Arabia, the United Arab Emirates, and Venezuela. Ecuador had its membership suspended at its own request from 31 December 1992, while Gabon from 1 January 1995. OPEC Member countries produce more than 40 percent of the world's oil and possess around three quarters of the world's proven crude oil reserves. They export about 60 percent of the oil traded internationally. Source: OPEC website, *www.OPEC.org.*

exporting countries when drawing up their economic policies and energy strategies, and when considering membership of the WTO. It follows that a range of energy-related issues will be explored in the accession negotiations, including:

- governmental controls on production and exports of petroleum-based products, including in the framework of OPEC;
- domestic prices and pricing policy;
- export tariffs and taxation;
- operations of state trading enterprises and monopolistic practices in this sector;
- "unfair" trade practices (e.g. subsidies and dumping);
- investment; and
- trade in services related to the exploration, extraction, transportation and processing of petroleum.

All these issues are prominent in the WTO accession process of major petroleum-exporting countries.

The aim of the first chapter of this book is to analyse the implications for petroleum-exporting countries of the post-Uruguay Round international trading system, including potential concerns both in the narrow sense of trade barriers to exports of petroleum or petroleum products (e.g., increased tariffs, countervailing duties, anti-dumping duties, environmental protection measures) and in the broad sense of challenges to petroleum policies (e.g., export restrictions, export taxes, and subsidies). In addition, Chapter 1 highlights advantages of WTO membership for petroleum-exporting countries, such as their ability to defend their rights effectively in an international forum.

II. Background

Since the beginning of the twentieth century, petroleum has been recognized to be not just an economic commodity, but also a strategic one. It played a decisive role in the two world wars that preceded the formation of the GATT, and has influenced an array of critical developments in the post-war world. At the time of the early GATT negotiations, most of the petroleum fields, located in North America, the Middle East and South-East Asia, were under the control of transnational corporations owned mostly by residents of the United States, the United Kingdom, the Netherlands, and France. Because these countries wanted to avoid new tensions over the control of resources, it seems likely that they decided to exclude from the GATT negotiations the most strategic international commodity at that time. Their concern was that the political and strategic aspects of petroleum would have introduced an undesirable degree of "politicization"

into the otherwise "technical" nature of the GATT. In any case, the main petroleum-exporting countries were not contracting parties to the GATT at that time.[2]

During the early history of the GATT, issues relating to trade in and prices of crude petroleum were not addressed. It appears that there was a "gentlemen's agreement" not to bring up petroleum issues in the GATT context. Because of the very nature of this agreement, it does not appear to be set out in any written documents.

However, the petroleum "shocks" of the 1970s highlighted the vulnerability of countries dependent on foreign supplies of natural resources. This prompted some industrialized countries, led by the United States, to include the subject of export restrictions in the Tokyo Round of Multilateral Trade Negotiations (1973-1979), conducted under the auspices of the GATT. The strong resistance of many countries, both developed and developing, to going beyond what was stipulated in the GATT, as further diluted under the GATT Protocol of Provisional Application ("grandfather clause"),[3] prevented any substantive agreement in the Tokyo Round on the issue of export restrictions, including export taxes.

The uniqueness of crude petroleum politics and economics is immediately apparent from the very fact that practically all quantitative analyses of international trade flows clearly separate crude petroleum exports and imports from the "mainstream". Also, it is evident that an import policy for petroleum products is determined primarily by energy needs; hence, tariffs or import duties have a more important role as revenue tools than as instruments of trade policy. This explains to a great extent the fiscal structure of taxes and charges on petroleum products, including import tariffs.

III. Petroleum and petroleum products in the Uruguay Round

During the Uruguay Round negotiations attempts were made by some participants to tighten the multilateral trading rules to deal with certain policies relating to petroleum and petroleum products.[4] These initiatives were taken mainly in the context of the Negotiating Group on Natural Resource-Based Products.

Key problems for trade in these products, as identified by those responsible for the initiatives, were “dual pricing” practices and export restrictions. They argued that “dual pricing”

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[2]However, some countries in this category (e.g., Indonesia, Kuwait, and Nigeria) were Contracting Parties to the GATT before the establishment of OPEC. Some OPEC members and other petroleum-exporting developing countries acceded to the GATT immediately before or during the Uruguay Round and have become original members of the WTO (e.g. Mexico, Brunei Darussalam, and Venezuela). For details of the status of OPEC and non-OPEC petroleum-exporting developing countries in the GATT/WTO, see Tables F and G.

[3]The Protocol is discussed in footnote 19.

[4]See the U.S. submissions in MTN.GNG/NG3/W/2, MTN.GNG/NG3/W/13 and MTN.GNG/NG3/W/23 and the European Community's submission in MTN.GNG/NG3/W/37.

practices distorted trade by maintaining price differentials to the advantage of domestic industry through export restrictions (or taxes) on raw materials. Similarly, differential export taxes on raw materials and processed products resulted in the supply of raw materials to local industry at prices lower than those prevailing on the world market. Although “dual pricing” had not given rise to major trade problems in recent years, it was argued that such practices could lead to trade distortions in the future, particularly if petroleum prices were to rise again.

These practices were uniquely problematic as regards natural resources because they were rooted in the unequal distribution of and access to supplies. The issue of export restrictions (or taxes) was considered to be directly linked to “dual pricing”, since the latter would be effectively impossible without the former: In the absence of such restrictions, other countries would buy these products at the lower domestic prices, with consequent supply problems and an eventual upward pressure on prices.[5] It was also argued that export restrictions (or taxes) had an effect similar to a subsidy to domestic producers and exporters who would have access to lower-priced inputs.

Those advancing these views also contended that interpretations of GATT 1947 did not address the problem effectively. They argued that (a) under the provisions of the Tokyo Round Subsidies Code, “dual pricing” would not give rise to a countervailable subsidy even though in certain cases such pricing practices were clearly aimed at stimulating or "subsidizing" exports (or

[5]GATT Article XX (i) is the only GATT provision that directly relates to the issue of justifying measures "involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan: provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination". According to the GATT negotiating history, this provision was proposed by New Zealand at the Geneva session of the Preparatory Committee in 1947 to justify its price stabilization schemes. It argued that without such schemes, prices of certain commodities -- particularly raw materials such as leather -- could rise to the world level, thus leaving no leather for the domestic footwear industry. However, certain concerns were expressed then with respect to the danger of abusing this exception. In 1950, a GATT Working Party examined the use of export restrictions on raw materials and took note of the fact that the exception clause referred to export restrictions associated with a government stabilization plan, and not to the plan itself. Therefore, the various provisos listed in Article XX (i) were meant to apply only to the export restrictions and not to other aspects of such a plan. The Working Party concluded that "the Agreement does not permit the imposition of restrictions upon the export of a raw material in order to protect or promote a domestic industry, whether by affording a price advantage to that industry for the purchase of its materials, or by reducing the supply of such materials available to foreign competitors, or by other means. However, it was agreed that the question of the objective of any given export restriction would have to be determined on the basis of the facts in each individual case". On the question of a country maintaining export restrictions on a raw material (which might have the effect of assisting a domestic industry processing that material) and a prohibition/restriction on imports of the finished product, there was general agreement that in considering whether export restrictions were justified by Article XX (i) one "would have to give close examination to the question whether these export restrictions in fact operated to increase the protection afforded to the domestic industry". See: John Jackson, *World Trade and the Law of GATT*, The Bobbs-Merril Company, Inc., 1969, at § 19.2.

providing an advantage to exporters);[6] (b) "dual pricing" had not generally been considered as falling within the scope of GATT Article XI;[7] (c) GATT itself permitted export taxes, which could provide one means of establishing "dual pricing"; and (d) the high degree of government ownership and control in resource-based industries could contribute to trade distortions that were not effectively addressed by GATT Article XVII (state trading enterprises).

This argument was opposed by many developing countries, which stressed that the Negotiating Group on Natural Resource-Based Products should adhere to its mandate and engage in negotiations in the three identified sectors (i.e., forestry, fisheries, and non-ferrous minerals and metals), and provide for the fullest possible trade liberalization for those products. On this view, the sectoral negotiations would concentrate on market-access problems (such as tariffs, tariff escalation, and non-tariff measures). Views also differed on the issues of "dual pricing" and export restrictions and other measures affecting exports of raw materials. As to possible recourse to export restrictions or other measures, for example, these same developing countries considered such actions to be in conformity with GATT Articles XI:2(a), XX (g) and XX (j), which provided for the use of export restrictions in the context of critical shortages, conservation measures, or development purposes.[8]

While the United States suggested that the negotiations should explore the principles to govern trade in natural resource-based products, with the result expressed in a code or an elaboration of GATT Articles, most participants, including the EC, felt that both "dual pricing" practices and export restrictions were issues of a general nature and should be addressed in a generic way. The United States also suggested that issues of dual-pricing and export restrictions for natural resource-based products should be reviewed in the broad context of subsidies within the Negotiating Group on Subsidies and Countervailing Measures. It believed such a review would be particularly useful for the discussions in the Negotiating Group on Natural Resource-Based Products since subsidies for these products provided a competitive advantage to exporters.

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[6]The issue of "dual pricing" was formally raised at the 1982 GATT Ministerial Meeting, at which the GATT Council was requested to make arrangements for the study of "dual pricing" practices. On 17 June 1986, in relation to the question of whether pricing policies for natural resources can constitute countervailable subsidies, the Canadian delegation made the following statement: "Natural-resource pricing policies, because they related both to matters of national sovereignty as well as to comparative advantage, were of fundamental importance to the contracting parties. All contracting parties, whether producers or consumers, had an interest in ensuring that the sovereign right to develop natural resources and maintain the general comparative advantage of natural resource producing countries continued to be recognized". Canada believed in particular that the unilateral right to countervail granted under Article VI and the Subsidies and Countervailing Measures Code (BISD 26S/56) was not intended to be used to negate a country's general comparative advantage. It should be recognized that the precedent set by a move unilaterally to broaden, and in the process make more ambiguous, the concept of subsidy would affect all contracting parties. A wide range of resource and resource infrastructure policies could be affected. See GATT, C/M/200, 10 July 1986, p. 12.

[7]As noted above, however, dual-pricing could not exist without some restriction or tax on the export of the natural resource. The United States believed that in some cases this practice was equivalent to a prohibited non-tax export restriction.

[8]See MTN.GNG/NG3/W/8/Rev.1, MTN.GNG/NG3/18, MTN.GNG.NG3/19 and MTN.GNG/NG3/23.

In this context, conclusions of the report of the earlier GATT Working Party on Non-Ferrous Metals and Minerals were cited, in particular the observation that "there exist other measures of a general nature in the form of governmental or inter-governmental grants and loans, fiscal measures, pricing policies, assistance for research, etc. which might have a protective effect".[9] In this respect, the main question for the Negotiating Group on Subsidies and Countervailing Measures was whether certain pricing policies for natural resources (including petroleum and petroleum products) could constitute countervailable subsidies.[10]

There is very little information available on how the review was conducted. In the Chairman's draft text of the Agreement on Subsidies and Countervailing Measures of 7 November 1990,[11] two provisions could be regarded as relevant to petroleum and petroleum products:

> Article 2.1 of the Chairman's draft text:
> "In order to determine whether a subsidy, as defined in Article 1.1 above, is specific to an enterprise or industry or group of enterprises or industries (hereinafter referred to as "certain enterprises"), and as such confers a benefit on certain enterprises over those available to other enterprises or industries <u>within the territory of a signatory</u>, the following shall apply: ..."
>
> Article 14 (e) of the Chairman's draft text:
> "When the government is the sole provider or purchaser of the good and service in question, the provision or purchase of such good or service shall not be considered as conferring a benefit, unless the government discriminates among users or providers of the good or service. Discrimination shall not include differences in treatment between users or providers of such goods or services due to normal commercial considerations."

On 26 November 1990, Mexico sent a communication to the Trade Negotiations Committee, dissociating itself from this draft text. In its view, the draft dealt with matters clearly outside the terms of reference of the Negotiating Group on Subsidies and Countervailing Measures, in so far as it referred to domestic pricing policies in respect of natural resources, to security of international supplies of those natural resources, to the terms on which they were offered to domestic industry (national or "guest"), and ultimately to access to those resources. While supporting the requirement that "there must be no discrimination between enterprises nor between industries", Mexico stated that "this requirement of non-discrimination must refer to -- and only to -- production facilities located in the national territory of the signatory country". It further argued that "[i]n the absence of such a clarification, the conditions as set forth in the Chairman's draft mean directly that countries endowed with natural resources renounce their comparative advantages, or otherwise that they be exposed to the application of countervailing measures in their export markets. This means that National Treatment is applied beyond the

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[9] See GATT, L/5995.

[10] See MTN.GNG/NG10/W/1 and MTN.GNG/NG10/W/20.

[11] See MTN.GNG/NG10/23.

territory of contracting parties, which is fundamentally inconsistent with this basic GATT concept".

In order to resolve this anomaly, Mexico proposed that Articles 2.1 and 14 (e) of the Chairman's draft specify that the provisions in question were limited to the territory of a contracting party. These Mexican proposals were reflected in the final version of Article 2.1 of the Agreement on Subsidies and Countervailing Measures:

> "In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authorities, the following principles shall apply: ..."

Subparagraph (e) of Article 14 was deleted from the final version.

Box I

Petroleum in the accession negotiations of Mexico and Venezuela

Export measures, including export restrictions, like any other trade measure, are subject to the general rules of the GATT (e.g., MFN and non-discrimination). Trade-restricting measures in the natural resources sector (including petroleum) may be justified under GATT Article XX (g) (general exceptions relating to the conservation of exhaustible natural resources), subject to certain conditions included therein, notably that production for domestic consumption is also restricted. This exception had served to strengthen the perception that, in general, international trade in crude petroleum was excluded from the rules of the multilateral trading system, and was governed by its own distinctive rules. It was only when petroleum-producing and exporting countries such as Mexico (1986) and Venezuela (1990) negotiated their accession to the GATT that the issue of flexibility for the management of crude-oil export policies came to the fore. Indeed, this may have been the most important element in Mexico's decision to reject accession to the GATT in 1980, after the negotiations had been successfully concluded.[12] When Mexico did accede to the GATT in 1986, this was still perceived as a major problem, warranting special consideration in the Mexican Protocol of Accession.[13] Thus, paragraph 5 of the Protocol reads: "Mexico will exercise its sovereignty over natural resources, in accordance with the Political Constitution of Mexico. Mexico may maintain certain export restrictions related to the conservation of natural resources, *particularly in the energy sector*, on the basis of its social and development needs if those export restrictions are made effective *in conjunction with restrictions on domestic production or consumption*" (emphasis added).

Venezuela, which acceded to the GATT during the Uruguay Round, did not consider that any modification to its standard Protocol of Provisional Application (PPA) was required in order to accommodate issues related to petroleum. In its view, paragraph 5 of the Mexican PPA did not change Mexico's multilateral rights and obligations, particularly in the light of the provision in GATT Article XX (g) that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production and consumption". Indeed, this last condition was identical to the one in the special provision concerning the energy sector in Mexico's PPA. Venezuela concluded that such a provision did not grant any particular advantage and therefore did not request the insertion of any special provisions in its own PPA or in the final report of the Working Group on the management of its petroleum sector.

IV. Petroleum and the WTO

[12]For example, see press reports on the speech made by President José López Portillo on 18 March 1980.

[13]See GATT, *Basic Instruments and Selected Documents Series, 33rd Supplement, Protocol for the Accession of Mexico to the General Agreement on Tariffs and Trade*, pp. 3-6.

1. Treatment of, and implications for, petroleum and petroleum products under the WTO Agreements

1.1 Agreement establishing the World Trade Organization[14]

The preambular paragraph of the Marrakesh Agreement, which establishes the World Trade Organization, reflects a clear political will on the part of the latter's Members to conduct "their relations in the field of trade and economic endeavour" in the framework of "an integrated, more viable and durable multilateral trading system". This system encompasses "the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations".

The examination of the impact of the new international trading regime on petroleum-exporting countries and on the international trade in petroleum and petroleum products must begin with a consideration of the substantive implications of the Agreement establishing the WTO. The WTO provides "the common institutional framework for the conduct of trade relations among its Members" in all matters related to the agreements annexed to the WTO Agreement. In this sense, the WTO will become, in law and in fact, the institutional framework for the conduct of trade relations between petroleum-producing and petroleum-consuming Members.

The WTO also provides "the forum for negotiations among its Members" on matters related to the agreements, as well as a possible "forum for further negotiations ... concerning ... multilateral trade relations, and a framework for the implementation of the results of such negotiations as may be decided by the Ministerial Conference".[15] This will be true both for petroleum-related issues emerging from the implementation of the Multilateral Trade Agreements, and for new issues such as protection of the environment and, possibly, competition and investment policies, to the extent that they have implications for international trade (including trade in petroleum).

1.2 Multilateral Trade Agreements

The Multilateral Trade Agreements (MTAs) are contained in Annex 1 to the Marrakesh Agreement on the WTO (see Box II). Annex 2 (the Understanding on Rules and Procedures Governing the Settlement of Disputes) and Annex 3 (the Trade Policy Review Mechanism) are, with Annex 1, integral parts of the WTO Agreement and binding on all Members. The Plurilateral Trade Agreements (PTAs) in Annex 4 are also an integral part of the WTO Agreement, but only

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[14]For the full text of the Final Act of the Uruguay Round, see GATT Secretariat, *The Results of the Uruguay Round of Multilateral Trade Negotiations. The Legal Texts*, Geneva, 1994 (available in English, French and Spanish).

[15]GATT Secretariat, ibid., pp. 6-18.

for Members that have accepted them.[16]

[16]There were four PTAs: The Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the International Dairy Agreement, and the International Bovine Meat Agreement, the latter two have since been abandoned. There is no expectation that current Members of the WTO that have not accepted the PTAs will accede to them. However, countries newly acceding to the WTO might expect, if not a formal request from WTO Member for accession to the PTAs, at least an informal indication of interest in their participation in the Agreement on Government Procurement.

Box II

List of the WTO MTAs

ANNEX 1A: MULTILATERAL AGREEMENTS ON TRADE IN GOODS

General Agreement on Tariffs and Trade 1994

Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994
Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994

Understanding on Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994

Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994

Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994

Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994

Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994

Agreement on Agriculture

Agreement on the Application of Sanitary and Phytosanitary Measures

Agreement on Textiles and Clothing

Agreement on Technical Barriers to Trade

Agreement on Trade-Related Investment Measures

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994

Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994

Agreement on Pre-Shipment Inspection

Agreement on Rules of Origin

Agreement on Import Licensing Procedures

Agreement on Subsidies and Countervailing Measures

Agreement on Safeguards

ANNEX 1B: GENERAL AGREEMENT ON TRADE IN SERVICES

ANNEX 1C: AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

The variety and complexity of issues covered by the WTO agreements warrant a comprehensive review which would go much beyond the scope of the present publication.[17] The objective of this chapter is to examine some of the provisions in selected agreements with the most direct potential impact for petroleum-producing and -exporting countries and for international trade in petroleum and petroleum products. In addition to GATT 1994, these include the agreements relating to subsidies and countervailing measures, anti-dumping, technical barriers to trade, intellectual property, and trade in services.

1.2.1 The General Agreement on Tariffs and Trade 1994 (GATT 1994)

Pursuant to Annex 1A of the Marrakesh Agreement, GATT 1994 consists of:

(a) the provisions of GATT 1947, "as rectified, amended or modified by the terms of legal instruments which have entered into force before the date of entry into force of the WTO Agreement"[18] (excluding the Protocol of Provisional Application[19]);

(b) the provisions of certain GATT legal instruments predating the WTO Agreement;[20]

(c) certain Understandings negotiated in the Uruguay Round;[21] and

(d) the Marrakesh Protocol to GATT 1994 (relating to tariff concessions and commitments on trade in goods).

Article I:1 of the GATT sets out the first basic principle of the international trading system

[17]For a comprehensive review of the results of the Uruguay Round, see UNCTAD, *Trade and Development Report, 1994*, Part Three ("The Uruguay Round: An Initial Assessment"), and its supplement, Supporting Papers, United Nations, New York and Geneva, 1994.

[18]GATT Secretariat, *The Results of...*, op.cit., p. 21.

[19]The General Agreement on Tariffs and Trade of 1947 was applied through an instrument called the Protocol of Provisional Application. As its name indicates, the GATT was applied on a "provisional" basis. An important feature of this Protocol is the provision for Part II of the General Agreement to be applied "to the fullest extent not inconsistent with legislation existing on the date of this Protocol". A major achievement of the Uruguay Round Agreements is the application of GATT 1994 on a definitive basis from 1 January 1995.

[20]Including protocols and certifications relating to tariff concessions; protocols of accession, excluding the provisions concerning provisional application and withdrawal of provisional application; decisions on waivers; and other decisions of the Contracting Parties to GATT 1947.

[21]These Understandings relate to Article II:1(b) (other charges and taxes), Article XVII (state trading enterprises), balance-of-payments provisions, Article XXIV (customs unions and free trade areas), waivers of obligations, and Article XXVIII (renegotiations).

- the most-favoured-nation (MFN) clause.[22] This clause applies to customs duties, charges, methods for levying them, and all rules and formalities in connection with importation and exportation (and the transfer of payments for imports or exports).

The MFN principle is also linked to the second cornerstone of GATT -- national treatment.[23] Article III (*National Treatment on Internal Taxation and Regulation*) provides that, with respect to internal taxation and domestic laws, regulations and requirements, imported products shall be accorded treatment "no less favourable" than that accorded to domestic products.

The third cardinal principle of the GATT relates to the form of the protection that States may afford their domestic producers while still meeting their GATT obligations. Protection *per se* is not prohibited under the GATT; however, Article XI (*General Elimination of Quantitative Restrictions*) provides that "No prohibitions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation ... or on the exportation or sale for export of any product".[24] This is supplemented by Article XIII (*Non-discriminatory Administration of Quantitative Restrictions*), which provides for non-discrimination in the application of restrictions or prohibitions, and sets out modalities for preserving "a distribution of trade ... approaching as closely as possible the shares which ... might be expected ... in the absence of ... restrictions".[25] Taken together, these provisions mean that any protection of domestic industry should be effected only through tariffs (that is, measures affecting prices), and not through measures directly affecting the volumes of imported goods (such as quantitative restrictions, import licences, and prior import permits). These provisions apply to both imports and exports.

Article XI:1 of the GATT may become increasingly important for those petroleum-exporting countries where the State currently allows private firms to participate in all stages of the petroleum industry, or where it is moving progressively in this direction (as in the case of Venezuela). On the one hand, while maximization of output might be the logical strategy for firms investing in this sector over the next few years, this kind of behaviour clearly militates against any OPEC strategy for coordinating export restraints to sustain international petroleum prices. On the other hand, although the prohibition of quantitative restrictions applies equally to

[22]"[A]ny advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties" (Article I:1).

[23]Specifically, it extends through its linkage to Articles III:2 and III:4 to "internal taxes or other ...charges" and to "laws, regulations and requirements affecting ... internal sale, offering for sale, purchase, transportation, distribution or use" of products.

[24]GATT Secretariat, *The Results* ..., op.cit., p. 500. Article XI:2 establishes exceptions to the general rule; these relate to shortages in foodstuffs (or other essential products), application of standards for commodities, and the enforcement of governmental measures on any agricultural or fisheries products.

[25]Ibid., p. 504.

imports and exports, Article XI:2(b) permits quantitative restrictions deemed "necessary to the ... marketing of commodities in international trade". This provision has been interpreted by a GATT Panel[26] in language that would seem to make room for export restrictions on petroleum and petroleum products: "The drafters of Article XI:2(b) agreed that this provision would cover export restrictions designed to further the marketing of a commodity by spreading supplies of the restricted product over a longer period of time".

The level of tariff protection afforded the petroleum sector is reflected in Tables K, L, M, N, and O. There were no negotiations under the Uruguay Round on tariffs applied to petroleum and petroleum products (with the exception of those involving the EU). However, their levels in the main importing markets (EU, Japan, and the United States) are generally very low and in many cases not bound. This fact confirms that tariffs in the energy sector typically reflect more the dictates of energy policy -- securing adequate supplies -- than a trade policy in the classic sense.

In the above-mentioned Tables, products have been grouped according to their kind, as defined in terms of the Harmonized System of classification of goods (HS). These groups are crude oil; petroleum products; hydrocarbons, plastics in primary forms, and all petroleum products. Tariff averages have been given for nine developed countries (including the EC), seven developing countries, and two economies in transition. Detailed pre- and post-Uruguay Round MFN tariffs have been given for the United States, the European Union, and Japan.

Table K summarizes tariff levels for *crude oil.* The Uruguay Round results for tariffication for crude oil differ markedly from those for other sectors. First, there is no reduction in crude oil tariffs for all the markets shown. Second, unlike in other sectors, MFN tariffs for crude oil remain unbound for the United States and Japan.

As for *petroleum products* -- shown in Table L -- the tariff situation differs significantly from that for crude oil. MFN tariff levels after the Uruguay Round remain higher for these products than for crude oil.

With respect to *hydrocarbons* - in Table M - the results of the Uruguay Round are much more in line with those for other industrial products: Tariff peaks are eliminated (at least in the industrial markets and major developing countries), and there have been significant general tariff reductions across the tariff lines. MFN tariffs on petrochemicals in the developed markets were already bound before the Uruguay Round. Moreover, transparency has increased as the result of a shift away from numerous specific duties to *ad valorem* duties.

Table L summarizes the tariff situation for plastics in primary form. The impact of the Uruguay Round here is very similar to its impact on hydrocarbons. First, the tariff peaks have been eliminated and a uniform maximum tariff of 6.5 percent is applied for these product groups in the three main industrial markets.

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[26]Panel Report on *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT, L/6268, adopted on 22 March 1988. See also BISD, 35S/98.

In summary, it may be concluded that the Uruguay Round has had hardly any impact on MFN tariffs for crude oil, and only a limited impact on petroleum products. Tariff reductions, however, have been significant in the case of petrochemical products. Tariff reductions occurred not only in the developed markets, but also in many developing markets, which are of growing interest for many exporters of petroleum and petroleum products. By reducing tariffs more for the processed products than for unprocessed petroleum or less processed petroleum products, the tariff escalation was sharply reduced. The increase in bindings, which was particularly significant in the developing country markets, provides greater security of access to those markets. The limited progress towards tariff reductions for crude oil and petroleum products is perhaps also linked to the limited participation by petroleum-exporting countries in the Uruguay Round negotiations. Future negotiations, with greater participation by petroleum-exporting countries, could change this situation.

Much more significant than tariffs are internal taxes and charges of a fiscal nature, levied on consumption. These are important as revenue-raising measures, and are typically applied at very high levels. In this context, commitments relating to national treatment become very relevant. Petroleum-exporting countries have traditionally considered that the high consumption and excise taxes imposed by importing countries on gasoline and other petroleum products undermine their ability to derive income from their own natural resources[27]. As these taxes are applied on a technically non-discriminatory basis against imports and domestic production (the latter often does not exist), they are not inconsistent with the GATT. This does not mean, however, that they cannot be the subject of negotiated concessions (a precedent exists in the Tokyo Round negotiations on tropical products). In the light of the various proposals for the extension of multilateral trade obligations further into the realm of domestic policy, there would seem to be no reason why the binding and reduction of these taxes could not be included in a future round of WTO negotiations.

A broad range of specific exceptions to GATT obligations can be found in Article XX (*General Exceptions*). Of these, paragraphs (b), (g) and (h) have the most potential relevance to the petroleum sector. It is expected that WTO Members will in the future rely more frequently on these exceptions as a means of justifying trade measures on environmental grounds, as already demonstrated by the tuna and gasoline cases (see section IV.2.3 below). It is important, however, to bear in mind that the exceptions in Article XX are limited and conditional, and that the burden of proof is on the party invoking them. Moreover, there is an additional requirement in the preambular paragraph to the Article that the measures applied shall not constitute "arbitrary or unjustifiable discrimination", nor shall they amount to disguised restrictions on international trade.

One of the exceptions that has attracted intense interest on the part of environmentalists in recent years is Article XX (b), which permits measures "necessary" to protect human, animal

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[27]According to some estimates provided by OPEC, in 1996, the G-7 nations' (United States, Canada, Japan, Germany, Italy, United Kingdom, and France) oil tax incomes totalled US$ 270 billion, while OPEC Petroleum Export Revenues were US$ 160 billion. See: *www.OPEC.org*.

or plant life or health. The term "necessary" has been interpreted by GATT Panels to mean that there is no alternative trade measure consistent with the GATT that could be expected to achieve the measure's health- or environment-related objective or that there are no less trade restrictive measures to that end.[28] In all the GATT "environmental" cases to date, the parties invoking the exception have failed these tests.[29]

Article XX (g) provides another relevant exception for measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption". It might seem that this exception would meet the needs of natural-resource-producing countries (including petroleum- producing and -exporting countries) with respect to export management policies. The key limitation unique to this exception, however, is that relating to restrictions on domestic production or consumption. In other words, in the event of a trade dispute involving export restrictions in the petroleum sector, a crucial question would be the scope and coverage of restrictions on domestic production and/or consumption, and the degree to which they are consistent with the export restrictions. Finally, it should be noted that Article XX (g) may also be invoked *against* petroleum-exporting countries, and indeed was pleaded -- albeit unsuccessfully -- by the United States in the gasoline case against Venezuela and Brazil.

Article XX (h) is also relevant to petroleum exporters, as it provides for measures "undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved".[30] It might then be argued that Article XX (h) could be relied on by OPEC members, in the sense that OPEC amounts to an intergovernmental commodity arrangement. It is highly questionable, however, whether all WTO Members would refrain from "disapproving" OPEC if the arrangement were submitted.

Another specific exception in the GATT that has some applicability to the petroleum sector is the national security exception in Article XXI:

"Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

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[28]See *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, BISD 37S/200 (adopted on 7 November 1990), and also the summary on *United States - Standards for Reformulated and Conventional Gasolines*.

[29]See in particular the treatment of Article XX (b) in the WTO Panel Report in the dispute between Venezuela/Brazil and the United States concerning measures by the latter with respect to standards for reformulated and conventional gasoline, discussed later in this chapter.

[30]The exception provided for in this subparagraph extends to any commodity agreement which conforms to the principles approved by the Economic and Social Council in its resolution 30 (iv) of 28 March 1947.

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;
(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."

States have traditionally asserted a high degree of discretion in invoking this exception. For example, it has been generally accepted that States have almost total discretion in deciding what constitutes an "essential security interest". This has led to somewhat strained interpretations; for example, in 1975 Sweden relied on this Article to justify a quota on footwear on the basis that "the decrease in domestic production has become a threat to the planning of Sweden's economic defence in situations of emergency as an integral part of its security policy".[31] With specific reference to the petroleum sector, it is clear that the special position occupied by petroleum in modern economies -- a position that has been referred to earlier in this paper -- is such that Article XXI might well be used to justify import or export restrictions in a range of circumstances. For example, it has been argued that a number of U.S. measures with respect to petroleum import-export controls find at least partial justification under this exception.[32]

Finally, the GATT contains a number of other provisions on such issues as anti-dumping, subsidies and countervailing measures, safeguards, economic development, customs valuation, and publication of laws and regulations which were developed further in the respective agreements of the Uruguay Round. Some of these developments of most relevance to the petroleum sector are discussed below.

1.2.2 The Agreement on Subsidies and Countervailing Measures

The Uruguay Round Agreement on Subsidies and Countervailing Measures (ASCM) imposes for the first time meaningful disciplines on subsidies, which are classified as "*prohibited*"

[31]Minutes of Meeting Held in the Palais des Nations, Geneva, 31 October 1975, GATT Doc. C/M/109, p. 9; cited in Donald N. Zillman, "Energy trade and the national security exception to the GATT", 12 *J. of Energy and Natural Resource Law* 117 (1994) p. 120. See also Michael Hahn, "Vital interests and the law of GATT: An analysis of GATT's security exception", 12 *Mich. J. of Int'l Law* 558.

[32]Zillman, op. cit., p. 122.

(that is, all export subsidies), "*actionable*" (those which may be subject to the WTO dispute-settlement mechanism and countervailing measures) and "*non-actionable*" (permitted).

The ASCM defines a "subsidy" as a "financial contribution by a government or any public body" whereby a "benefit" is conferred. This may involve a transfer of funds, revenue forgone, or the purchase or provision of goods by governments.[33] The concept of "specificity" -- that is, whether subsidies are "generally available" throughout the economy or an economic sector, or are specifically limited to a certain number of firms or industries -- is crucial, as only "specific" subsidies are actionable. On the basis of the concept of "specificity", it could be argued that the provision of petroleum, natural gas, or petroleum products to all domestic consumers at prices below those prevailing in the international market does not constitute a "specific" subsidy, and would therefore be non-actionable. If access to such energy products were available only to certain industries or enterprises, this could constitute an "actionable" subsidy. If such access were linked to the export performance of the enterprises concerned, it would be a prohibited export subsidy.

There is one aspect of the ASCM with respect to specificity, however, that might be considered to have implications for oil-exporting countries (and natural-resource exporters more generally). In deciding whether a subsidy is indeed specifically bestowed on an industry, the question arises whether a measure that *in fact*, though not necessarily *in law*, confers a disproportionate benefit on a particular industry is open to countervailing measures. This was an issue of some consequence for natural-resource exporters to the United States in the 1980s, and resulted in a change in the applicable U.S. law. Until 1984, it had been generally accepted in U.S. trade jurisprudence that the focus would be on the selectivity of the subsidy as a matter of law. Thus, while some industries might in fact benefit more than others from measures designed to provide domestic access to natural resources at favourable prices, as long as this benefit was available as a matter of law to all, then there was no specific bestowal of the benefit. Beginning in the mid-1980s, however, U.S. tribunals began to take a different approach, arguably influenced in this respect by a number of initiatives in Congress aimed at natural resources subsidies. In criticizing the earlier approach to the question of specific bestowal, the United States Court of International Trade took the position that:

> "while it is true that a generalized benefit provided by government such as national defence ... is not a countervailable bounty or grant, a generally available benefit -- one that may be obtained by any and all enterprises or industries -- may nevertheless accrue to specific recipients. General benefits are not conferred upon any specific individuals or classes, while generally available benefits, *when actually bestowed*, may constitute specific grants conferred upon specific identifiable entities, which would be subject to

[33] Ibid., p. 93.

countervailing duties."[34]

This approach to natural resource subsidies, which clearly limits the ability of resource-exporting States to use their natural endowment as a means of encouraging domestic economic diversification, was ultimately codified in the U.S. Omnibus Trade and Competitiveness Act of 1988.[35] It is arguable that the ASCM arising out of the Uruguay Round has gone some distance towards adopting this approach, with the inclusion of Article 2.1(c), which provides in part: "If, notwithstanding any appearance of non-specificity ... there are reasons to believe that the subsidy may in fact be specific, other factors may be considered".[36]

Even if a particular subsidy is considered to be specifically bestowed on an industry or sector, under Article 8.2 of the ASCM some specific subsidies (i.e., industrial research and pre-competitive development subsidies, regional aid, and aid for compliance with environmental laws) are considered non-actionable, so that no countervailing measures are permitted. However, their non-actionability depends on mandatory notification and examination by the WTO Committee on Subsidies and Countervailing Measures.[37] The provisions on "non-actionable" subsidies apply for a period of five years from the date of entry into force of the WTO Agreement (i.e., 1 January 1995), and are to be reviewed six months before the end of this period with a view to determining whether their application will be extended in either their current or modified form.

Countervailing duties "may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of [the ASCM]".[38] Part V of the ASCM contains detailed provisions on investigations, evidence, consultations, calculation of the amount of

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[34]*Cabot Corporation v. United States*, 620 f., Supp. 722 (1985). The case was one of a number involving the sale by PEMEX (Mexico's national oil company) of carbon black feedstock (a petroleum derivative) to Mexican producers of carbon black at a price significantly below that prevailing on world markets. For a more detailed discussion of the case and the general development of United States law with respect to natural resources subsidies, see Christian Yoder, "United States countervailing duty law and Canadian natural resources: The evolution of resources protectionism in the United States", in J. Owen Saunders (ed.), *Trading Canada's Natural Resources* , Calgary, 1987. See also James D. Southwick, "The lingering problem with the specificity test in United States countervailing duty law", 72 *Minnesota Law Review* 1159 (1988).

[35]Section 1312 of the Act sets out a "Special Rule", which provides in part: "Nominal general availability ... is not a basis for determining that the bounty, grant or subsidy is not, or has not been, in fact provided to a specific enterprise or industry".

[36]According to the same paragraph, the factors that may be looked to are "use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy".

[37]As provided for in paragraphs 3, 4, and 5 of Article 8, which embody the long-standing objective of the United States that subsidy programmes should be notified and approved before implementation.

[38]"Agreement on Subsidies and Countervailing Measures", Part V, Article 10, in GATT Secretariat, *The Results of the ...,* op.cit.

subsidies, determination of injury, definition of domestic industry, etc. Action may be taken against subsidies which displace exports in import markets or third country markets.

The ASCM has seven Annexes.[39] Of these, Annexes I (Illustrative List of Export Subsidies) and II (Guidelines on Consumption of Inputs in the Production Process) have particular significance for petroleum-producing and exporting countries. As a first step, potentially affected countries should review their current practices in the light of Annex I, in order to identify whether any of them could be characterized as export subsidies (and hence prohibited under the Agreement). Items (d), (h) and (I) in Annex I refer, respectively, to government provision on favourable terms of products or services used as inputs in the production of exported goods; the exemption of prior-stage cumulative indirect taxes; and the remission or drawback of import charges. Both items (d) and (h) refer to *goods or services used in the production process*, whereas item (I) refers to *imported inputs consumed in the production process*. The distinction is important for petroleum-producing countries, since "inputs consumed" refers to those "inputs physically incorporated, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product".[40] Annex II provides guidelines for examining, as part of a countervailing duty investigation, whether inputs are *consumed* in the production of the exported product, as well as whether there is a differential pricing of exports. These guidelines could raise important issues with respect to goods whose production process is energy-intensive, and/or downstream products in the petroleum sector, such as petrochemicals, chemical products and compounds, and plastics. Specifically, they raise the question of whether a petroleum-producing country pursuing industrial development through incentives based on its natural endowment might find itself open to countervailing duty investigations.

On the question of differential (dual) pricing, the reality is that under the ongoing regime of structural adjustment in many developing countries, the prices of petroleum products are being gradually raised towards international levels. A number of OPEC member-countries are currently carrying out economic reform programmes under the general supervision of the World Bank/International Monetary Fund as a condition for gaining access to world credit markets and/or the rescheduling of existing debts -- and even, in some cases, for receiving aid. One condition typically laid down under economic reform programmes is that subsidies should be phased out as part of the effort to achieve a balanced budget. Petroleum products are especially targeted in this regard because of the elasticity conditions associated with them. At the same time, governments often find it difficult to completely eliminate such subsidies in the face of popular resistance.

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[39]Annex I, Illustrative List of Export Subsidies; Annex II, Guidelines on Consumption of Inputs in the Production Process; Annex III, Guidelines on the Determination of Substitution Drawback Systems as Export Subsidies; Annex IV, Calculation of the Total Ad Valorem Subsidization; Annex V, Procedures for Developing Information Concerning Serious Prejudice; Annex VI, Procedures for On-the-Spot Investigations; and Annex VII, Developing Country Members.

[40]ASCM, Annex II, note 61.

Against this background, governments of developing countries have generally tended to adopt a gradualistic approach, rather than try to remove all elements of subsidy in one fell swoop. Among OPEC countries, for example, the domestic prices of gasoline and diesel have been increasing since the late 1980s as a direct result of adjustments. For example, the prices of premium motor gasoline in Nigeria and Saudi Arabia rose respectively from 7 to 50 cents/litre, and from 4 cents/litre to 16 cents/litre between 1990 and 1995. Similarly, between 1990 and 1995, the price of diesel petroleum rose from 10 cents/litre to 15 cents/litre in Algeria, from 26 cents/litre to 32 cents/litre in the Libyan Arab Jamahiriya, and from 5 cents/litre to 41 cents/litre in Nigeria. In general, these prices have risen significantly in local currency terms in all of the OPEC Member countries, but exchange-rate movements have tended to obscure such increases when expressed in dollar terms. In sum, there is pressure to phase out such subsidies, most of which are non-specific and thus non-actionable under the WTO.[41]

It should be noted that GATT 1994 accords export duties the same status as import duties, in that they must be applied on an unconditional MFN basis and can be bound against increase (and included in the schedules of concessions) as a result of negotiations. In practice, however, while most import duties have been bound, with one or two exceptions export duties (which are, of course, perfectly legal under the GATT) have not been subject to negotiation or binding. There are instances, however, where countries currently applying for accession to the WTO are being requested to bind export duties; as with import duties, these bindings can be negotiated on an item-by-item basis in return for reciprocal concessions by interested trading partners.

[41]It may be pointed out parenthetically that this discussion illustrates yet again the need for coherence between the policies of the Bretton Woods institutions and those of the WTO. In this regard, the Marrakesh Ministerial Declaration provides for the WTO to pursue and develop cooperation with the IMF and World Bank with a view to achieving greater coherence in global economic policy-making, and calls for the WTO Director-General to review with his counterparts the implications and forms of cooperation. For details, see GATT Secretariat "*The Results of the ...,* op.cit., pp. 442-443.

Box III

U.S. imports of MTBE from Saudi Arabia

At issue here is U.S. imports of Methyl Tertiary-Butyl Ether (MTBE) from Saudi Arabia. American producers of ethanol, which competes with MTBE as an oxygenate, contend that Saudi production of MTBE is subsidized through low-cost provision of the raw material (i.e., natural gas and methanol) to refiners in Saudi Arabia. The U.S. ethanol industry hopes to combat these alleged "natural resource subsidies" through a variety of means, including the negotiations over Saudi Arabia's accession to the WTO, the threat to file a countervailing duty (CVD) petition, and pressure from key members of Congress.

The Office of the U.S. Trade Representative (USTR) had requested in December 1998 that the U.S. International Trade Commission (USITC) conduct a study into conditions affecting the U.S. MTBE industry. Although the USTR's letter to the Commission did not identify the specific reason for the study, it appears to serve two purposes. One is to provide information that may prove useful to the ethanol industry and its allies in Congress in the event that they wish to pursue a CVD case against Saudi MTBE. Such a case might require direct intervention by Congress, because the U.S. ethanol industry appears to lack the "standing" needed to file a petition (i.e., they produce a substitute rather than the "like product").

The second (unstated) purpose of the USITC investigation is to put pressure on the Saudis in their WTO-accession negotiations. The U.S. negotiators hope to obtain a commitment to eliminate "dual-pricing" in the petrochemical industry, and the threat of a CVD investigation may improve their leverage.

The USITC's report does provide ammunition to those who charge that the Saudi industry is subsidized. The question of whether these subsidies are countervailable is nevertheless a tricky question of trade law, which hinges in part on whether these subsidies are targeted to certain producers or are "generally available" in the economy. The report does not resolve that issue, which ultimately would be up to the Department of Commerce rather than the USITC. It merely reports the views of the different contending parties, without offering any opinions on which is correct. The report makes no recommendations.

Note: USITC Publication 3231, Investigation No. 332-404

The ASCM contains provisions for special and differential treatment of developing country members (Part VIII, Article 27), as well as provisions on transitional arrangements for countries in the process of transformation from a centrally planned to a market economy. These provisions could be of interest to some petroleum-exporting countries with downstream industries; of special interest are the *de minimis* clause (if the subsidy is less than 1 percent *ad valorem*), the longer time-frame to phase out export subsidies (10 years), and special exemptions for least developed countries and countries whose per capita income remains at less than US$1,000 per annum (e.g., Egypt).[42]

In sum, the treatment of subsidies in the ASCM holds mixed possibilities for petroleum-exporting countries. On the one hand, for example, there is a danger that schemes by such states

[42]Most of the developing country exporters of petroleum and petroleum products would fall into the category of developing countries obliged to eliminate export subsidies over an eight year period, or a two-year period for subsidized exports which reach 3.25 percent or more of world trade in the product concerned.

to provide their petrochemical exporters with energy inputs at prices lower than world prices would be viewed as "prohibited" (export) subsidies, assuming that goods for domestic consumption received less favourable treatment. On the other hand, petroleum-exporting states may themselves be able to take advantage of the improved disciplines in the ASCM on "actionable" subsidies in the appropriate circumstances. For example, the ASCM facilitates action against a Member's subsidization of a product if the impact of the subsidy is to displace or impede another Member's exports of a like product into the importing or a third country market. This could conceivably provide the basis for challenging subsidies for other energy products competing with petroleum or petroleum products.

1.2.3 Anti-dumping[43]

Under the Agreement on Implementation of Article VI of GATT 1994 "a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country".[44] Article 2 of the Agreement establishes detailed criteria for the determination of dumping where the circumstances are not as clear-cut as in the definition provided. Under the principles established in Article 1, an anti-dumping measure shall be applied only in conformity with Article VI of GATT 1994, and pursuant to investigations initiated and conducted under the Agreement.

There is a very close correlation between the provisions on subsidies and countervailing measures under the ASCM and the provisions of the Anti-dumping Agreement. The basic distinction between them is that subsidization is an unfair trade practice of states, whereas dumping is an unfair trade practice of private sector entities.

The first Anti-dumping Code was negotiated during the Kennedy Round of Multilateral Trade Negotiations (1962-1967). A second attempt to clarify and improve multilateral rules on anti-dumping was made during the Tokyo Round (1972-1979). Problems arose, however, during the implementation of the 1979 Agreement. For exporting countries, frequent resort to anti-dumping measures by certain developed countries was perceived as trade harassment and unjustifiable protectionism. On the other hand, importing countries considered that foreign exporters were effectively circumventing anti-dumping duties through innovative practices. The Uruguay Round Agreement is the most detailed set yet of multilateral rules to regulate the application of anti-dumping measures, although many issues of importance to exporting countries remain unaddressed and are subject to national legislation. Many of the proposals of developing countries for the Third WTO Ministerial Conference relate to further modifications of the Anti-Dumping Agreement.

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[43]For an extensive discussion of the Anti-Dumping Agreement, see "Multilateral rules on anti-dumping measures", in UNCTAD, *TDR*, 1994; op. cit., Supporting Papers, Chapter III, pp. 65-88.

[44]See GATT Secretariat, *The Results of the* ..., op.cit., Article 2, p. 108.

The threat of anti-dumping measures against petroleum products, especially those with higher value-added (such as petrochemicals), is a real one and should be a matter of concern for exporting countries. Moreover, the imposition of anti-dumping duties is facilitated when sales of the products on the domestic market account for less than 5 percent of exports of the product to the country concerned; this is often the case for petroleum-producing countries. Indeed, according to WTO documents,[45] there are numbers of anti-dumping actions affecting the petrochemical sector; these include those concerning polyvinyl chloride resin (Australia/Brazil, China, Mexico, Saudi Arabia, Thailand, etc.), dioctyl phthalate (Australia/Taiwan Province of China, Republic of Korea, Venezuela, etc.), polyester yarn (EU/Taiwan Province of China, Turkey, Indonesia, China), polyester fibres (EU/Taiwan Province of China, Turkey) and polyvinyl alcohol (United States/China, Taiwan Province of China, Japan). Members of the WTO can challenge such actions within the framework of the Anti-Dumping Agreement. In mid-1999, the Committee to Save Domestic Oil (SDO), a regional U.S. group of independent oil producers, filed AD and CVD complaints against Venezuela, Mexico, Iraq, and Saudi Arabia, claiming that these countries had a policy of undercutting prices in the United States to put American producers out of business. The U.S. Commerce Department, however, decided not to pursue the investigation on the ground that the coalition did not have broad enough industry support to justify a full-blown investigation (see Chapter 3).

1.2.4 Agreement on Technical Barriers to Trade

The Agreement on Technical Barriers to Trade (TBT) was also first negotiated during the Tokyo Round and was signed by 32 GATT Contracting Parties. The new TBT Agreement, which was negotiated during the Uruguay Round, is an integral part of the WTO Agreement and has strengthened and clarified the provisions of the previous agreement. One of its stated objectives is that technical regulations, standards, and conformity assessment procedures should not become unnecessary obstacles to international trade. The relevance of this Agreement to international trade in petroleum and petroleum products is evident, given the complexity of technical regulations and standards in the sector.

The Agreement is based on the principles of non-discrimination and national treatment, avoidance of unnecessary obstacles to trade, harmonization, equivalence of technical regulations, mutual recognition of conformity assessment procedures, and transparency.

An important new mechanism introduced in this Agreement is the Code of Good Practice for the Preparation, Adoption and Application of Standards (Annex 3 of the Agreement). The Code requires standardization bodies to follow principles and rules very similar to those specified for mandatory regulations, to avoid standards to have unnecessary detrimental effects on international trade. The Code is open for acceptance to any standardizing bodies, whether central government, local government, non-governmental and regional standardizing bodies.

The Agreement includes provisions about mutual recognition of conformity assessment

[45] See WTO document series G/ADP/N/16/...

procedures (Article 6), which can reduce transaction costs and avoid delays, as well as provisions related to the equivalency of technical regulations. According to Article 2.7, Members should give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations. Therefore, different measures can fulfil the same policy objectives and countries can enjoy flexibility about the kind of measures to adopt to ensure the fulfilment of a legitimate objective.

The TBT Agreement contains a non-exhaustive list of legitimate objectives that technical regulations should aim at fulfilling. Among those, the environment is mentioned. Considering that the petroleum sector is particularly vulnerable to environmental measures, it may be anticipated that the TBT Agreement will play a role in this field.

A number of issues related to the TBT Agreement are particularly relevant to petroleum-exporting countries. *First*, there is the issue of the impact of technical regulations and standards on their competitive position and their access to their main trading partners' markets. For example, this was one of the underlying issues (apart from national treatment) in the case on reformulated and conventional gasoline (Venezuela/Brazil versus United States; see section IV.2.3 below).

Second, there is the question of harmonization of standards and regulations. This leads directly to the issue of the development of international standards at the multilateral level with the full participation of all countries concerned (including developing countries), and the avoidance of unilateral imposition and extraterritorial application of domestic law. The approach of the TBT Agreement is to encourage countries to base domestic regulations on international standards (Article 2.4). However, uniform regulations may not be always optimal, especially on environmental and political grounds.[46] It thus follows that a balance has to be struck between the advantages that harmonization yields in terms of trade and transparency, and the environmental advantages that flow from allowing legitimate differences in national standards and regulations. In general, it would seem reasonable to prefer harmonization where no good reasons for differences exist or where differences in standards and regulations may cause trade distortions. The objectives of free trade and the desire to set standards and regulations at the national level can be reconciled through mutual recognition.

In the case of standards and regulations which relate to processes and production methods, harmonization would seem justified for those process and production methods that have transborder environmental impacts or affect the "global commons". In this case, measures should be based, as far as possible, on international consensus, with the full participation of all countries

[46]If, on the one hand, technical regulations for products were harmonized at a "low" level, some countries would be forced to endure product standards below their social optimum. If, on the other hand, technical regulations were harmonized at a "high" level, other countries would be forced to endure product standards more costly than their circumstances warrant.

concerned.[47] Of growing relevance also is the emergence of new approaches to environmental quality, which differ from the traditional use of technical standards and regulations. As was shown by the Panel decision on automobiles (see below), new policy instruments may set requirements for corporations rather than directly for products, for example, with respect to measures related to fuel efficiency and reduction of emissions from cars, instead of measures directly affecting petroleum.

1.2.5 The General Agreement on Trade in Services[48]

The General Agreement on Trade in Services (GATS) comprises six parts and eight annexes. Part I addresses the scope of the Agreement and the definition of trade in services. Part II contains general obligations and disciplines, applicable to all services, and includes the MFN clause (Article II) and a commitment to increasing the participation of developing countries (Article IV). Part III includes specific commitments with respect to market access and national treatment, as well as the possibility of additional commitments on the part of Members. Part IV, on progressive liberalization, sets the procedures for negotiations.[49] Part V, on institutional provisions, includes articles on consultation and dispute settlement, establishes the Council for Trade in Services, provides for technical assistance and defines the relationship with other international organizations. Part VI contains the final provisions.[50]

The GATS applies to *all* measures applied to trade in services, whether in the form of laws, regulations, procedures, decisions, administrative actions, etc. Its objectives include the expansion of services trade "as a means of promoting the economic growth of all trading partners and the development of developing countries".[51] The architecture of the Agreement rests on four main pillars:

(1) a definition of trade in services based on the mode of supply -- cross-border

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[47]See "UNCTAD's contribution, within its mandate, to sustainable development: Trade and environment", TD/B/40(1)/6, 6 August 1993.

[48]For an extensive discussion of the General Agreement on Trade in Services, see "General Agreement on Trade in Services", in UNCTAD, *TDR*, 1994, op.cit., Supporting Papers, Chapter VII, pp. 145-184.

[49]Article XIX:2 states that "the process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives in Article IV."

[50]Annexes to GATS cover Article II exemptions (MFN treatment), movement of natural persons, air transport services, financial services, maritime transport services and telecommunications, including negotiations on basic telecommunications.

[51]GATT Secretariat, *The Results of the ...*, op.cit., p. 327.

supply, movement of the consumer, commercial presence, and movement of natural persons suppliers of services;[52]

(2) general obligations and disciplines, applicable to all services sectors, except "services supplied in the exercise of the governmental authority" -- that is, "any service which is supplied neither on a commercial basis nor in competition with one or more service suppliers"[53] (with certain exemptions being provided with respect to application of the MFN principle[54]);

(3) specific commitments, to be negotiated and included in national schedules of commitments, covering market access and national treatment, as well as additional commitments that might be achieved in specific services sectors; and

(4) the concept of progressive liberalization, to be implemented through negotiations.

Energy-related services include the full range of activities from exploration for raw materials to distribution of finished products. The following services can be regarded as "core" energy services: exploration, drilling, processing and refining, transport, transmission, distribution, waste management and disposal. Other services include consulting, design and engineering, construction, storage, maintenance of the network, and services related to distribution, such as metering and billing. There are two major difficulties in identifying energy services: (i) the industry has traditionally not distinguished between energy goods and services; (ii) many relevant services could be used both for energy-related purposes and for other purposes. As a practical matter, services related to hydrocarbons in general, and oil in particular, are the most important component of energy services, however, non-oil-related services may increase in importance in the years to come.

The WTO "Services Sectoral Classification List" does not include a separate comprehensive entry for energy services. Important energy-related services -- such as transport, distribution, consulting, construction, engineering, etc. -- are covered by the respective horizontal categories. An exception is "Pipeline transportation of fuels" which is listed as a separate sub-sector of transport services. A number of other energy-related services fall under "other business services".

The UN Provisional Central Product Classification (CPC) also does not list energy services as a separate category. Annex I, however, provides a compendium of energy related products listed under different headings in the CPC, including energy related services.

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[52]See UNCTAD, *TDR*, 1994, op.cit., Supporting Papers, box 15, p. 154.

[53]GATT Secretariat, *The Results of the ...*, op.cit., p. 328.

[54]See GATS, Annex on Article II Exemptions.

Until recently, the market structure of the sector was dominated by state-owned, vertically integrated suppliers, which performed all energy-related economic activities. In this context energy services would normally constitute value added to energy goods produced, transported and distributed by the same supplier. The privatization of public suppliers and the introduction of partial or full competition in the sector in some countries has led to the identification of energy services as a separate category and to their distinction from energy goods.

The principal modes of supply of energy-services are commercial presence, cross-border trade and movement of natural persons. However, specific commitments are very limited and quite sparse, partly due to the fact that energy services do not represent a separate category in the UNCPC or in the WTO Services Sectorial Classification List. International trade may also be affected by lack of market access in other sectors -- like engineering, consulting and analytical services -- which are almost invariably in the vanguard of the provision of energy services. Liberalization would therefore include several sectors in a single package.

Present specific commitments and the future market access negotiations open up an opportunity for services providers to penetrate the world market in a variety of services sectors. For example, the scheduled list of commitments of the European Communities provides for market access and national treatment for professionals engaged in construction and engineering services; scientific and technical consulting and analysis services; site investigation work; maintenance and repair; services relating to transport, machinery and equipment; and advisory and consulting services relating to mining. The U.S. schedule includes market access and national treatment commitments, covering, for example, construction and engineering services, services incidental to energy distribution and mining, and scientific and technical consulting (some of these commitments are subject to limitations such as an economic- needs test).

Several developing countries, especially petroleum-producing developing countries, have acquired an expertise in the energy services sector and could benefit from liberalization in this sector. Moreover, liberalization could provide them with opportunities for the diversification of their economies. Those developing countries that do not have at present export capacity in this sector, but whose market liberalization is being requested by their trade partners, could consider exchanging the opening of their domestic markets in the field of energy-services with the parallel opening of other country markets in other services sectors. From a development point of view, the following points seem of specific relevance:

- Liberalization of developing country markets, supported by domestic privatization, could result in improved efficiency in the energy system, which could lead to more productive use of energy resources. This would result in overall enhanced economic performance, while protecting human health and safety, and advancing national security;

- Further liberalization of the energy services sector could result in significant environmental benefits, through the introduction of cleaner and safer energy systems, the improvement in the efficiency of production, and a more appropriate use of natural resources;

- The benefits of trade liberalization may not be realized if certain preconditions are not satisfied. Ultimately all considerations point to the need for governments, especially developing country governments, to provide a strong and effective regulatory and incentive framework for the private actors involved in providing energy services. An appropriate framework reinforces both equity and efficiency. Developing countries may have an interest in setting conditions under which domestic and foreign private companies are to operate, possibly in the form of qualifying market-access commitments under GATS. These measures could focus on the need to ensure equity and/or capacity building, in conformity with articles IV and XIX of GATS.

For an overview of the GATS commitments in energy specific services sectors, see Tables H, I, and J.

It should be borne in mind that GATS provides for the negotiation of rules on emergency safeguards[55], subsidies[56], and government procurement[57] that could be of relevance to the energy services sector.

[55]Emergency safeguards refer to temporary measures that Members may take to limit market access in cases of market disruption. Article X of GATS provided for multilateral negotiations on disciplines for emergency safeguards to be completed by the end of 1997 and to come into force no later than the beginning of 1998. However, agreement has not yet been reached. Questions such as the exact definition of "injury" or whether all modes of supply should be included remain open. Developing countries wish to get early results on this issue, since they believe that a "safety net" is a pre-condition for the opening of their markets to foreign providers.

[56]According to Article XV, Members have to develop the necessary multilateral disciplines to avoid the trade-distortive effects of subsidies and address the appropriateness of countervailing procedures. This issue remains unresolved, however negotiations are underway and will run on into the new round.

[57]Governments are large purchasers of services. If government procurement is not open to foreign services suppliers, the impact on trade in services could be significant.

Box IV

Recent trends in the oil and gas services sector

The services sector for oil and gas is multi-layered and well consolidated with large companies providing complete arrays of services and integrating a wide variety of specialized equipment and services. Oil and gas services are a sector driven by a global price for oil and related prices for gas. Because of the capital-intensity of the oil exploration business, a large amount of consolidation among major players has already occurred and will likely continue in the future. The energy and power sectors, notably gas pipelines and oil field concessions, are also among the lead sectors in foreign direct investment. Brazil and Argentina have joined the Caspian region in attracting considerable private investment in the energy sector, notably three major gas pipeline projects and several thermal plants. After the Asian financial collapse triggered in July 1997, demand for oil and gas decreased sharply in the Asian manufacturing sector. Oil prices dropped 50 percent worldwide from US$20 a barrel, leading to widespread idling of oil rigs and gas exploration. With oil prices reaching a historic low of US$10 a barrel in December 1998, the whole year was one of the worst on record for oil services companies at all levels. Most of the major oil companies lost substantial revenues in 1998 and services firms suffered even more, with their stock values plummeting 50 percent, as investors sold their shares. This brought exploration and expansion to a halt in developing countries as global oil giants and exploration firms idled equipment and delayed investments in emerging economies. Clearly, sustained high oil prices are the leading indicator for oil services demand, and indirectly affect gas prices. However, even when there are surges in oil price, exploration demand lags as companies wait to see a sustainable trend in price. Oil services companies' stocks jumped only in the second quarter of 1999 in anticipation of a sharp recovery in exploration after the oil price doubled from US$ 10 in December 1998 to over US$ 20 in the summer of 1999. However, surplus capacity has so far been able to absorb most of the increased activity, leading to only modest gains for oil services companies to date.

Source: A. Paterson," Oil and Gas Services Report", Environmental Business International, Mimeo, October 1999.

2. Dispute settlement under GATT 1947 and the WTO

The WTO dispute-settlement mechanism[58] is one of the main pillars of the multilateral trading system. The regime emerging from the Uruguay Round has as its glue, on the one hand, the WTO Agreement proper, which provides the rules for the new multilateral trading system, and, on the other hand, the dispute-settlement mechanism, which guarantees compliance by Members with those rules. In principle, infringement of the WTO rules can be met by trade sanctions authorized by the Members.

Two petroleum-related dispute settlement cases were brought under GATT 1947 (the European Community-United States automobile taxation case and the Mexico-United States Superfund case), and one was brought under the WTO (Venezuela-United States Standards for reformulated and conventional gasoline), all of them involving the national-treatment obligation. Another relevant case, which did not, however, lead to a dispute-settlement procedure, was the

[58]For a detailed discussion of the Dispute Settlement Understanding in the WTO Agreement, see UNCTAD, *TDR*, 1994, op.cit., Supporting Papers, pp. 205-219.

complaint by Singapore (February 1995) with regard to Malaysia's prohibition on imports of polyethylene and polypropylene. In July 1995, Singapore withdrew the complaint after the case was apparently resolved through bilateral consultations. The three cases that have been decided under the GATT/WTO deserve careful consideration by petroleum-exporting States for the insights they provide into how the WTO is likely to treat both the issue of national treatment and the potential conflict between trade and environmental policies in the context of the petroleum sector.

2.1 The European Community versus the United States: Taxes on automobiles[59]

In 1978 the United States imposed a tax (popularly known as the "gas guzzler" tax) on the sale by manufacturers (including importers) of automobiles with low fuel-economy rates. According to the United States, the tax created an incentive to purchase more fuel-efficient automobiles, and could thus be expected to lead to increased conservation of fossil fuels. The EC argued that the tax violated Article III:2 of the GATT (national treatment with respect to internal taxation), because most of the cars affected by the tax were imports from the EC. The GATT Panel convened to consider the dispute noted that in order to find a violation of Article III it was essential to analyse whether the tax was established with the aim and effect of protecting domestic production. It held that the mere fact that EC automobiles bore most of the burden of the tax did not mean that the measure had the effect of affording protection to domestic production. It also held that in terms of Article III:2, and for the purposes of the "gas guzzler" tax, fuel-inefficient imported automobiles were not "like" fuel-efficient domestic automobiles; therefore, different and less favourable treatment could be accorded to them.

The United States also maintained a measure -- the Corporate Average Fuel Economy (CAFE) Regulation -- requiring that the average fuel economy for fleets of automobiles produced by any manufacturer (including importers) not fall below a certain level. The application of the CAFE Regulation to importers was essential in order to avoid nullifying the reduced consumption of fuel resulting its application to domestic manufacturers. A manufacturer had to meet average fuel economy standards for both its imported and domestic fleets, calculated separately.

According to the EC, the CAFE Regulation as imposed on car importers violated Article III:2 and Article III:4 of the GATT. The EC argued that treatment based on fleet averaging was inherently discriminatory, since importers of big cars from specialized manufacturers (which tended to be foreign) could not offset the fuel-economy of such cars with other fuel-efficient models. In fact, the CAFE system provided manufacturers with some flexibility in meeting fuel economy requirements by letting them compensate for fuel-inefficient models by taking into account their fuel-efficient ones. However, because of the requirement for separate accounting for imported and domestic fleets, it was impossible to compensate for imported fuel-inefficient models by taking into account domestic fuel-efficient ones.

The Panel found that the requirement for separate foreign fleet accounting prevented

[59]Report of the Panel not formally presented to the GATT Council for adoption, DS31/R (11 October 1994).

manufacturers of large domestic cars from complying with the CAFE Regulation for their domestic fleet by adding to it small foreign cars. The Panel also noted that the CAFE Regulation prevented foreign manufacturers of large cars from meeting its requirement for their imported fleet by adding to it small domestic cars. The Panel therefore concluded that the CAFE Regulation treated products of foreign origin less favourably than "like" domestic products and was thus inconsistent with Article III:4.

The United States argued that the CAFE Regulation could be justified under Article XX (g), relating to the conservation of exhaustible natural resources. The Panel agreed that the measure fell within the range of policies mentioned in Article XX (g). However, for the law to come within Article XX (g), it also had to be proved that the measure -- and in particular the separate foreign fleet accounting requirement -- was primarily aimed at fuel conservation and at rendering effective restrictions on domestic production or consumption. The Panel concluded that the separate accounting requirement did not further these objectives; indeed, it inhibited imports of small fuel-efficient cars. As such, the CAFE Regulation could not be justified by Article XX (g), although this exception would have been available but for the separate fleet-accounting requirement.

The Panel spelt out an important distinction between the requirements under Article XX (g) and those under Article XX (b). In the case of Article XX (b), measures otherwise inconsistent with GATT rules can be justified if they are necessary to protect human, animal or plant life or health -- "necessary" meaning that an alternative GATT-consistent measure is not available. In the case of Article XX (g), however, it is not necessary to prove that the specific measure is necessary: The mere fact that other less trade-restrictive (and possibly even more effective) measures are available to encourage the conservation of exhaustible natural resources does not prevent the measure from being justified under this exception.

The Panel decision is relevant for petroleum-exporting countries because it states that GATT parties can grant less favourable treatment to fuel-inefficient imported cars as compared with fuel-efficient domestic cars, because a difference in fuel-economy is sufficient to make one automobile unlike another for the purposes of Article III:2. As was pointed out by the United States, restrictions on sales of fuel-inefficient cars could be more effective in reducing fuel consumption than restrictions on sales of fuel, since higher fuel taxation would be regressive and would not promote technological innovation.

Two additional points must be kept in mind, however. First, the Panel report was not presented to the GATT Council for adoption; therefore it may have limited influence in GATT jurisprudence. Secondly, in a recent case,[60] the Appellate Body of the WTO has adopted a different approach to Article III:2. Under this approach, "like products" should be assessed on a case-by-case basis and with reference to such criteria as physical characteristics and end use,

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[60] *EC, US and Canada versus Japan - Taxes on Alcoholic Beverages* (WT/DS8/R, WT/DS10/R, WT/DS11/R). The Dispute Settlement Body adopted the Appellate Body Report (WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, October 1996) and the Panel report as modified by the Appellate Body Report on 1 November 1996.

rather than by reference to the aim and effect of the domestic taxes and charges. It is arguable, then, that if a WTO Panel had to examine a case similar to the one concerning taxes on automobiles, it might well reach conclusions different from those reached by the GATT Panel.

2.2 Mexico and others versus the United States: The Superfund case[61]

The U.S. Superfund Amendments and Reauthorization Act of 1986, known as the Superfund Act, reauthorized a programme to clean up hazardous waste sites and address public health problems caused by hazardous waste. Among various fiscal measures, the Act imposed a tax on petroleum that was higher for imported products than for domestic ones. It also imposed a tax on certain chemicals and a tax on certain imported substances produced or manufactured from the taxable chemicals. The latter tax is relevant for the discussion of border tax adjustment.

Canada, the EEC, and Mexico took the case to the dispute-settlement system of the GATT, with Australia, Indonesia, Kuwait, Malaysia, Nigeria, and Norway intervening as interested third parties. A Panel was created, and it issued its report in June 1987. The panel concluded that the tax on petroleum was inconsistent with U.S. national treatment obligations under Article III:2 (first sentence) of the GATT. On the issue of border tax-adjustment, the Panel noted that tax adjustment rules distinguish between taxes on products and taxes not directly levied on products; in other words, they do not distinguish between taxes with different policy purposes. The Panel therefore concluded that because the tax on chemicals was a tax directly imposed on products, it was eligible for border tax adjustment, despite the fact that it was designed to finance environmental programmes benefiting only U.S. producers. However, the Panel found against the United States with respect to another provision in the Superfund legislation, which prescribed a penalty tax in the event that importers failed to provide the required information about the chemical inputs of certain imported substances subject to the Superfund tax. The Panel held that the basis for imposition of this penalty was such that it would not conform to GATT national treatment obligations.

The Superfund tax was amended in December 1989 in compliance with the recommendations of the Panel, being brought to a uniform rate for both domestic and imported petroleum products.[62]

2.3 United States: Standards for reformulated and conventional gasoline[63]

In December 1993, the U.S. Environmental Protection Agency (EPA) adopted a final rule entitled "Regulation of Fuels and Fuel Additives: Standards for Reformulated and Conventional Gasoline". This regulation implemented certain provisions of the Clean Air Act requiring that,

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[61]BISD, 3hS/160 (17 June 1987).

[62]GATT, *Trade Policy Review: United States 1992*, report by the Secretariat, April 1992, Volume I, p. 205.

[63]WT/DS2/R (29 January 1996).

from 1995 to 1998, only gasoline of a specified cleanliness be sold in areas of high air pollution, and that gasoline sold in the rest of the United States cause no greater air pollution as compared with gasoline sold in 1990.

The rule applied to refiners, blenders, and importers of gasoline. It required that certain chemical characteristics of their gasoline were in conformity, on an annual average basis, with defined levels. Some of these levels were fixed by the gasoline rule; others were expressed as "non-degradation requirements", under which each domestic refiner had to maintain, on an annual average basis, the relevant characteristics at levels no worse than its "individual baseline", which was the annual average achieved by the refiner in 1990. For the establishment of the baseline, individual refiners had to show evidence of the quality of gasoline produced or shipped in 1990 (“Method 1"); if the evidence in this respect was not complete, they had to use data on the quality of blendstock produced in 1990 (“Method 2") or, failing that, use data on quality of post-1990 gasoline blendstock or gasoline (“Method 3").

Importers were also required to employ an individual baseline using Method 1 data only (all disputants agreed this was unlikely for any importer). If they could not, they were not allowed to use either of the other two methods; instead, they had to use a statutory baseline which the United States claims was derived from the average characteristics of all gasoline consumed in the United States in 1990 (which included the much higher quality reformulated gasoline sold in California). Before the EPA proclaimed these rules, and as a result of public hearings and views from importers, it set a modification for importers in May 1994, but Congress denied the budget for administering it.

According to Venezuela and Brazil,[64] by imposing less favourable standards on Venezuelan gasoline (as compared with those applied to domestic products and gasoline imported from certain countries) the regulation violated GATT Articles III (national treatment) and I (MFN treatment), as well as Articles 2.1, 2.2 and 12 of the WTO Agreement on Technical Barriers to Trade.[65] Venezuela also claimed that, apart from any technical breach of trade rules, the gasoline rule had nullified and impaired its GATT benefits under Article XXIII:1(b). The United States argued that the gasoline rule could be justified under the exceptions in Article XX, paragraphs (b), (d), and (g), and did not come within the scope of Article 2 of the TBT Agreement. The European Union and Norway made submissions to the Panel as interested third parties.

Venezuela also expressed concern that application of the gasoline rule could justify the fears of many countries about the use of purported environmental measures as disguised restrictions on international trade. It stressed that it was not seeking to avoid legitimate

[64]See Document "Summary of the Submission of the Government of the Republic of Venezuela to the WTO Dispute Settlement Panel in 'United States: Measures on Gasoline'", Geneva, June 1995 (public summary).

[65]Venezuela did not make any claim on the basis of Article 12 of the TBT Agreement (Special and Differential Treatment of Developing Countries Members), thus rejecting the notion that it was seeking privileges for its gasoline. It stated that while it was not asking for the Panel to rule under Article 12, it did point out that the discriminatory treatment was particularly objectionable in the light of that provision.

regulations for environmental protection, but merely wanted its gasoline to be subject to the same rules as gasoline produced in the United States and third countries.

The WTO Dispute Settlement Body, at a special meeting on 10 April 1995, agreed to establish a dispute settlement panel to examine the complaints of Venezuela and Brazil. The Panel held that imported and domestic gasoline were like products; it also held that under the differing baseline establishment methods, imported gasoline was effectively accorded less favourable treatment than domestic gasoline, in violation of Article III:4. The Panel rejected the U.S. argument that the requirements of Article III:4 were met because imported gasoline was treated similarly to gasoline from similarly situated domestic parties. Such an interpretation, it said, would be contrary to the ordinary meaning of the Article and would mean that imported and domestic goods could no longer be assured of equal treatment on the objective basis of their likeness as products, but rather would suffer from "highly subjective and variable treatment" according to extraneous factors. This, the Panel said, would create great instability and uncertainty in the conditions of competition as between domestic and imported goods in a manner fundamentally inconsistent with the object and purposes of Article III of the GATT.

The Panel also rejected the U.S. argument that the statutory baseline criteria it applied to imports resulted in treatment "on the whole" no less favourable than that accorded to domestic gasoline under individual baselines. It stated that this view of "equivalence" amounted to accepting that less favourable treatment in one instance could be offset by correspondingly more favourable treatment in another instance -- a balancing that was not supportable under Article III:4.

Dealing with the U.S. arguments with respect to the Article XX exceptions, the Panel stated that in order to justify a departure from GATT obligations on the ground that a measure was necessary to protect human, animal, or plant life or health, Article XX (b) provided that three requirements had to be satisfied:

- The policy in respect of measures for which the exception was invoked fell within the range of policies designed for protecting human, animal or plant life or health;

- The inconsistent measures for which the exception was being invoked were necessary to fulfil the policy objective; and

- The measures were applied in conformity with the requirements of the introductory clause of Article XX.

The Panel agreed that a policy to reduce air pollution fell within the range of excepted measures for protection of health. Also, it held that it was not the necessity of the policy goal that was in issue, but rather the necessity of the particular measure for achieving that goal -- that is, whether it was necessary that imported gasoline be effectively denied the favourable sales conditions afforded by an individual baseline tied to the producer of a product.

Examining the various U.S. arguments about the difficulties in applying the same or equivalent methodologies to foreign refineries and products, the Panel found that the United States had not demonstrated that this could not be done through the use of various methods available to it. The Panel concluded that the United States had not met the requirement of showing that the concerns raised by it justified a violation of Article III:4. It held also that the United States had not demonstrated that there were no other measures, consistent or less inconsistent with Article III:4, that were reasonably available to it to enforce compliance with foreign refiner baselines or importer baselines based on them. The Panel found that the imposition of penalties on importers was a sufficiently available mechanism for enforcement of standards.

As for the U.S. argument under Article XX(d) -- that its differing treatment was needed in order to secure compliance with its laws and regulations not inconsistent with GATT -- the Panel found that discrimination between imported and domestic gasoline did not secure compliance with the United States' baseline system. These methods were not an enforcement mechanism, but simply rules to determine individual baselines. As such, they were not covered by Article XX (d).

Regarding a possible justification based on the conservation of exhaustible natural resources (Article XX (g)), the Panel noted that this provision was originally intended to cover exports of exhaustible goods such as petroleum and coal, and its expansion to cover "conditions" could not be justified. The Panel agreed that clean air was a "resource" with a value and could be depleted. That this depleted resource was defined with respect to its qualities was not decisive for the Panel, and its renewability did not constitute an objection. A policy to conserve clean air was hence a policy to conserve a natural resource. The Panel found, however, that while the United States was free to regulate air quality, the treatment of chemically identical products had no direct connection with this objective.

In its concluding remarks, the Panel observed that it was not its task to examine generally the desirability or necessity of the environmental objectives of the Clean Air Act or the gasoline rule. Under the GATT, WTO Members were free to set their own environmental objectives, but were bound to achieve these goals through measures that were GATT-consistent, especially with respect to the relative treatment of domestic and imported products. In sum, the Panel concluded that the baseline establishment methods in the United States gasoline rule were inconsistent with Article III:4 of the GATT and could not be justified by any of the Article XX exceptions. It recommended that the Dispute Settlement Body request the United States to bring its rules into conformity with its GATT obligations.

On 20 February 1996 the United States submitted an appeal to the Appellate Body of the WTO. On 22 April 1996, the Appellate Body issued its report (WT/DS2/AB/R), modifying the Panel Report on the interpretation of GATT Article XX (g), but leaving the Panel's conclusions intact. The Appellate Report, together with the Panel Report as modified, was adopted by the Dispute Settlement Body on 20 May 1996, including the recommendation that the Dispute

Settlement Body request the United States to bring its baseline establishment rules[66] into conformity with its GATT obligations.

Some additional clarifications about how Article XX (g) should be interpreted were offered by the Appellate Body. In its view, the clause "if made effective in conjunction with restrictions on domestic production or consumption" does not require identical treatment of domestic and imported products. In the case in question, in order to invoke Article XX (g), it was essential to prove that restrictions on the "cleanliness" of imported gasolines were established in the light of corresponding measures on domestic production. The Appellate Body also clarified that the same clause in Article XX (g) is not intended to establish an empirical "effects test". In other words, once the United States had proved that the measures concerned imposed restrictions in respect of both imported and domestically produced gasoline, it did not have to prove a causal link between the measure and the conservation of clean air.

The Appellate Body stressed, however, that to rely on the exception in Article XX (g), it was necessary to meet the specific requirements of that paragraph, as well as the requirements imposed by the opening clauses of Article XX. This means that the measures falling within the exceptions in Article XX must be applied reasonably, with due regard to both the legal duties of the party claiming the exception and the legal rights of the other parties concerned.

The Appellate Body reconfirmed that Article XX contains provisions designed to permit important state interests -- including the protection of human health and the conservation of exhaustible natural resources (such as clean air) -- to be protected. WTO Members have the autonomy to determine their own environmental policies and objectives, and to implement the corresponding legislation. With respect to the WTO, that autonomy is limited only by the need to respect the rules of the GATT and the associated agreements.

The findings of the WTO, as modified by the Report of the Appellate Body, may give rise to additional difficulties for petroleum-exporting countries. *First,* it was reconfirmed that WTO Members are free to set their own environmental objectives, and that the WTO's only task is to ensure that they are implemented through GATT-consistent measures. *Second*, clean air is regarded as an "exhaustible natural resource"; its protection therefore falls under the Article XX (g) exception. *Third*, while it was reconfirmed that in order to apply the Article XX (g) exception it is necessary to implement restrictions on domestic production or consumption as well as restrictions on imports, it was also held that this does not require identical treatment for imported and domestic products. *Finally*, in so far as it was stated that in order to invoke the exception of Article XX (g) it is not necessary to prove that the trade-restrictive measure has effectively contributed to the conservation of exhaustible natural resources, it easier to rely on this exception.

All three cases discussed above, while ultimately decided at least partially against the importing country (the United States), nevertheless facilitate the implementation by importing countries of trade-restrictive measures that would affect petroleum directly or indirectly. The

[66]Contained in Part 80 of Title 40 of the Code of Federal Regulations.

European Community-United States automobile case allowed for the possibility of differential treatment for fuel-efficient and fuel-inefficient automobiles; in the Superfund case the principle was accepted that environmental taxes for purely domestic purposes can be brought to bear on petroleum-sector imports; and in the gasoline case it was acknowledged that States are free to set their own environmental objectives and may rely on a generous reading of Article XX (g) in justifying measures to meet them. However, these cases also illustrate the advantages of WTO membership -- namely, the possibility of relying on a neutral and strong multilateral dispute-settlement system to settle commercial disputes with trading partners, independently of relative economic power.

3. Environment-related initiatives

3.1 The WTO Committee on Trade and Environment

The Marrakesh Agreement on the WTO includes a Ministerial Decision on Trade and Environment.[67] The main thrust of this decision is a concern to avoid contradictions between an open multilateral trading system, the protection of the environment and the promotion of sustainable development, and to ensure that environmental policies and measures do not become protectionist devices. The decision establishes a Committee on Trade and Environment (CTE), which is given two specific functions: to identify the relationship between trade and environmental measures in order to promote sustainable development, and to make recommendations on whether any modifications to the multilateral trading system are required.[68] In addition, the decision sets out a number of tasks for the CTE to address and provides for a report to the first biennial meeting of the Ministerial Conference. At that conference (held in Singapore in December 1996), the report of the CTE[69] was adopted, together with a Ministerial Declaration, which includes a reference to trade and the environment. The Declaration recognizes the value of the CTE's work and calls for more work on all items on the CTE's agenda.[70]

A number of topics covered by the work of the CTE are relevant for petroleum-exporting countries -- in particular, the relationship between the Multilateral Trading System (MTS) and Multilateral Environmental Agreements (MEAs); eco-labelling; market access; and the relationship between the MTS and taxes and charges for environmental purposes.

As to the relationship between the provisions of the *MTS and trade measures for*

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[67]See GATT Secretariat, *The Results of the ....*, op.cit., pp. 469-471.

[68]The CTE is also given responsibilities under a separate Decision on Trade in Services and the Environment (see GATT Secretariat, *The Results of the ...*, op.cit., pp. 457-458) to examine and report on issues related to services trade and the environment.

[69]It can be found in *Trade and Environment News Bulletin*, No. PRESS/TE 014, 18 November 1996.

[70]For a more detailed discussion on the work of the CTE, see Simonetta Zarrilli, "Trade and Environment - the rules, panels and debate in the World Trade Organization", 20 *World Competition* (1997).

environmental purposes taken pursuant to MEAs, discussions in the CTE have revealed different views on whether any modifications of the MTS are required in order to accommodate trade measures, including those taken pursuant to an MEA.

Various recommendations have been proposed with a view to enhancing the understanding and reducing the scope of conflict between the MTS and trade measures taken pursuant to MEAs. For example, the report of the CTE to the Singapore Ministerial Conference encourages cooperation between the WTO and the MEA institutions, and suggests that disputes between WTO Members that are parties to the MEAs may be resolved under MEAs themselves. However, the report notes that in the negotiation of future MEAs particular care should be taken regarding the application of trade measures to non-parties. It makes a distinction between the treatment of trade measures specifically mandated by an MEA and those which are not, but also notes that "a range of provisions in the WTO can accommodate the use of trade-related measures taken pursuant to MEAs". A number of proposals have been put forward in the CTE to broaden the scope available under WTO provisions for the use of trade measures applied pursuant to MEAs, but these proposals have not attracted consensus support in the Committee.

As to *eco-labelling*, energy policies often employ information-based instruments. In the context of eco-labelling, energy-related criteria[71] may refer to the energy inputs required to manufacture a product, and/or to the amount of energy needed to use a product. For instance, in the case of the EU Eco-label Award Scheme, the criteria for washing machines cover, *inter alia*, energy use during the use of the machine. In the case of the Environmental Choice Programme of Canada, the majority of the eco-label criteria developed aim at promoting products that reduce environmental damage during the use and disposal phases, such as reduction of energy consumption for household appliances and lamps. However, for sanitary and paper products criteria refer, *inter alia*, to energy consumption during the production process. The use of such criteria may result in *de facto* discrimination against some sources of energy, such as fossil fuels. It also raises the question of possible equivalencies, based on the comparability of different sources of energy. The treatment of energy-related criteria in the context of eco-labelling may be of particular interest to petroleum-exporting countries.

On the issue of *market access*, discussions in the CTE have so far focused on whether and how the removal of trade restrictions and distortions -- in particular high tariffs, tariff escalation, export restrictions, subsidies and non-tariff measures -- has the potential to yield benefits for both the MTS and the environment. Until now, discussions have centred on the agriculture sector, although a proposal on the energy sector has been tabled. The implications of removing both energy and agriculture subsidies would be important for petroleum-exporting countries, because their petroleum exports would be affected and because they are net food importers.

As regards the relationship between the *MTS and taxes and charges* for environmental purposes, one interesting aspect is the possible application of measures such as border tax

[71]Criteria are the requirements which products have to fulfil to become eligible for eco-labelling. They may be product- or process-related.

adjustment to energy products. The WTO allows border tax adjustment, since taxes can affect the competitiveness of domestically produced goods relative to products from other countries. Product taxes can be levied on imported products (at the same rate as on domestic like products), whereas an exemption or remission of taxes can be granted for products to be exported. Key questions that arise in the context of the trade and environment debate relate to the treatment of "like" and "competing" products, and the extent to which border adjustments should be allowed for "prior-stage" taxes, such as taxes on inputs. With regard to the first point, under GATT rules (Article III:2, first paragraph), countries cannot impose a higher tax on an imported product than on a domestic like product. However, different tax rates may be applied to products which are not "like products". Under the previously discussed Panel decision on automobiles, fuel-inefficient cars are not "like products" when compared with fuel-efficient cars; therefore, they can be subject to less favourable treatment. With regard to the second point -- whether border tax adjustments can apply to taxes on inputs -- WTO rules allow the adjustment of a specific tax if the taxed input is physically incorporated in the product in question (e.g. carbon content of fuels). A common interpretation of the WTO rules is that taxes on non-incorporated inputs (e.g. carbon-dioxide emissions during production), as well as taxes on production processes, are generally not eligible for adjustment.[72]

While it is true that this particular matter has not had a high profile in the discussions so far, there are concrete proposals by a number of WTO Members that favour the application of this type of tax -- not only to products (currently permitted, provided that it is not discriminatory) but also to those production processes in which fossil energy is used as an input. The CTE has concluded that further work is needed on this issue. The WTO becomes all the more relevant for petroleum-exporting countries when one considers the work that the organization is currently doing on trade and environment, and its potential implications for and impact on their present and future trading positions.

3.2 The Climate Change Convention and the Kyoto Protocol

The biggest challenge to petroleum-exporting countries in this area probably comes from the United Nations Framework Convention on Climate Change (UNFCCC). This instrument demands efforts to reconcile trade and environment objectives. The Convention, which entered into force in March 1994 and by September 1999 had been ratified by 180 countries, contains principles and obligations, and, as the title suggests, provides a "framework" for action intended to stabilize and reduce the emissions of greenhouse gases, the primary cause of climate change. Most members of the Organization for Economic Cooperation and Development (OECD) plus the States of Central and Eastern Europe -- the so-called Annex I countries -- took the commitment to adopting policies and measures aimed at returning their greenhouse gas emissions to 1990 levels by the year 2000.

At the first session of the Conference of the Parties to the UNFCCC (April 1995), it was

[72]See "Newly emerging environmental policies with a possible trade impact: A preliminary discussion", TD/B/WG.6/9, 28 August 1995.

agreed to initiate a process to develop new commitments for the period beyond the year 2000 (the "Berlin Mandate") and a subsidiary group (the Ad Hoc Group on the Berlin Mandate - AGBM) was established to explore ways to strengthen the commitments of Annex I countries. The decision to develop new commitments was taken despite the strong opposition of oil-producing and exporting countries. The forth meeting of the AGBM coincided with the second Conference of the Parties (COP) in Geneva in July 1996. By this time the AGBM had explored the possible elements of a protocol that could be used to push forward the objectives of the Climate Change Convention. After the Geneva meeting, the AGBM examined the use of flexible mechanisms to help Annex I countries meet any target that would be included in a protocol.

The third COP was held in December 1997 in Kyoto, Japan. After intense negotiations Annex I countries adopted the Kyoto Protocol. They agreed to reduce their overall emissions of six greenhouses gases[73] by at least 5% below 1990 levels between 2008 and 2012[74]. Building on the work of the AGBM, the Protocol also established emissions trading between countries and a range of other flexible mechanisms as valid tools to achieve reductions. The Protocol will enter into force after 55 parties, including Annex I countries that account in total for at least 55% of carbon dioxide emissions for 1990, have ratified it. By October 1999, 84 countries had signed the Protocol and 16 had ratified it.

The fourth Conference of the Parties was held in November, 1998 in Buenos Aires, Argentina. The main outcome was the adoption of the Buenos Aires Plan of Action. Under the Plan of Action, the Parties declared their determination to strengthen the implementation of the Convention and to prepare for the future entry into force of the Kyoto Protocol. Argentina expressed its intention to adopt voluntarily an emission-limitation target for the 2008-2012 period. Kazakhstan decided to join the group of industrialized countries and accept a legally binding target.

The politics before Kyoto were complicated, but the position of the United States was crucial. The Clinton Administration accepted the need to reduce greenhouse emissions in principle, but its room for manoeuvre was limited by powerful domestic interests, concern about the public's reaction to increasing the cost of energy, and worries about international competitiveness. Mainly because of this, the United States called for "meaningful participation" by developing countries in the emission reduction process and declared that this would be a pre-

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[73]Carbon dioxide, methane, nitrous oxide, hydro fluorocarbons, per fluorocarbons, sulphur heaxafluoride. The combustion of fossil fuels is the major source of man-made CO_2 emissions. It accounts for about four-fifths of all greenhouse gas emissions in the industrialized countries and about three quarters of all man-made CO_2 emissions. Source: Climate Change Information Kit, Climate Change Information Sheets 18 and 21, website: *www.unfccc.de/resource/iuckit/fact.html*, and R. Priddle, "The meaning of Kyoto", website: *www.iea.org/pubs/free/articles/priddle/meaning.htm.*

[74]This group target will be achieved through cuts of 8 percent by Switzerland, most Central and East European States, and the EU; 7 percent by the United States; and 6 percent by Canada, Hungary, Japan, and Poland. Russia, New Zealand, and Ukraine are to stabilize their emissions, while Norway may increase emissions by up to 1 percent, Australia by up to 8 percent, and Iceland by up to 10 percent.

condition for its involvement in future negotiations. Developing countries reacted by arguing against anything that appeared to lead toward commitments for them. At Kyoto, the growing interest in flexible mechanisms for implementing any commitments provided the possibility of compromise. The Clinton Administration was able to explain to domestic opponents that the flexible mechanisms involved would mean that important interest groups or national competitiveness would not be compromised and, therefore, it was able to accept the Kyoto targets. The interest in flexible mechanisms also mirrored a growing attention in the United States to innovative policy instruments to deal with environmental problems.

After Kyoto the pace of negotiations has slowed down. Negotiators are analysing the implications of the Kyoto Protocol and are designing the process of institutionalising the outcomes of Kyoto. Developing countries are reflecting about the risks and opportunities associated with the Protocol. However, the crucial question of whether the Kyoto Protocol will come into force remains unresolved. United States' ratification is likely to depend on non-Annex I countries accepting some form of commitment to reduce emissions. If the United States does not ratify the Protocol, it is not likely that it will enter into force, because of the high U.S. share of emissions by Annex I countries. However, some developing countries are starting considering the possibility to accept voluntary greenhouse-gas reduction targets to benefit from the flexible implementation mechanisms. This may facilitate the ratification of the Protocol by the United States. On the other hand, the "Earth Summit+10" meeting scheduled in 2002 is being regarded by many participants as an appropriate time for the Protocol to come into force. Failure to address climate change issues could become increasingly embarrassing for policy makers and activists will question why no progress has been made in the ten years following the Earth Summit of Rio de Janeiro. Moreover, by the time the "Earth Summit+10" occurs, there is likely to be more tangible evidence about the effects of global warming, which will increase public sensitivity about the issue.[75]

A number of studies have been carried out on the impact of emission-reduction policies on the economies of different country-groupings. However, one point of consensus in the international economic community is that countries whose economies are highly dependent upon the export of fossil fuels are likely to suffer the most economic damage from climate change measures. OPEC's research, for example, suggests that OPEC Member countries could collectively suffer losses in revenue flows of the order of US$ 20 billion each year as a result of the proposed mitigation measures being implemented.

Having been unable to resist any commitments to reduce emissions of carbon dioxide, OPEC countries have tried to seek compensation for the damages that they would suffer as a result of the implementation of the emission-reduction measures by industrialized countries. Specifically, during the negotiation of the Kyoto Protocol, OPEC States stressed the importance of including into it a mechanism to compensate energy-exporting countries for the social and economic losses which would result from the implementation of climate-change policies and

[75]The analysis of the Kyoto Protocol is based on: *Oxford Analytica Brief*, *International*: "Climate Treaties", 14 July 1999 and *Oxford Analytica Brief*, *International*: "Climate Change", 18 November 1999.

measures, and urged that the UNFCCC contain specific provisions aimed at avoiding economic injuries to developing countries arising from actions taken by developed countries to mitigate climate change[76].

The inclusion of a compensation mechanism in the Kyoto Protocol was impossible to achieve due to the opposition of developed countries. However, as a result of the coordinated action of OPEC States, it was possible to include a provision in the Kyoto Protocol whereby Annex I countries strive to implement their commitments in such a way as to minimize adverse social, environmental, and economic impacts on developing country Parties, including those which are highly dependent on income generated from the production, processing and export of fossil fuels and energy-intensive products. A Subsidiary Body for Implementation was established to undertake a process to identify and determine actions necessary to meet the specific needs of the above-mentioned countries. Negotiations on this issue are proving to be very difficult. Annex I countries argue that emissions reduction commitments will entail great costs to their economies. Adding to such costs the price of compensating oil-exporting countries from the adverse effect of mitigation measures would be politically impossible to achieve. Nevertheless, a work programme on this issue was adopted in the 1998 COP meeting in Buenos Aires. At the Fifth Conference of the Parties (Bonn, Germany, 25 October to 5 November 1999), Saudi Arabia and other Members of OPEC insisted that they deserve financial compensation because implementation of the Kyoto Protocol will result in less petroleum being sold.

Until now, oil-exporting countries have acted in a coordinated and efficient manner and won the support of other developing countries. It seems that OPEC States are aware of the inevitability of global trends towards the "greening" of the world energy market. The objective of these countries is to find out ways of making greenhouse emission reduction compatible with energy-exporting country continued economic viability and political stability. Some possible options include the elimination of subsidies to domestic fossil fuel producers in industrialized countries, support to research and development programmes for the separation and disposal of CO_2, the development of more efficient hydrocarbon production and use infrastructure, and the diversification of energy-exporting countries.

3.3 Energy Taxes

Introducing energy taxes is probably one of the most immediate way to reduce emissions. Carbon-dioxide and energy taxes can be applied directly to fuels, to secondary forms of energy such as electricity, and to energy-intensive products on the basis of the amount of carbon-dioxide

[76]The Convention states the need to take account of the interests of economies that are "highly dependent on the income generated by the production, processing and export ... of fossil fuels" and of countries that "have serious difficulties in switching to alternatives" (Articles 4.7 and 4.10). The Convention provides also that developed country parties must promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies -- particularly to or for developing country parties -- so as to enable them to implement the provisions of the Convention. Developed countries must also support the development and enhancement of endogenous capacities and technologies of developing country parties. Financial assistance is to be provided, on an interim basis, through the Global Environmental Facility (GEF).

emitted or energy consumed in their production. Germany introduced a new energy tax on 1 April 1999. With a carbon tax already agreed in Italy, significant energy tax increases tabled in the United Kingdom, energy excise duty harmonization across the European Union now likely, and energy and carbon taxes already an integral part of tax reform in the Nordic countries and in the Netherlands, it seems that a political will is present in Europe. In North America, there is little opportunity for this type of debate. The Clinton Administration proposed a tax in 1993 based on British thermal units (BTUs), but Congress rejected the measure altogether. In Japan energy taxes may emerge as part of the country's emissions-cutting "Kyoto plan". An energy tax should be consistent with national energy policy and give clear signal to investors. The German energy tax, for example, gives such a signal. It will be used to reduce labour taxes while raising energy prices by around 10 percent over three years. The Dutch and Danish tax systems already have a range of energy and carbon taxes, including the recycling of tax revenues to both reduce other taxes and assist energy efficiency and renewable energy investments. Four different energy taxes apply in the Netherlands, including an additional energy tax introduced in 1997 which exempted energy intensive industries signing up for negotiated agreements on energy efficiency and carbon reduction. As a part of a wide tax harmonization package that the European Union is expected to introduce in 2000, a measure has been proposed to increase minimum excise duty on mineral fuels, while introducing them for natural gas and coal. The extension of duty to natural gas and coal is new for some EU countries: at present only ten countries tax natural gas and five tax coal[77].

3.4 Private sector's initiatives

While the future of the Kyoto Protocol in still unclear, initiatives to reduce greenhouse emissions have been taken by several private companies individually or through concerted efforts. Influential American firms, including Dupont, United Technologies and Enron, have formed a coalition, the Business Environmental Leadership Council, with the aim to take action to reduce emissions. According to them, the scientific evidence regarding the impact of fossil fuel burning on climate change, though incomplete, is alarming enough to warrant action. Consumer perception and technological reality have created a requirement that companies embrace a pro-active attitude on the environment. The coalition companies say that they will press the U.S. Congress to guarantee financial benefits for firms that take "early action" on emission reduction, independently from U.S. ratification of the Kyoto Protocol.

BP Amoco announced in 1998 that it had the target of reducing its emissions of greenhouse gases by 10 percent from a 1990 baseline over the period 2010. To help it meet these targets it has introduced an emission-trading system, developed with the help of the Environmental Defence Fund, a U.S.-based environmental group. BP was the first large oil company to break ranks with the Global Climate Coalition, the United States' lobby group that opposed the Kyoto Protocol. In April 1999, DaimlerChrysler and Ford unveiled what is claimed to be the first zero-emissions fuel-cell powered car suitable for production. The prototype uses

[77] *Financial Times Survey*, *World Energy*, S. Boyle, "The role of taxation. US watches from sidelines",15 April 1999.

hydrogen to generate electricity to drive the vehicle, producing mainly water vapour for the exhaust. However, hydrogen, being an explosive gas with a very low boiling point, is hard to handle routinely. Yet it easy to make it from methanol, and it is this chemical that drivers will eventually put in their tanks. In the long term, fuel cells technology could make an immense impact on energy usage. Toyota and General Motors, which between them make a quarter of the world's car, signed in early 1999 a pact to develop alternatives. These include battery-powered cars -- "hybrid" vehicles that have both electric and petrol engines -- and, most significantly, vehicles powered by fuel cells.

The prospect of shifting the world's economy away from oil towards renewable energy and hydrogen presents enormous difficulties and heavy costs. However, according to some specialists, it holds attractive benefits. The most obvious ones are those related to environmental advantages, other benefits are less obvious but potentially even more significant: renewable resources, such as wind and sunshine, are far more evenly distributed throughout the world than oil. That means that the majority of countries could become far less dependent on a small number of producers than at present. If this way of looking at energy-related issues spreads out, the amount of money and efforts that will be invested in finding alternative energy sources will increase, while the efforts to find more sustainable ways of utilizing fossil fuels will diminish, with negative consequence for fossil-fuel producing and exporting countries[78].

4. Trade, investment, and competition policy[79]

Even before the results of the Uruguay Round had been officially accepted at the Marrakesh Ministerial Meeting, pressure was being exerted to seek international agreement on the future work programme of the new WTO, even as a component of the final "package". This was successful in the case of trade and environment; the other proposals are laid out in the Concluding Remarks of the Chairman of the Marrakesh Ministerial Meeting.[80]

The Agreement establishing the WTO is itself, broadly speaking, related to competition since its main thrust is to promote a healthy international competitive environment and to

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[78]"Hot market", *The Economist*, 7 November 1998, page 79 and "Fuel cells hit the road", *The Economist*, 24 April 1999, page 91-92.

[79]See UNCTAD, *TDR*, 1994, op.cit., Supporting Papers, Annex 3 ("Competition Policy and the Trading System"), pp. 239-243.

[80]Ministers from a number of delegations stressed the importance they attached to their requests for an examination of the "relationship between the trading system and internationally recognized labour standards; between immigration policies and international trade; trade and competition policy, including rules on export financing and restrictive business practices; trade and investment; regionalism; the interaction between trade policies and policies relating to financial and monetary matters, including debt, and commodity markets; international trade and company law; the establishment of a mechanism to compensate for the erosion of preferences; the link between trade, development, political stability and the alleviation of poverty; and unilateral or extraterritorial trade measures". "Concluding remarks by the Chairman of the Trade Negotiating Committee at Ministerial Level", Marrakesh, 12-15 April 1994, doc. MTN.TNC/MIN(94)/6, 15 April 1994.

eliminate any distortions in competitiveness. More directly, a number of WTO Agreements relate to the issue of competition policy. For example, the Agreement on Trade-Related Investment Measures (TRIMs) provides that, no later than five years after its entry into force, the Council for Trade in Goods shall review its operation and consider whether it should be complemented with provisions on investment and competition policy. Similarly, the Agreements on Anti-Dumping, Subsidies and Countervailing Measures, and Safeguards all deal with the counteracting of measures that distort competition. The General Agreement on Trade in Services, for its part, deals with monopoly suppliers and exclusive suppliers (Article VIII), and recognizes that certain business practices may restrain competition (Article IX). The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) recognizes that appropriate measures may be needed to prevent the abuse of intellectual property rights by rights holders, and includes provisions on the control of anti-competitive practices.

The issue of the inclusion of investment policy in the disciplines of the multilateral trading system was addressed in the Uruguay Round, with the results being limited to a mechanism of "commercial presence" as a subject for commitment under GATS. The TRIMs Agreement does not deal with investment policy *per se*, but only prohibits those investment measures identified as inconsistent with GATT Articles III (National treatment) and XI (General elimination of quantitative restrictions). At the Singapore Ministerial Conference, it was decided to establish a Working Group on Trade and Investment. It would draw upon the work of the UNCTAD Working Group, which at UNCTAD IX (1996) was instructed to examine the development implications of a possible multilateral framework on investment.

The pressure in the WTO for action on trade and investment was stimulated by the decision in the Organization for Economic Cooperation and Development (OECD) to negotiate a Multilateral Agreement on Investment (MAI). The MAI proposal aimed at establishing national treatment and right of establishment as a basic obligation, provided rules for movement of key personnel, prohibited mandatory performance requirements and sought to limit investment incentives. In addition, it laid out detailed rules dealing with investment protection and investor/state and state/state dispute settlement.

The initiative ultimately collapsed in 1998 due to numerous differences among OECD members. One of the key problems concerned differences over a reformed national-security clause. Canada and the European Union hoped to devise a clause that was stricter than GATT Article XXI. Some of the more specific proposals were to establish a “closed list” of circumstances in which a country might justifiably invoke the national-security clause, establish consultation requirements under which the invoking country must give prior notification of its intended actions to a parties group (perhaps giving the other affected parties an opportunity to raise concerns or even to disapprove the imposition of such measures), or limit the scope of such exceptions so that they can apply to some provisions of the agreement (e.g., the MFN and national treatment clauses) but not to investment protection. Negotiators were unable to reach agreement on these matters, nor could they resolve the question of whether the revised disciplines would apply only to future actions.

There is broad recognition, particularly in developing countries, of the benefits of foreign direct investment as a source of increased productivity, transfer of technology and integration in the world economy. Investment policy instruments, therefore, remain critical in the achievement of trade and industrial development objectives for all developing countries. Policy instruments such as selective investment incentives and performance requirements are aimed at furthering those objectives. Any attempt to reduce or eliminate such measures in these areas, like in the case of MAI, would be likely to limit the scope for the formulation of national policy objectives and overall strategies for a country's development.

There is no clear set of rules in the WTO which deals with anti-competitive practices. It is therefore left to each Member to determine the need for such provisions in its national legislation. At present, only some developing countries have domestic laws on competition policy. But the need for such laws is being increasingly felt as a result of the recent liberalization of their trade and investment regimes, accompanied by rapid privatization of their economies. They therefore have a stake in the formulation of international rules to govern trade and competition policies, all the more so since they are the least able to control individually the anti-competitive behaviour of private international firms.

CHAPTER 2

THE ENERGY SECTOR IN REGIONAL AGREEMENTS

I. Introduction

Apart from disciplines imposed by the WTO, international trade is increasingly subject to regional norms. The GATT itself recognizes in Article XXIV the possibility that regional trading arrangements may contribute to a more open world economy. However, it also stresses that the purpose of such arrangements should be to expand trade in the particular region, not to discourage trade with states outside the region. The GATT acceptance of both free trade areas and customs unions is accordingly conditioned on two primary criteria: *first*, the creation of such regional arrangements should not result in a higher level of trade protection (Article XXIV:5), and, *second*, the coverage of the union or area should extend to "substantially all the trade in products" originating there (Article XXIV:8). Regional economic relationships have evolved over the past decade to take on a more varied and richer form than that originally envisaged in GATT Article XXIV, and indicate the direction in which such the multilateral system is likely to move in the future. Particular emphasis is paid in this respect to the implications such regional agreements have for petroleum-exporting states, and the demands they are likely to face in the event of either regional or multilateral trade negotiations. The discussion focuses on three regional relationships, embracing a range of institutional approaches, but reflecting some common underlying interests. The relationships are the North American Free Trade Agreement (NAFTA), the Energy Charter Treaty (ECT), and the forum for Asia-Pacific Economic Cooperation (APEC).

II. Background

It has been noted in Chapter I that issues relating to petroleum trade were initially excluded from GATT negotiations by virtue of a gentleman's agreement to this effect. Indeed, the special place of energy with respect to the GATT was illustrated by the reaction of industrialized nations to the energy disruptions of the 1970s. The reaction was not to pursue concerns primarily through the GATT (which in any event did not include important energy suppliers), but rather to conclude special arrangements to deal with energy. The most notable example in this respect was the agreement on energy sharing entered into by developed states in 1974 – the International Energy Program[81] – and the creation of the International Energy Agency to deal with energy-related concerns on a continuing basis. If one looks at early regional free trade arrangements one finds similarly that energy is not typically mentioned as an issue in its own right. Many of these free trade arrangements were originally concluded amongst developing states in the Americas and most of them were predicated on a theory of import substitution under which regional industries would be protected until they had reached sufficient size and efficiency to

[81]*Agreement on an International Energy Program*, Paris, 18 November 1974, (1975) 14 *International Legal Materials*.

compete effectively.[82] This typically involved the protection of manufacturing industries as opposed to primary product sectors such as petroleum. In reality of course the horizon for reaching competitive status became a constantly receding one, and the temporary barriers became permanent.

It is striking, then, to note how Latin American regional arrangements have evolved, especially over the past decade, from inward-looking mechanisms for the protection of regional markets (and, at least notionally, for the enhancement of intraregional trade) to much more outward-looking instruments designed to facilitate economic relations with states and groups of states outside the immediate region. This trend could be detected as early as 1970, with the creation of Latin American Integration Association (ALADI)[83], which, among its other objectives, encouraged the development of cooperation with economic integration areas outside Latin America. This approach has been pursued more vigorously in subsequent regional arrangements such as MERCOSUR, which goes beyond the creation of a customs union to include the formation of a common market which would involve "the free movement of goods, services and factors of production between countries" and "the co-ordination of macroeconomic and sectoral policies."[84] One interesting feature of the MERCOSUR is the creation of working groups authorized to deal with a range of substantive matters, including one dealing specifically with energy policy[85] -- an issue that had gone essentially untouched in such agreements in the past. One other regional arrangement worthy of note here is the so-called G-3 Agreement of 1989 between Mexico, Venezuela, and Colombia.[86] The Agreement is of particular interest to petroleum exporting states in that it comprises the three major energy producers in the region, and was entered into with the goal of creating an "energy basin", with an interconnection of both power grids and pipelines in the region.[87] The G-3 treaty establishes a free trade area among the three parties, but is at least as interesting for the scope of the provisions other than those relating tariff reduction. The treaty includes chapters dealing with such "new" trade issues as financial

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[82]Perhaps the two paradigmatic examples of this approach to regional trade arrangements were the Latin American Free Trade Association (LAFTA), created in 1960 by the Treaty of Montevideo (comprising Argentina, Brazil, Chile, Ecuador, Mexico, Paraguay, Peru and Uruguay – subsequently joined by Bolivia in 1966 and Venezuela in 1967), and the sub-regional Andean Group, created by the Cartagena Agreement of 1969 (comprising Bolivia, Chile – which withdrew in 1976 – Colombia, Ecuador, and Peru, joined in 1974 by Venezuela).

[83]Created by the Treaty of Montevideo Establishing the Latin American Integration Association, August 12, 1980, reproduced in (1981) 20 *International Legal Materials* 672.

[84]*Treaty establishing a common market between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay* [MERCOSUR Treaty], UN DOC A/46/155, April 19, 1991, reproduced in (1991) 30 *International Legal Materials* 1041, Article 1.

[85]MERCOSUR Treaty, Annex V.

[86]*Treaty on Free Trade Between the Republic of Colombia, the Republic of Venezuela and the United Mexican States*, found at the website of OAS, Foreign Trade Information Service (SICE): *www.sice.oas.org*.

[87]Anthony Chapman, *Free Trade in Latin America and the Caribbean*, Library of Parliament Background Paper, Parliament of Canada (January 1994), at 20.

services, temporary entry for business persons, investment, technical standards and intellectual property -- all of which would be addressed in the NAFTA. In sum, by the late 1980s there had emerged in Latin America a network (albeit a not entirely coherent one) of overlapping free trade arrangements, driven by motivations other than the traditional rationale of import substitution.[88] In a sense, the NAFTA represents the fullest expression to date of this change in Latin American perspective -- and to a large extent has set the template for future trade and economic agreements in the hemisphere.

III. THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)

1. Introduction and background

The NAFTA[89] holds considerable potential interest for petroleum exporting countries for at least three reasons. *First*, it is an agreement that includes both a major importing country (the United States) and an important exporting country (Mexico) at significantly different levels of economic development. It also includes an economically advanced country that is on balance self-sufficient in energy (Canada), although, depending on the energy sector and region, it may be an exporter or an importer. In this respect the NAFTA differed from most regional trading arrangements, which typically comprised either developed or developing states, but not both.[90] The NAFTA "package" may therefore have broader applicability in suggesting directions for other North-South bargains.[91]

Second, and related to the first point, the NAFTA in many respects reflected an attempt to supplement GATT disciplines. Both the NAFTA and its predecessor, the Canada-United States

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[88]Examples of such bilateral free trade agreements, other than that between Chile and Mexico include: Chile and Venezuela (in force, July 1, 1993); Chile and Colombia (in force, January 1, 1994); Chile and Ecuador (in force, January 1, 1995); Mexico and Bolivia (in force, January 1, 1995); and Mexico and Costa Rica (in force, January 1, 1995). For a compendium of bilateral arrangements, see Organization of American States, Foreign Trade Information System (SICE), "An Analytical Compendium of Western Hemisphere Trade Arrangements", located at SICE website.

[89]*North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America* (1992), in force, 1 January, 1994, reproduced in (1993) 32 *International Legal Materials* 289, and 605.

[90]There is of course a history of trading arrangements under which developed states extend preferential access to certain products (usually raw or less processed materials) from developing countries. However, these arrangements have typically been characterized explicitly or implicitly as a form of development assistance, with some expectation that developed states will make unilateral concessions to developing ones. In the case of NAFTA, however, Mexico was expected to make reciprocal concessions in exchange for market access in the same way as would any other trading partner.

[91]In fact much, though not all, of the NAFTA package has been replicated in the free trade agreement between Canada and Chile: *Canada-Chile Free Trade Agreement*, 5 December 1996, in force 5 July 1997, reproduced in (1997) 36 *International Legal Materials* 1067.

Free Trade Agreement (FTA)[92] are GATT-oriented. GATT provisions are imported explicitly into the Agreements, where they are both interpreted (sometimes more strictly than is true under GATT practice) and expanded. Additionally, some NAFTA provisions mirror very closely developments in the Uruguay Round – for example the provisions on sanitary and phytosanitary measures. This is not surprising, of course, because the NAFTA negotiations parallelled those in the Uruguay Round; indeed, on some issues, it was clear that the United States especially was using the NAFTA negotiations to set precedents for its broader multilateral trade agenda.

Third, the NAFTA deals specifically with trade in energy. The NAFTA contains a separate chapter on energy, and it is well known that access to the Mexican energy sector was an important objective of the United States in the negotiations. In this respect the template for the NAFTA energy chapter was set by the earlier Canada-United States FTA, where, again, access to Canadian energy resources was a prime objective of the United States. Indeed, it is striking that in the FTA negotiations, the energy chapter was negotiated first, with its provisions then essentially replicated in the more general chapter on trade in goods.[93] It is reasonable to suppose, then, that the detailed energy provisions of the FTA and the NAFTA reflect to an important extent the policy directions that the world's major trading nation wishes to pursue with respect to energy trade in other fora such as the WTO.

The sections below describe the energy-related provisions in the NAFTA; these provisions will serve to suggest some possible directions for future trade-related negotiations affecting the petroleum sector (and by extension, the interests of petroleum exporting countries), whether conducted multilaterally under the auspices of the WTO or within a regional framework. This is not to suggest that the outcome of such negotiations will necessarily mirror what was achieved in the NAFTA. However, the NAFTA is useful in illustrating the types of issues that are likely to arise and – given that the NAFTA itself is based in many respects on GATT principles – in indicating where the GATT is perceived as deficient. At a basic level, the message emerging from the NAFTA for petroleum exporting states is that energy – including petroleum – is increasingly being viewed as "just another good" rather than a special case, and as such should be subject to the same market disciplines that govern other products. However, it should also be noted that there is still a recognition in the NAFTA that energy, and petroleum in particular, occupies a special and strategic place in the economies of exporting countries. Thus, Mexico became a Party to the NAFTA despite significant reservations with respect to the applicability of the Agreement to its energy sector (including petroleum products).

2. Energy chapter

[92]*Canada-United States Free Trade Agreement*, 10 December 1987, in force 1 January 1989, reproduced in (1988) 27 *International Legal Materials* 281.

[93]See "Analysis of Chapter Nine of the US-Canada Free-Trade Agreement, Concerning Trade in Energy", Memorandum prepared by the staff of the U.S. Department of Energy and the Office of the U.S. Trade Representative (Mimeo, 1988), p.7.

The *first* important development introduced by the NAFTA energy chapter is its treatment of certain GATT provisions. While the NAFTA "affirms" certain GATT obligations, and applies them explicitly to the energy sector, it interprets these provisions more strictly in some respects and adds to them in others. For example, the parties to NAFTA agree that they "understand" that GATT prohibits minimum or maximum export-price requirements in those circumstances where QRs would be prohibited (Article 603(2)). Of course, GATT practice suggests the contrary, and indeed both Canada and Mexico have imposed such requirements either directly or indirectly. Obviously any widespread acceptance of this interpretation within the WTO would severely constrain the ability of petroleum exporting countries to use dual pricing as a means of encouraging domestic diversification in the petroleum sector (for example, into petrochemicals). As to unambiguous additions to GATT obligations, an example is the NAFTA prohibition on discriminatory export taxes (Article 604) -- again, an instrument that had been used in the energy sector by both Mexico and Canada, and also an instrument that can be used to encourage further processing of natural resources.[94]

Box V

Selected NAFTA Articles

Article 603(2):"The Parties understand that the provisions of the GATT incorporated in paragraph 1 prohibit, in any circumstances in which any other form of quantitative restriction is prohibited, minimum or maximum export-price requirements and, except as permitted in enforcement of countervailing and antidumping orders and undertakings, minimum or maximum import-price requirements".
Article 604:" No Party may adopt or maintain any duty, tax or other charge on the export of any energy or basic petrochemical good to the territory of another Party, unless such duty, tax or charge is adopted or maintained on : a) exports of any such good to the territory of all other Parties; and b) any such good when destined for domestic consumption."
Article 605

(a): "Subject to Annex 605, a Party may adopt or maintain a restriction otherwise justified under Articles XI:2(a) or XX(g), (i) or (j) of the GATT with respect to the export of an energy or basic petrochemical good to the territory of another Party, only if: a) the restriction does not reduce the proportion of the total export shipments of the specific energy or basic petrochemical good made available to that other Party relative to the total supply of that good of the Party maintaining the restriction as compared to the proportion prevailing in the most recent 36 month period for which data are available prior to the imposition of the measure, or in such other representative period on which the Parties may agree".

(b): "the Party does not impose a higher price for exports of an energy or basic petrochemical good to that other Party than the price charged for such good when consumed domestically, by means of any measure such as licenses, fees, taxation and minimum price requirements. The foregoing provision does not apply to a higher price that may result from a measure taken pursuant to subparagraph (a) that only restricts the volume of exports."

(c): "the restriction does not require the disruption of normal channels of supply to that other Party or normal proportions among specific energy or basic petrochemical goods supplied to that other Party, such as, for example, between crude oil and refined products and among different categories of crude oil and of refined products".

[94]No doubt because of some of the implications of such provisions for its processing sector, Mexico in a separate annex reserved the right to "restrict the granting of import and export licences for the sole purpose of reserving foreign trade in [certain petroleum products] to itself." NAFTA Annex 603.6.

Second, the energy chapter narrows in some significant ways certain GATT exceptions that have special importance for petroleum exporting countries. For example, it restricts the use of those GATT exemptions which permit export prohibitions imposed to deal with critical shortages (GATT Article XI:2(a)); measures relating to conservation of natural resources (XX(g)); restrictions on exports in cases where essential quantities are needed for a domestic processing industry (XX(i)); and measures "essential to the acquisition or distribution of products in general or local short supply" (XX(j)). The invocation of these exemptions is now further conditioned by three constraints. First any restriction imposed under colour of the exemptions must "not reduce the proportion of the total export shipments of the [energy] good made available to the other Party relative to the total supply of that good of the Party maintaining the restriction" (Article 605(a)). Second, the restriction on exports cannot be accomplished through the imposition of an export price higher than that charged for the good domestically (including not only minimum export prices as such, but also the use of licences, fees, taxes or other means to this end). This implies that higher prices that result merely from a reduction in the quality of exports, however, are permissible (Article 605(b)). Third, the restriction must "not require the disruption of normal channels of supply to [the] other Party or normal proportions among [different energy] goods" (Article 605(c)).

The NAFTA also significantly limits the use of the GATT national security exception (Article XXI) as a justification for restrictions on *imports or exports* of energy goods. Now, such restrictions can only be imposed where necessary "to supply a military establishment ... or enable fulfilment of a critical defense contract" or to "respond to a situation of armed conflict".[95] In essence, then, the NAFTA narrows what has been a sometimes broadly-read security exception under the GATT to situations involving military activity or establishments. It might well be the case, of course, that this narrowing could work to the benefit of petroleum-exporting countries in certain circumstances.

The above-described measures represent important limitations on normally-available GATT rights. However, it is important to note that, with respect to both the restrictions on export measures in Article 605 and the narrowing of the national security exception in Article 607, Mexico has exempted itself from all these provisions by virtue of NAFTA Annexes 605 and 607, respectively. This does not detract, however, from the fact that such provisions might well appear on the agenda of energy-importing states in future trade negotiations. It does suggest, though, that they are not fundamental to the conclusion of an energy-related trade agreement.

3. "Fair trade" provisions in the NAFTA

Apart from the provisions in the energy chapter, the NAFTA includes many provisions elsewhere in the text that have special importance for the energy sector; this is especially relevant for Mexico, given that it is largely exempted from the obligations of Chapter 6. One example in

[95]NAFTA Article 607(a), (b). Two other justifications for restrictions are also included in the article; however, these relate to nuclear weapons and materials and would not normally be relevant to restrictions on petroleum sector goods.

this respect is the NAFTA provisions on "fair trade" actions. The NAFTA introduces additional disciplines, beyond those imposed by the WTO, on certain measures allegedly aimed at the promotion of "fair trade" – especially legislation relating to subsidies and dumping. While provisions in this respect were originally introduced in the FTA largely in response to Canadian irritation with the increasingly protectionist sentiment in the U.S. Congress[96], the major Canada-U.S. disputes over "resources protectionism" did not involve the petroleum sector. However, some Mexican measures related to preferential pricing of feedstock[97] did give rise to countervail actions in the United States; moreover, equivalent measures by other petroleum-exporting states hoping to diversify their petroleum sector would similarly raise the possibility of such actions in the future.

There was originally a firm commitment in the FTA to negotiate, over a period of five to seven years, a new set of common substantive trade rules to supplement the somewhat general GATT provisions on subsidies and dumping (including the then-applicable GATT Subsidies Code and Anti-dumping Code). This commitment was included primarily at the insistence of Canada, which saw it as an important tool for achieving secure access to the U.S. market for its natural resources. At the time, however, it was questioned whether it would ever be possible for Canada to persuade the United States to relinquish any significant control over such important trade instruments, and in the end the common trade rules were never negotiated.[98] One does not find this commitment in the NAFTA, but rather a much weaker undertaking to "consult" on ways of developing more effective disciplines on subsidies.[99] Of more practical significance, however, are the NAFTA provisions aimed at ensuring that *those domestic rules in place* governing subsidies and dumping are applied fairly. This is accomplished by providing for supranational panels to replace the normal domestic mechanisms for judicial review of anti-dumping and countervailing duty determinations. These provisions[100] reflect a common perception that domestic trade tribunals are sometimes influenced by political factors in their application of trade law. The general Canadian reaction (and Canada has been a frequent target of U.S. actions) to the experience with this mechanism to date, under both the NAFTA and the FTA, has been that it has

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[96]This evolution of U.S. trade policy is noted in Chapter I. For a full discussion, see Christian Yoder, "United States Countervailing Duty Law and Canadian Natural Resources; The Evolution of Resources Protectionism in the United States", in J. Owen Saunders (ed.), *Trading Canada's Natural Resources*, Calgary, 1987.

[97]See Chapter 1.

[98]It could be argued that with the conclusion of the Uruguay Round, especially the new *Agreement on Subsidies and Countervailing Measures*, the need for such a set of rules was diminished.

[99]NAFTA, Article 1907(2) provides for consultation on:

"(a) the potential to develop more effective rules and disciplines concerning the use of government subsidies; and

(b) the potential for reliance on a substitute system of rules for dealing with unfair transborder pricing practices and government subsidization."

[100]Found in NAFTA, Chapter 19: *Review and Dispute Settlement in Anti-dumping and Countervailing Duty Matters*.

had a positive effect in restraining protectionist forces acting under the guise of "fair trade". Again, while it may not be realistic to think of replicating the NAFTA approach in the context of wider multilateral agreements concluded under the auspices of the WTO, the principle of providing some supranational check on the domestic *application* of laws relating to dumping and subsidies is one that may have some appeal for petroleum-exporting countries, who might well be the targets of such measures. This possibility may prove especially attractive for such states as pressure grows to constrain their use of subsidies as a mechanism for encouraging economic diversification.

A weapon in the protectionist arsenal that is constrained significantly by both the FTA and the NAFTA is the use of so-called emergency actions (or safeguard measures) against imports in certain circumstances, as anticipated in GATT Article XIX. Essentially the GATT requirements for the application of this remedy are an unforseen increase in the imports of a product in such quantities as "to cause or threaten serious injury to domestic producers"; moreover the increase in imports must in theory be attributable to trade concessions under the relevant agreement (although in practice this latter requirement tends to be virtually assumed).[101] An emergency action is not strictly speaking concerned with "unfair" trade, it serves a temporary adjustment role in trade relations similar to that of countervailing duty and antidumping actions. Moreover, it has been used in the natural resources sector[102], although, at least in the United States, it is far harder to succeed with this remedy than is true for countervail and antidumping actions. This is because the situation it addresses is not linked to unfair behaviour, and because of the procedure for accessing the remedy in the United States, which requires presidential approval (that is typically not forthcoming). The NAFTA distinguishes between two types of emergency actions: bilateral actions that result from the operation of the Agreement itself (that is, where the increased imports in question are due to the tariff reductions initiated by the NAFTA) and global actions (primarily, rights accruing under GATT Article XIX). With respect to the former, the NAFTA incorporates as between Canada and the United States the provisions of the FTA.[103] The FTA provided for the elimination of such actions over a 10-year period. In this transition period, bilateral actions are only available where "the imports of such good from the exporting Party *alone* constitute a substantial cause of serious injury to the domestic industry"[104], and are limited to a three-year duration; moreover, an action can only be used once during that period for any given good. Essentially the same provisions are repeated in the NAFTA (Chapter 8) for bilateral actions other than those between Canada and the United States (but with the 10-year transition period running from January 1, 1994, with certain specified exceptions). As to global actions, the Parties retain their GATT rights and obligations, although these are constrained somewhat, so that the goods

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[101]GATT Article XIX (1)(a).

[102]Leading up to the FTA negotiations, Canada had seen such actions directed at zinc (1978), copper (1978 and 1984) and cedar shakes and shingles (1986), although only the latter of these was successful. This of course to some extent underestimates the "chilling" effect on trade exercised by the mere potential invocation of the remedy.

[103]NAFTA Annex 801.1.

[104]FTA Article 1101(emphasis added).

of other NAFTA parties are excluded from the action unless such goods "considered individually, account for a substantial share of total imports" and (except in exceptional circumstances) "considered individually ... contribute importantly to the serious injury, or threat thereof".[105] The NAFTA also addressed the administration of emergency actions to ensure that the procedures are "equitable, timely, transparent and effective".[106] To this end, procedural obligations relating to such matters as the initiation of a proceeding, the contents of petitions or complaints, notice requirements, provision for public hearings, the treatment of confidential information, evidence of injury and causation, and the findings to be included in a report, are all specified in Annex 803.3. Finally, subsequent to the conclusion of the NAFTA, and formally separate from it, the Parties negotiated three "side-deals", including an understanding on Chapter 8 emergency actions.[107] Under this, the Parties agree to establish a Working Group on Emergency Action with a broad mandate to "consider any issue related to recourse to [such actions under the NAFTA] ... [and to] make recommendations to the [Free Trade Commission]"[108]. The Working Group may also serve as a forum for consultations with respect to certain Chapter 8 issues. While the constraints on safeguard actions in the FTA/NAFTA are significant, it is nevertheless true, as noted above, that such actions, because of their limitations, probably do not pose a significant threat to the petroleum sector -- or more specifically to the petroleum products sector -- because it is unlikely that safeguard measures would be directed at crude petroleum imports.

4. Investment provisions

A major difference between the GATT and the FTA/NAFTA framework is the inclusion in the latter of provisions relating to foreign investment. The use of a trade agreement as an instrument for facilitating investment flows was pioneered in the FTA and continued in the NAFTA, with appropriate allowances for the special position of Mexico. There are four fundamental principles underlying the NAFTA treatment of foreign investment. *First*, the NAFTA adopts a principle of national treatment with respect to investment by NAFTA Parties; that is:

> "Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."[109]

These obligations include, specifically, prohibitions on the imposition of minimum domestic

[105]NAFTA Article 802(1).

[106]NAFTA Article 803.

[107]*Understanding Between the Parties to the North American Free Trade Agreement Concerning Chapter Eight – Emergency Action*, Sept. 14, 1993, (1993) 32 *International Legal Materials* 1519.

[108]*Understanding* ..., op.cit., Article 3(1)).

[109]NAFTA Article 1102.

ownership requirements and forced divestment by reason of nationality. The NAFTA provides, *secondly*, for a most-favoured nation standard of treatment for foreign investors of other Parties.[110] Where there is a conflict between the national treatment standard and the MFN standard, foreign investors from NAFTA Parties are to be accorded the better treatment.[111] *Third*, each Party is obligated to provide a minimum international standard of "fair and equitable treatment" to investments by investors of other Parties.[112] *Fourth*, Parties are prohibited from attaching to investments a broad range of performance requirements[113] and from conditioning the receipt of an advantage relating to an investment on certain such requirements.[114] While the list of prohibited requirements is far-reaching, it is also explicitly limited to the measures identified.[115] Moreover, the Article does provide that the Parties retain the ability to take environmental measures (as well as measures generally to assure compliance with domestic law) where these "are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguise restriction on international trade or investment..."[116]

The investment chapter also includes provisions designed to facilitate investment-related transfers, including profits and other revenues flowing from the investment, proceeds of the sale of the investment and certain payments relating to the investment.[117] Perhaps most striking, however, are the provisions relating to expropriation and compensation. Parties are prohibited from expropriating or nationalizing investments (or taking measures tantamount to this) unless this is done:

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[110]NAFTA Article 1103.

[111]NAFTA Article 1104.

[112]NAFTA Article 1105.

[113]Thus Parties may not impose investment-related requirements involving: (a) the export of a specific level or percentage of goods or services, (b) the achievement of a specific percentage or level of domestic content, (c) a preference for use of domestic goods and services, (d) a relation between volume or value of imports and that of exports (or foreign exchange inflows relating to the investment), (e) a restriction on domestic sales generated by the investment through a linkage to export earnings, (f) the transfer of technology other than where required as a remedy for a violation of competition laws, and (g) the operation by the investor as the exclusive supplier in a particular region or in the world market. NAFTA Article 1106(1).

[114]The restrictions are the same as those in NAFTA Article 1106(1)(b),(c),(d), and (e), *id.* The NAFTA does not, however, preclude a Party from conditioning such advantages on "a requirement to locate production, provide a service, train or employ workers, construct or expand ... facilities, or carry out research and development, in its territory." NAFTA Article 1106(4).

[115]NAFTA Article 1106(5).

[116]NAFTA Article 1106(6). This is in addition to the general provision in the investment chapter of the NAFTA permitting Parties to adopt measures "to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns." NAFTA Article 1114.

[117]NAFTA Article 1109 (1). Parties are further required to "permit transfers to be made in a freely usable currency at the [prevailing] market rate of exchange": NAFTA Article 1109(4).

"(a) for a public purpose;

(b) on a non-discriminatory basis;

(c) in accordance with due process of law ... and

(d) on payment of compensation ..."[118]

The criteria for acceptable compensation are further clarified in the Agreement to mean compensation at fair market value at the date of expropriation, "paid without delay and fully realizable."[119] The inclusion of these provisions in the NAFTA is at least somewhat ironic since they clearly owe much to the so-called Hull Rule with respect to nationalization, which was advanced in 1938 by the U.S. Secretary of State in response to the Mexican expropriation of agrarian and oil properties. They also reflect the position of most capital exporting states as to the conditions that attach to nationalization and expropriation today. These provisions were part of the FTA chapter on investment; the NAFTA, however, goes beyond the FTA in including additional provisions concerning settlement of disputes between one NAFTA party and an investor of another Party. Under these provisions, investors are given the right to press an arbitral claim directly against the state Party for a breach of the obligations in the investment chapter.[120] The provisions also set out in detail the procedural requirements that attach to such claims, including such matters as the appointment of arbitrators, notice requirements, place of arbitration, governing law, nature and enforcement of the final award, etc. The fact that these provisions are new to the NAFTA clearly reflects U.S. and Canadian concern over the transparency and reliability of Mexican dispute-settlement processes for investment disputes.

While the investment provisions may seem at first blush to represent an almost total capitulation to the traditional agenda of capital-exporting states with respect to facilitation of foreign investment, the NAFTA carries with it some important exceptions, especially in the energy sector. As between Canada and the United States, exceptions had already been set in place in the FTA, which exempted the oil, gas, and uranium-mining industries from the FTA obligations regarding minimum domestic ownership and performance requirements, and which did not extend to those sectors the relaxation in Canadian investment review requirements that was undertaken as part of the FTA.[121] The NAFTA similarly provides for a number of investment-related exceptions by Canada in Annex I. These tend to be more targeted than was true in the FTA,

[118]NAFTA Article 1110 (1).

[119]NAFTA Article 1110(2), (3).

[120]NAFTA Article 1116; the provisions dealing with settlement of disputes are found in Section B of Chapter 11. Under the same Article, an investor may also submit a claim on the basis of infringement of obligations with respect to monopolies and state enterprises (found in NAFTA articles 1502 and 1503.)

[121]FTA Annex 1607.3(4). The Annex merely provides that these restrictions in the identified energy industries "shall be no more restrictive than those in effect on October 4, 1987."

however, and are aimed especially at performance requirements and national treatment with respect to offshore petroleum developments.[122] The exemptions claimed by Mexico are far more sweeping than those for Canada, a result that reflects both the national sensitivities and constitutional constraints that are peculiar to the former. In Annex III, Mexico reserves to the state the right to perform a range of energy-related activities, and to refuse investment in those areas. These include, amongst others:

> "(a) exploration and exploitation of crude oil and natural gas; refining or processing of crude oil and natural gas; and production of artificial gas, basic petrochemicals and their feedstocks and pipelines; and
>
> (b) foreign trade; transportation, storage and distribution, up to and including first hand sales of ... crude oil; natural and artificial gas; [other energy] goods ...obtained from the refining or processing of crude oil and natural gas; and basic petrochemicals ..."[123]

This essentially leaves non-basic petrochemicals as an area open to foreign investment in the Mexican oil and gas sector. One advantage of the NAFTA in this respect for foreign investors is that the definition of basic petrochemicals in the NAFTA is relatively narrow (and the definition of non-basic petrochemicals correspondingly broad), and to the extent that this definition represents a floor rather than a ceiling, it opens doors to foreign investment that might otherwise be closed in the future because of the constitutional constraints on investment in basic petrochemicals in Mexico.

5. Energy services sector

The coverage of services, first in the FTA and subsequently in the NAFTA, represented at the time a significant expansion of obligations beyond the GATT, although the conclusion of the Uruguay Round and the negotiation of the General Agreement on Trade in Services (GATS) has since altered the picture significantly. Nevertheless, the NAFTA is still an important indication for non-WTO parties of the concessions that might be demanded in negotiations on a more limited bilateral or regional trade agreement. The twin principles underlying the NAFTA chapter on cross-border trade in non-financial services (Chapter 12) are national treatment (Article 1202) and MFN treatment (Article 1203), with service providers entitled to the higher of the two standards (Article 1204). The chapter is, however, subject to important qualifications. Most importantly, existing non-conforming measures are grandfathered (Article 1206) through their inclusion in each Party's Schedule to Annex I of the NAFTA. Of particular relevance to the energy sector, it is explicitly provided (Article 1201(2)(c)) that Chapter 12 does not apply to government procurement (including procurement by state enterprises). The significance of this provision

[122] Annex I also follows the FTA in providing for differential treatment of the oil, gas and uranium producing sectors with respect to review of foreign investment.

[123] NAFTA Annex III (1)(a). Annex 602.3 (1) also operates to the same effect.

relates to the fact that most of the Mexican energy sector is operated as a state monopoly, whether by Pemex (Petróleos Mexicanos) or, in the case of electricity, by the CFE (Comisión Federal de Electricidad). In the result, the major potential purchasers of energy sector services in Mexico are not subject to the disciplines of the non-financial services chapter of NAFTA. The more relevant provisions with respect to opening up the Mexican market for energy services, then, are found in the NAFTA chapter on government procurement.

6. Government procurement

The government procurement provisions of NAFTA (Chapter 10) were of particular significance in the case of Mexico because it was not a party to the GATT Procurement Code. As noted above, the provisions had added importance in the case of the energy sector since, as a matter of practice, most of the potential trade in energy services with Mexico was not captured under the NAFTA chapter on trade in services. The government procurement chapter both establishes some general principles and addresses in detail matters of specific concern. As to the former, the basic principles enunciated in the chapter are national treatment and non-discrimination; that is, a Party must accord to both goods and suppliers (including suppliers of services) of another Party "treatment no less favourable that the most favourable treatment that [it] accords to (a) its own goods and suppliers; and (b) goods and suppliers of another Party."[124] General principles are also established for such issues as valuation of contracts (Article 1002), rules of origin (Article 1004), denial of benefits (Article 1005), prohibition of offsets (Article 1006), and technical specifications (Article 1007). The two areas of concern that the chapter addresses in detail are tendering procedures (Section B) and bid challenges (Section C). Both these sections are aimed at ensuring fair, transparent, and non-discriminatory processes for these two crucial aspects of government procurement. In the case of tendering procedures, for example, the NAFTA provides detailed rules governing such matters as qualification of suppliers, invitations to participate, the use of selective tendering procedures, time limits, required documentation, negotiation disciplines, limited tendering procedures, submission, receipt and opening of tenders, and awarding of contracts. The government procurement chapter is applicable to Pemex[125] (as well as CFE), although the obligations are phased in over a period of ten years. However, in the first year of the transition period, 50 percent of Pemex procurement is made subject to the NAFTA provisions.[126] While this does provide for an immediate potential impact on trade in energy-related services, which will grow over the years, even at the end of the transition period the NAFTA will still permit Mexico to exempt from the application of Chapter 10, contracts for Pemex and CFE in an amount up to U.S.$300 million.[127]

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[124]NAFTA Article 1003(1).

[125]This is so because Pemex is listed as a government enterprise in NAFTA Annex 1001.1a-2 (8), and therefore is subject to Chapter 10 by virtue of article 1001(1)(a). The coverage does not extend, however, to procurement of fuels or natural gas.

[126]NAFTA Annex 1001.2a(2) sets out the phase in of the obligations for Pemex and CFE.

[127]NAFTA Annex 1001.2b, "Schedule of Mexico", para. 3(c). The reference is to 1994 U.S. dollars.

7. NAFTA and the environment

The NAFTA is a landmark trade agreement in many respects, especially in regard to its environmental provisions.[128] The demand on the part of environmental groups that the NAFTA include environmental provisions reflected both a dissatisfaction with the relative neglect of environmental aspects in the FTA and a growing awareness, especially in the U.S. environmental community, of the potential significance of the trade-environment interface in light of then-current GATT disputes.[129] Given that any future trade negotiations, whether across the board or sector-specific, are likely to be subject to the same or greater pressures for input from the environmental community, the NAFTA provides an important reference point as to the likely demands that developing countries in particular should anticipate. The NAFTA negotiators were faced with reconciling two, somewhat-competing goals with respect to the environment. On the one hand, there was a concern, particularly on the part of Canada and the United States, that they should be able to retain their ability to take measures to protect the environment. On the other, there was a concern that environmental measures not be used to distort the normal flows of international trade and investment; such distortions could follow from unnecessarily high environmental standards that inhibited imports into a Party, or from relaxed standards that provided an "unfair" inducement to investment (the so-called "pollution havens" concern). The NAFTA provisions represent an attempt to balance these two goals.

There is no "environmental chapter" *per se* in the NAFTA; however, environment-related provisions are scattered throughout the Agreement, beginning with references in the Preamble to the promotion of sustainable development, the strengthening of environmental laws, and the general assurance that implementation of the trade obligations would be "consistent with environmental protection and conservation".[130] The concern that Parties retain their sovereign rights to protect the environment, even where it may interfere with international trade, is most clearly reflected in NAFTA's treatment of an issue that has not been satisfactorily resolved in the GATT – that is, the resolution of potential conflicts between trade obligations arising out of the NAFTA and those imposed by virtue of international environmental agreements. The NAFTA provides that, in the event of any inconsistency between it and the trade obligations in certain

[128]The most detailed analysis of these provisions to date is Pierre Marc Johnson and André Beaulieu, *The Environment and NAFTA: Understanding and Implementing the New Continental Law* , Washington: Island Press, 1996.

[129]Most importantly, the dispute over the ability of the United States to restrict imports of tuna from Mexico on the basis that the harvesting methods employed were not "dolphin friendly". The (unadopted) GATT panel report on this dispute came under heavy attack in the United States: *United States – Restrictions on Imports of Tuna*, GATT Dispute Settlement Panel Report, BISD 39S/155, 3 September 1991.

[130]Environmentalists have noted disapprovingly, however, that there is no mention of the environment in the list of objectives of the Agreement in NAFTA Article 102.

specified international environmental agreements, the latter are to prevail.[131] This type of provision could obviously hold some special significance for petroleum exporting states in the event that instruments such as the Kyoto Protocol come into force and impose binding commitments with respect to carbon emissions.

The concern with respect to environmental sovereignty is similarly addressed in the context of investment through a provision in the investment chapter permitting a Party to take any appropriate measures (so long as they are otherwise consistent with the chapter's obligations) "to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns" (Article 1114(1)). However, this emphasis on environmental sovereignty is balanced with a recognition in the NAFTA that this discretion can be abused though a relaxation of standards to create the pollution havens referred to above. In this respect, the NAFTA provides that "Parties *recognize* that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures" and that a Party *"should not*" engage in such conduct. [132] This rather weak articulation of a duty is reflected in a similarly weak remedy – a duty to consult in the event of a complaint by another Party. Despite the weakness of the provision as it now reads, however, the principle underlying the provision – that states have a legitimate interest in the *domestic* environmental standards and practices of their trading and investment partners – is one that is of great potential importance to developing states, including petroleum exporting states. In effect, it raises in the context of investment flows the very issue of production standards that the United States raised (unsuccessfully) in an attempt to justify certain trade restrictive measures in the *Tuna Dolphin* case. It is not unrealistic to suppose that in future multilateral and regional trade negotiations there will be continuing pressure on the part of environmental communities in the United States and other capital exporting nations both to extend this scope of this principle – so as, for example, to apply the principle to commodity trade (i.e. to re-visit the *Tuna Dolphin* decision) – and to give it greater teeth. In the case of some petroleum exporting nations, this could conceivably lead to trade-related or investment-related measures with respect to the production standards employed either at the extraction stage, or (more likely) at the processing stage.

The bulk of the NAFTA provisions with potential consequences for the environment are found in the two chapters on standards: Chapter 7, Section B on sanitary and phytosanitary (SPS) measures, and Chapter 9 on technical standards. The latter is discussed further on, and has broader applicability than with respect to the environment alone. As to the former, the NAFTA negotiators were clearly aware of the progress of the Uruguay Round negotiations on SPS standards, and the resulting approach in Chapter 7 is very similar to that taken in the WTO

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[131]NAFTA Article 104. The specified conventions are: the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES), the *Montreal Protocol on Substances that Deplete the Ozone Layer*, and the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*. The same treatment is to be accorded any treaties listed in Annex 104.1. This list initially contained a Canada-U.S. agreement on transboundary movement of hazardous wastes and a U.S.-Mexico agreement on environmental cooperation in their border area. However, other agreements can be added to this list if the Parties so decide (Article 104(2)).

[132]NAFTA Article 1114 (2); emphasis added.

Agreement on the Application of Sanitary and Phytosanitary Measures. Given the close similarity to the WTO commitments, however, and given the low probability that such measures would hold specific interest for petroleum exporting states, the NAFTA SPS provisions will not be addressed in detail here.[133]

The NAFTA environmental provisions came under heavy attack from the environmental community in North America for their perceived weakness, which was often linked to the GATT influence on many of the NAFTA provisions. Environmentalists were particularly concerned with the willingness of Mexico to enforce its environmental laws adequately. The ensuing political pressures led to the conclusion of three separate "side-deals", which while not part of the NAFTA *per se*, were clearly part of the price that was required before the NAFTA proper could gain approval in the U.S. Congress. These side-deals involved environmental cooperation, labour cooperation and emergency actions.[134] The first of these, the North American Agreement on Environmental Cooperation (NAAEC), was seen as an attempt to put trade-related environmental issues front and centre, rather than treat them as incidental to trade rights and obligations, as was seen inevitably to be the case for trade agreements negotiated by trade experts. An additional concession to environmental groups was the establishment of a special bank to fund environmental projects at the border, that was included in the U.S. implementing legislation for NAFTA. As with some of the provisions in the NAFTA, the side deals on labour and environment are likely to represent a minimum political demand by North American environmentalists for future trade deals involving developing states (since the impetus for these agreements was clearly a concern that lower labour and environmental standards in Mexico would be used as unfair instruments of competition).[135]

While there is some indirect reference to trade goals in the NAAEC[136], it is preeminently an environmental agreement. The objectives of the NAAEC are broad, including "the protection and improvement of the environment ... for the well being of present and future generations" (Article 1(a)), the promotion of sustainable development (Article 1(b)), strengthening environmental cooperation (Article 1(f)), improving compliance with environmental norms, and promoting "transparency and public participation in the development of environmental laws,

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[133]The provisions are discussed in detail in Johnson and Beaulieu, op. cit.

[134]*North American Agreement on Environmental Cooperation Between The Government of the United States of America, The Government of Canada, and The Government of the United Mexican States*, Sept. 13, 1993, (1993) 32 *International Legal Materials* 1480 (entered into force 1 January 1994); *North American Agreement on Labour Cooperation*, Sept. 9, 1993, (1993) 32 *International Legal Materials* 1499; *Understanding Between the Parties to the North American Free Trade Agreement Concerning Chapter Eight Emergency Action*, Sept. 14, 1993, (1993) 32 *International Legal Materials* 1519.

[135]And indeed a similar – although institutionally more modest – Canada-Chile Agreement on Environmental Cooperation was subsequently negotiated incidental to the negotiations on the Canada-Chile Free Trade Agreement.

[136]This might be inferred from the reference in the NAAEC objectives to the avoidance of the creation of trade distortions or barriers (Article 19(e))and to the promotion of "economically efficient and effective environmental measures" (Article 1(I)).

regulations and policies" (Article 1(h)). The substantive obligations of the NAAEC are, however, relatively narrow and are of two general types; the first (to which most of the Agreement is directed) has to do with domestic environmental law, while the second involves international environmental cooperation. As to the former, the NAAEC is directed not at specific environmental laws and regulations, but rather at general commitments by the Parties with respect to such matters as reporting periodically on the state of the environment, developing measures to deal with environmental emergencies, promoting environmental education and research, assessing environmental impacts "as appropriate", and promoting the use of economic instruments (Article 2(1)). However, the NAAEC leaves it to each Party to set its own level of environmental protection.[137] The emphasis in the NAAEC, then, is not on specifying the substance of environmental laws and regulations, but in assuring that they are transparent and are enforced. With respect to the latter, the NAAEC includes a series of undertakings designed to attain effective enforcement of those domestic environmental laws and regulations that exist.

The final provisions of special interest in the NAAEC are those related to dispute resolution. These provisions were hotly debated at the time, as one of the critical issues in the debate over the side deal was whether or not it would have "teeth". On the one hand, U.S. environmentalists (reflected in congressional sentiment) were insistent that the agreement be more than just a political statement; on the other, Canada clearly took the position that any enforcement mechanism that included trade sanctions was unacceptable. The NAAEC then represents a compromise between these two positions. However, it should be noted, first, that the dispute-resolution procedures are highly limited in their application, and are available only with respect to a Party's "persistent pattern of failure ... to effectively enforce its environmental law" (Article 22(1)). Second, the path that must be taken before sanctions are imposed is very tortuous. This makes it rather unlikely that the dispute resolution procedures will often be used (see the following section for a recent submission regarding alleged non-application of environmental law by California).

8. Technical standards

Technical standards, other than SPS measures (referred to above) are dealt with in Chapter 9 of the NAFTA, which builds on both the FTA and the GATT Standards Code. The chapter applies to other standards-related measures (SRMs)[138] (excluding also certain requirements covered by the chapter on government procurement) "that may, directly or indirectly, affect trade in goods or services between the Parties" (Article 901). The NAFTA

[137] NAAEC Article 3, which also provides that "each Party shall ensure that its laws and regulations provide for *high levels* of environmental protection and shall *strive to continue* to enforce those laws and regulations" (emphasis added). There is, however, no attempt to define what is meant by "high levels" of protection.

[138] A standards-related measure is defined as including "a standard, technical regulation or conformity assessment procedure": NAFTA Article 915(1). Each of these is further defined in the Article. Essentially a standard refers to a non-mandatory product or service standard; a technical regulation refers to a mandatory product or service standard; and a conformity assessment procedure refers to a procedure used to determine compliance with a technical regulation or standard.

establishes four basic rights and obligations with respect to SRMs: *first*, the right of each Party to take such measures (Article 904(1)); *second*, a right to impose "the levels of protection that it considers appropriate" (Article 904(2)); *third*, an obligation to accord, in relation to SRMs, both national treatment and MFN treatment to goods and service providers of other Parties; and *fourth*, to avoid the use of SRMs so as to create "an unnecessary obstacle to trade between the Parties" (Article 904(4)). These provisions are designed to balance the sovereign rights of parties to protect their legitimate interests with respect to health, safety, the environment and consumer protection, while at the same time minimizing the trade-distorting use of such measures. As is true of the SPS provisions, the NAFTA encourages the use of international standards[139] and commits the Parties to working towards compatibility and equivalence of SRMs (Article 906).[140] Much of the chapter focuses on putting in place the procedural safeguards to militate against the improper use of SRMs, including provisions specifying the procedures for conformity assessments (Article 908), requirements for notification, publication and provision of information (Article 909), and the creation of inquiry points to respond to queries from Parties and interested individuals (Article 910). The Agreement establishes a Committee of Standards-Related Measures to both monitor and facilitate the implementation of the Parties undertakings with respect to SRMs; the Committee also serves as the forum for inter-Party consultations with respect to SRMs for the purposes of the NAFTA's dispute resolution chapter (discussed *infra*). While there are parallels between the constraints on SPS measures in Chapter 7 and those on SRMs in Chapter 9, there are also some important differences – differences which suggest that Chapter 9 extends much more freedom for states to act in the imposition of standards. It has been pointed out, for example, that while Chapter 7 refers to the right of Parties to take SPS measures "*necessary* for the protection of human, animal or plant life or health" (Article 712(1)), Chapter 9 allows Parties to impose SRMs "*relating*" to health, environment or consumer protection (Article 904(1)).[141] It has been argued in the same vein that the disciplines on SRMs are especially loose when one notes what is *not* included in Chapter 9 – specifically, any requirement that either scientific principles or risk assessment be used in setting SRMs.[142]

As to the specific implications of the SRM provisions for the petroleum and petroleum products sector, the most likely impact would be felt in areas such as gasoline additives that might have an impact on health. Indeed, one such case has already arisen in Canada-U.S. trade relations, concerning Canada's import ban on MMT, a gasoline additive. The ban was challenged by an

[139]NAFTA Article 905 provides that a "Party shall use, as a basis for its [SRMs], relevant international standards or international standards whose completion is imminent, except where [they] would be an ineffective or inappropriate means to fulfill its legitimate objectives ..."

[140]The chapter also permits the use of risk assessment, subject to the avoidance of unjustified discriminatory treatment of other Parties' goods and services providers and the proviso that it not amount to a disguised restriction on trade: NAFTA Article 907

[141]For a discussion of the implication of this distinction in the light of GATT jurisprudence, see Johnson and Beaulieu, op.cit., at 89-91.

[142]Johnson and Beaulieu, Ibid., page 94.

American firm, Ethyl Corporation, not on the basis of the NAFTA SRM provisions, however, but on the basis of the investment chapter – the argument being that the import ban amounted to an expropriation of Ethyl's investment in its distribution system in Canada. Although the corporation announced its intention to proceed against Canada under the Chapter 11 arbitration provisions, the government and the company ultimately reached a settlement in the matter. Perhaps one of the more important lessons to be learned from the affair is that the ban was not challenged, and indeed would very likely have withstood a challenge, based on the SRM provisions alone; the company was successful in reaching a settlement only because of the discriminatory nature of the ban (i.e., the measure in question was directed not at the *use* of the additive *per se* but at the *trade* in the additive).

Another recent dispute between Canada and the United States in the area of gasoline additives concerns an executive order issued by the Governor of California on March 1999 requiring that Methyl Tertiary-Butyl Ether (MTBE) be phased-out of gasoline by no late than 31 December 2002. According to Californian authorities, because of leaking underground fuel storage tanks (USTs), MTBE poses an environmental threat to groundwater and drinking water.

MTBE, which is imported to a very significant extent, has at present approximately 85% of the U.S. oxygenate market. Ethanol has about 8%. The remainder is held by other oxygenates. If MTBE is eliminated, ethanol will likely take the "lion's share" of the U.S. market.

According to Methanex Corporation -- a Canadian methanol-producing company which exports methanol to the United States mainly for the production of MTBE -- the measures introduced by the Californian authorities are inconsistent with a range of U.S. obligations under the WTO agreements, while the most effective and least trade restrictive way to deal with water contamination would be to enforce California's environmental laws and regulations related to water resources protection and to the regulation of USTs:

- they establish technical regulations which raise "unnecessary obstacles" to international trade, inconsistent with the WTO Agreement on Technical Barriers to Trade;

- as MTBE, methanol and ethanol are all "oxygenates" -- a class of like products -- the measures accord less favorable treatment to imported oxygenates (MTBE and methanol) than to domestic oxygenates (ethanol) inconsistent with the national treatment obligation;

- by allowing some oxygenates to be imported (ethanol) while raising barriers to the import of other oxygenates, the measures accord less favorable treatment to some WTO members inconsistent with the MFN obligation;

- by restricting or prohibiting the amount of MTBE and methanol that may be imported into the United States, the measures may raise quantitative restrictions inconsistent with GATT 1994 Article XI:1;

- by supporting the production and use of domestically-produced ethanol, the measures

violate the principle in GATT 1994 Article III:1, and the obligation in GATT 1994 Article III:2, second sentence, not to apply measures so as to afford protection to domestic production;

- the subsidies and grants paid to support the production of domestically-produced ethanol as a replacement for imported fuels violate Article 3.1(b) of the WTO Agreement on Subsidies and Countervailing Measures; and

- the U.S. has not notified these subsidies as agriculture subsidies, which raises questions concerning whether it has violated its obligations under the WTO Agreement on Agriculture.

In October, 1999, Methanex requested the Commission on Environmental Cooperation, pursuant to Article 14 of the NAEEC, to address the case of California's failure to enforce its environmental laws.

9. Intellectual property

The NAFTA provisions on intellectual property (IP) were at the time unique to a trade agreement, although they were influenced very much by the then-current Uruguay Round negotiations on Trade Related Aspects of Intellectual Property Rights (TRIPs). While the FTA did not include IP provisions, this was largely explicable in terms of the generally similar approach to IP in Canadian and U.S. law. The case was, however, much different for Mexico, which, for example, was not even a party to the Berne Convention. The concern with respect to Mexican protection of IP would likely be reflected in any future trade negotiations with developing countries, especially in the energy sector where proprietary rights to processes, computer programmes and data bases are often a vital concern. The IP provisions in the NAFTA (Chapter 17) on the one hand commit Parties to the twin goals of providing "adequate and effective protection *and enforcement* of intellectual property rights, while ensuring that [such enforcement] measures ... do not themselves become barriers to legitimate trade" (Article 1701(1), emphasis added); however, the primary concern of the NAFTA is clearly with the former goal rather than the latter. The IP provisions build on existing international law by requiring compliance with the substantive obligations of four leading IP conventions, although it does not require adherence to the conventions *per se*.[143] Two of these – the Berne Convention and the Paris Convention – are of direct relevance to the energy sector. Apart from complying with the specified conventions, the Parties are bound generally to extend the principle of national treatment (with some limited qualifications) in the protection and enforcement of IP rights (Article 1703).

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[143]NAFTA Article 1701(2); the four conventions are: the 1971 *Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of the Phonograms*, the 1971 *Berne Convention for the Protection of Literary and Artistic Works*, the 1967 *Paris Convention for the Protection of Industrial Property*, and either the 1978 or 1991 *International Convention for the Protection of New Varieties of Plants* (UPOV Convention). Parties are free to extend greater IP protection than in these conventions, unless this involves an inconsistency with the NAFTA.

The NAFTA also expands in some important respects upon existing conventional obligations. This is true with respect to its provisions on copyright (Article 1705), where the wording of the Berne Convention is clarified to include computer programs as literary works and to specify that data compilations constitute intellectual creations subject to protection. Again, both these aspects of IP are of particular interest to the petroleum and petroleum products sectors. Other IP provisions of particular interest to the energy sector in the NAFTA include those with respect to patents (Article 1709), trade secrets (Article 1711) and industrial designs (Article 1713). Apart from these specific obligations, the NAFTA is important for its requirements regarding the enforcement of IP rights – an area that has been at the heart of many north-south IP disputes. In this respect, the NAFTA requires Parties to "ensure that enforcement procedures ... are available under [their] domestic laws so as to permit effective action to be taken against any act of infringement of [IP] rights ... including expeditious remedies to prevent infringements and remedies to deter further infringements" (Article 1714(1)). To this end, the NAFTA specifies the procedural and remedial provisions that must be included domestically in both civil (Article 1715) and criminal (Article 1717) law, including provisional measures (Article 1716).[144] Finally, there are general obligations with respect to cooperation and technical assistance on IP issues (Article 1719). In the result, the IP chapter imposes important IP obligations on Parties, especially with respect to enforcement. While this did not result in major changes to Canadian or U.S. law, it did necessitate important changes to Mexico's IP regime.[145] For a petroleum-exporting state not a party to TRIPs, the NAFTA experience suggests that trade negotiations with WTO parties are likely to involve some IP element, and may involve substantial changes to the existing domestic IP regime.

10. Competition policy and state enterprises

It is increasingly recognized that competition policy and the existence of state enterprises (especially state monopolies) may have important consequences for international trade. Nevertheless, with some limited exceptions[146], these areas have not traditionally been the subject of international trade agreements. The NAFTA, then, was largely breaking new ground with its chapter (chapter 15) on Competition Policy, Monopolies and State Enterprises (the FTA had no such chapter), and perhaps not surprisingly the provisions in this respect are not particularly onerous. For example, with respect to competition law, there is only a general undertaking by Parties to "adopt or maintain measures to proscribe anti-competitive business conduct and to take appropriate actions with respect thereto" (Article 1501(1)) and to cooperate on enforcement of competition law (Article 1501(2)). Significantly, though, these obligations are not subject to

[144]The NAFTA also specifies procedures for enforcement of IP law at the border: Article 1718

[145]For example, it has been pointed out that the NAFTA requirement that domestic IP law provide courts with the ability to issue injunctive relief "was an entirely new addition to the civil law in Mexico": Barry Appleton, *Navigating NAFTA; A Concise User's Guide to the North American Free Trade Agreement* (Toronto: Carswell, 1994), at 129.

[146]For example, GATT Article XVII (State Trading Enterprises) and GATT Article II:4 (authorized monopolies for importation of products).

challenge under the NAFTA's dispute settlement provisions (Article 1501(3)). As to monopolies and state enterprises, Parties are given a similarly free hand; the NAFTA explicitly does not prevent Parties from designating monopolies (Article 1502) or creating state enterprises (Article 1503). However, it does subject these entities to certain constraints. In the case of monopolies, these obligations are essentially four-fold (Article 1502). *First*, wherever a designated monopoly is exercising "regulatory, administrative or other governmental authority" that has been delegated to it in connection with its monopoly good or service, it must act consistently with the respective Party's NAFTA obligations.[147] *Second*, it must act "solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market". *Third*, it must not discriminate against other Parties' investors or providers of goods or services. *Fourth*, it must not act anti-competitively in non-monopolized markets so as to adversely affect the investments of other Parties' investors. State enterprises are also constrained in their activities (Article 1503). Parties are required to ensure that where such enterprises are exercising regulatory, administrative or other governmental authority delegated to them, they must comply with the Parties' obligations with respect to investment (chapter 11) and financial services (chapter 12); a state enterprise is also required to accord "non-discriminatory treatment in the sale of its goods or services to investments [made by] investors of another Party."[148] Finally, the chapter provides for the establishment of a Working Group on Trade and Competition, which is to report back within five years, with recommendations for possible further work regarding the relation between trade and competition law and policy.

The import of all this for the petroleum and petroleum products sector will probably not be great. Neither Canada nor the United States uses designated monopolies or state enterprises in these sectors. With respect to Mexico, Pemex is state enterprise, but as suggested earlier, the important provisions of NAFTA with respect to Pemex are found in the chapter on government procurement. Pemex's role as a body exercising governmental authority would not seem to be a major source of concern, nor would its ability to discriminate in selling its products to foreign investors.

11. Institutional arrangements and dispute resolution

The NAFTA's provision for review and dispute settlement with respect to antidumping and countervailing duty matters have been referred to earlier and are dealt with in a separate chapter of the agreement (Chapter 19). In addition to these provisions, however, the NAFTA provides a dispute-resolution mechanism for the Agreement generally in Chapter 20. Chapter 20 establishes the Free Trade Commission, consisting of cabinet-level representatives as a means of supervising the NAFTA's implementation and resolving disputes with respect to its interpretation

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[147]This obligation may be enforced by an investor under the arbitration provisions of NAFTA's investment chapter pursuant to Article 1116(1)(b) where the monopoly has breached the substantive obligations of the investment chapter.

[148]NAFTA Article 1503(3); this obligation is may similarly be enforced by investors under Article 1117(1)(a) of the investment chapter.

or application.[149]

Chapter 20 allows a Party to invoke the dispute settlement provisions of that chapter whenever it "considers that an actual or proposed measure of another Party is or would be inconsistent with [its NAFTA] obligations or cause nullification or impairment" (Article 2004)[150]. This right to invoke the dispute-settlement provision of NAFTA does not preclude Parties from relying in the alternative on the dispute-settlement provisions of the WTO where the dispute rests on "substantially equivalent" grounds in the two fora (Article 2005(1),(2)).[151] Once the choice is made, however, to rely on another forum such as the WTO, that forum will be used to the exclusion of the NAFTA (Article 2005(6)).

The first step in the dispute-settlement process is a request for consultation (Article 2006); failing resolution of the dispute, either Party may request the Free Trade Commission for assistance in resolving the matter, which may involve recourse to technical experts and reliance on such approaches as good offices, mediation, conciliation, etc. (Article 2007(5)). In the event there is still a failure to resolve the dispute, the matter may go to arbitration by a panel, the nature and procedures of which are described in the NAFTA. Upon receipt of the final arbitral report, the resolution of the dispute will normally conform to the panel recommendations, and non-implementation may give rise to a right of the complaining Party to suspend "benefits of equivalent effect" (Article 2019).

IV. THE ENERGY CHARTER TREATY

1. Introduction and background

The Energy Charter Treaty[152] (ECT), signed in Lisbon, Portugal on 17 December 1994, establishes for the energy sector a regime for investment, trade, and transit. The signatories to the ECT include all the members of the European Community, several central and eastern European

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[149]NAFTA Article 2001; this includes the supervision of the various working groups and committees established under the Agreement, some of which have been discussed earlier in this paper.

[150]The right to request invoke a claim of nullification and impairment (that is, the denial of a benefit that "could reasonably be expected to accrue" under the Agreement) is limited by the definition in NAFTA Annex 2004; the definition explicitly excludes, *inter alia,* any provision of the energy chapter relating to investment. For reasons discussed earlier – and especially the limited possibilities for investment in Mexico's energy sector given existing constitutional constraints –this limitation may not have much practical importance.

[151]There are some limited exceptions to this provision; for example, where a Party relies on NAFTA Article 104 (Relation to Environmental and Conservation Agreements) as a justification for its measures, then the complaining Party is limited in that respect to the NAFTA dispute settlement procedures. Similarly, where the matter involves SPS measures under Chapter 7 or SRMs under Chapter 9, the responding Party has the right to have the matter considered solely under the NAFTA procedures. (NAFTA Article 2005 (3), (4).

[152]*The Energy Charter Treaty*, 12 December 1994, (1995) 30 *International Legal Materials* 381, *in force* 16 April 1998.

countries, Russia and all other newly independent states of the former Soviet Union, Australia, and Japan. The ECT came into force on 16 April 1998, although ratification is still pending with some of the signatories. Several of these signatories are applying the ECT provisionally. The history of the ECT began in 1990 as the USSR was collapsing and the European Council was searching for an appropriate political response to the changes occurring in the successor states. In June, 1990, the Dutch Prime Minister at the time, Ruud Lubbers, responded to these changes by proposing to his colleagues in the European Council that economic recovery and democratic restructuring in the former Soviet Union could be secured by intensified trade relations and cooperation in the energy sector. This proposal marked the beginning of a process which led in December 1991 to the signing of the European Energy Charter,[153] a non-binding declaration of policy designed to promote the development of an efficient energy market throughout Europe, and then three years later to the signing of the ETC.

The ECT is reminiscent of the NAFTA Energy Chapter in many respects, especially in its reference to GATT and WTO principles, and in the inclusion of provisions for the protection of foreign investment and a mechanism for the settlement of disputes between governments and between governments and investors. The following sections describe the most important provisions of the ECT and also compare the ECT approach to that taken in the NAFTA.

2. Energy and trade: influence of GATT/WTO principles

With respect to trade provisions, the ECT is designed to preserve rights and obligations of GATT parties and to extend to non-parties a GATT-based standard for trade in the energy sector. Like the NAFTA, the ECT is rooted firmly in the GATT/WTO framework. This is of even more significance for the former than the latter, given that (unlike for the NAFTA parties), not all ECT signatories are members of the WTO, with Russia being the most important exception in this respect. Thus, while the NAFTA is useful in both explicitly recognizing that energy goods are by and large goods like any other, and in increasing the scope of trade disciplines attaching to these (and other) goods, much of what the NAFTA provides with respect to trade in petroleum sector products can in any event be achieved by the parties as members of the WTO. This is obviously not true for Russia at present.

While the ECT does make reference to the GATT, it differs from the NAFTA in that it does not actually incorporate GATT articles by reference. Rather, the GATT appears in different places in the ECT, and the reference is sometimes to the GATT 1947 and at others to the GATT 1994 (i.e. post-Uruguay Round). With respect to ECT parties that are also parties to the GATT there is a general provision (Article 4) that nothing in the ECT shall derogate from GATT obligations as between GATT parties *inter se*. There is also a more specific provision that deals with the GATT and energy trade; again, though, this falls short of actually incorporating GATT obligations into the ECT. Article 29 provides that, where one of the trading parties (such as

[153] Adopted and signed on 17 December 1991 at The Hague, the Netherlands.

Russia) is not party to the GATT, trade in energy materials and products[154] is to be subject to the trade rules as represented by the pre-Uruguay Round GATT 1947. Obviously, in the event that all ECT parties eventually become members of the WTO, this provision will no longer have any relevance, and the trade obligations associated with the latter will be effective.

Specific trade obligations and exceptions are found at various places throughout the treaty; some of these, such as the provisions on TRIMs are discussed *infra*. As with the NAFTA, these provisions follow the trends in GATT law and practice as reflected in the Uruguay Round, although there are some differences on how the NAFTA and ECT treat GATT obligations. While, as discussed earlier, the NAFTA tended to broaden the scope of GATT principles through interpretation and additions, this is not the case for the ETC. For example, with respect to the GATT national security provision (Article XXI), the NAFTA narrowed the possible scope of this exception (i.e. broadened the coverage of GATT disciplines) – both generally and with specific reference to the energy sector – to make it less available as a means of escaping trade obligations. The ECT, however, provides in part that the treaty "shall not be construed to prevent any Contracting Party from taking any measure *which it considers necessary*:

(a) for the protection of its essential security interests *including* those:

(i) relating to the supply of Energy Materials and Products to a military establishment; or

(ii) taken in time of war, armed conflict or other emergency in international relations.

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(c) *for the maintenance of public order*."[155]

These provisions arguably allow for a more expansive reading of the exception than does the GATT. For example, by using the word "including" in clause (a), the ECT indicates that the list of what may qualify as an essential security interest is merely illustrative and not exhaustive, whereas the list in GATT Article XXI provides no such indication. Second, the inclusion of the broad category of maintenance of public order is an addition to the GATT exceptions.

3. Foreign investment under the ECT

The agreement on principles to govern foreign investment in the energy sector was a critical goal of Western states in the negotiations on the ECT – as indeed it was during the

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[154]These are essentially the same as energy goods as defined by the NAFTA, with some minor exceptions not relevant to this paper.

[155]ECT, Article 24(3); emphasis added.

NAFTA negotiations. The result for the ECT differs again, however, from the regime that was negotiated for the NAFTA. The foreign investment regime under the ECT makes a distinction between pre-investment (when the issue is one of access) and post-investment (when risk is assumed and the investor is vulnerable to the national policies of the host country) stages. Broadly speaking, the pre-investment stage is characterized by "soft law", with a general commitment by parties to "encourage and create stable, equitable, favourable and transparent conditions for Investors of other [ECT] Parties", including a commitment to accord the investments of these investors "fair and equitable treatment."[156] There is similarly a weak commitment to "endeavour" to accord to investors making investments the better of national or MFN treatment.[157] These provisions stand in contrast to the NAFTA, where NAFTA investors are entitled to national treatment with respect to the establishment as well as operation and disposal of investments.[158] The ECT does, however, specifically contemplate the conclusion of a supplementary agreement with respect to obligations at the pre-investment stage.[159]

The post-investment stage brings with it obligations more reminiscent of the NAFTA. At this stage, the ECT imposes "hard law" obligations enforceable by international arbitration. Investors are accorded full national treatment and most-favoured-nation treatment.[160]. Additionally, expropriation or nationalization is conditioned on the traditional requirements insisted on by capital-exporting states – that is, that the expropriation be for a public purpose, that it be non-discriminatory, that it be subject to due process, and that it be accompanied by prompt, adequate and effective compensation (the so-called Hull Rule).[161] The inclusion of these requirements is in line with the growing trend among non-Western states to accept such obligations in multilateral arrangements and bilateral investment treaties (BITs). In the result, investors under the ECT would receive protection for their energy sector investments similar to that found in the NAFTA and BITs, but would be subject to the possibility of discrimination at the stage of initial investment.

4. Sovereignty over energy resources

The ECT, unlike the NAFTA, includes a specific article on sovereignty over energy resources. This would appear to be an attempt to provide some counterbalance to the provisions regarding protection of foreign investors, although it is not clear that the article adds significantly

[156]ECT, Article 10 (1).

[157]ECT, Article 10(2), (3).

[158]NAFTA, Article 1102(1); the investments of NAFTA investors are also separately entitled to national treatment: Article 1102(2).

[159]ECT, Article 10(4).

[160]ECT, Article 10.

[161]ECT, Article 13. This is the equivalent of NAFTA Article 1101.

to the substance of the treaty. There is a general provision recognizing "state sovereignty and sovereign rights over energy resources".[162] More specific provisions note that the treaty shall not prejudice the system of property ownership with respect to energy resources[163] and that each state retains its rights to decide which areas it wishes to see developed, the rate at which its resources will be exploited, the associated environmental and safety conditions for exploration and exploitation, the appropriate fiscal regime attaching to energy resource development, and the possible direct or indirect participation by the state in such development.[164] In sum, then, the treaty confirms that states retain broad rights to manage their energy resources, although this is balanced by what would seem to be a soft law commitment to "undertake to facilitate access to energy resources, inter alia, by allocating [energy development rights] in a non-discriminatory manner on the basis of published criteria".[165] It is not at all clear that any of this language is required to confirm the traditional and well-recognized rights of states at international law to control natural resource development within their boundaries. NAFTA's approach to the problem of Mexican constitutional constraints on foreign investment in the energy sector was not to include a broad reference to sovereign rights but rather to exempt significant parts of its energy sector from a number of specific provisions which would have impinged on constitutional provisions.[166]

5. Competition law and the energy sector

The growing nexus between competition law and international trade and investment flows has been recognized both within the WTO and such regional frameworks as the NAFTA. The NAFTA, however, dealt with this issue in a somewhat rudimentary and largely hortatory fashion, recognizing the rights of parties to proscribe anti-competitive practices but providing that the parties would "consult from time to time about the effectiveness of the measures"[167] and cooperate on issues of competition law enforcement policy".[168] However, neither of these commitments is subject to the dispute-settlement provisions of the NAFTA.[169] There is also

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[162]ECT, Article 18(1).

[163]ECT, Article 18(2).

[164]ECT, Article 18(3).

[165]ECT, Articles 18(4).

[166]The NAFTA does include one broad requirement that is somewhat analogous to the approach taken in the ETC. This is the general provision in Article 601(1) – i.e. in the energy chapter of NAFTA – that "The Parties confirm their full respect for their Constitutions." The insertion of this in the energy chapter is clearly designed to recognize the constitutional restraints on Mexico – although the legal consequences of the wording are less than clear.

[167]NAFTA, Article 1501(1).

[168]NAFTA, Article 1501(2).

[169]NAFTA, Article 1501(3).

provision for the creation of a working group on trade and competition[170]; however, possibly because of U.S. reluctance to change substantially its antidumping laws and policies, this has produced nothing of real substance.[171] The NAFTA of course has no clauses addressing the trade and competition policy issue specifically in the energy sector. By contrast, the ECT provides a much more aggressive approach to dealing with trade and competition in the energy sector. The ECT not only includes a general soft law obligation on parties to "work to alleviate market distortions and barriers to competition"[172] in the sector and to cooperate with other parties in this respect, it also provides for a framework for collaboration between competition authorities and allows a party to request competition law action and to raise it under the party-to-party dispute settlement procedure.[173] Admittedly, these provisions are not as significant as they may appear at first blush; while parties must indeed entertain complaints from other parties that some anti-competitive conduct "is adversely affecting an important [relevant] interest", the duty on the party being notified is merely that its competition authorities consult with their equivalents in the complainant party and "accord full consideration to the request of the notifying ... Party in deciding whether or not to initiate enforcement action."[174] While somewhat modest, however, these provisions do represent a significant advancement on the approach taken in the NAFTA.

It should be noted finally with respect to competition policy and trade that the objectives of the parties in the two agreements were almost certainly somewhat different. In the case of the NAFTA, the provisions reflect both a U.S. concern over weak competition policy elsewhere (and a concomitant interest in maintaining the right to vigorously enforce its own competition policy, even where there may be significant extra-territorial effects) and a Canadian/Mexican concern over the reach of U.S. competition policy, which has been the occasion of bilateral friction in the past. In the case of the ECT, the primary concern was not the overly vigorous use of competition policy, but rather its non-enforcement, especially with respect to the energy sector in eastern and central Europe, where the industry has been dominated by large and powerful state monopolies or oligopolies.

6. Environment and the energy sector

As discussed earlier, the NAFTA has no environmental chapter *per se*, although there are a number of environment-related provisions – albeit provisions that are largely soft law in their formulation – at different places in the Agreement. Nor does the NAFTA have any environmental provisions directed specifically at the energy sector. In contrast, the ECT does include a number

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[170]NAFTA, Article 1504.

[171]Lawrence L. Herman, "NAFTA and the ECT: Divergent Approaches with a Core of Harmony" (1997) 15 *Journal of Energy & Nat. Res. Law* 129, at 150-51.

[172]ECT, Article 6(1).

[173]ECT, Articles 6(5), 27.

[174]ECT, Article 6(5).

of provisions on environmental aspects of the energy sector. As with the NAFTA, these provisions are primarily of a soft law character. However, their articulation, their modernity and their extensiveness arguably represent an improvement over NAFTA. For example, the ECT explicitly accepts such modern concepts of international environmental law and policy as sustainable development, the precautionary principle and the polluter pays principle, and considers environmental impacts in the context of the energy cycle, rather than in isolation.[175] Similarly, the ECT takes an expansive view of what constitutes an environmental impact, to include effects on cultural heritage and socio-economic effects.[176] The actual obligations to give effect to these principles are typical of modern soft law multilateral environmental agreements. They include duties to take environmental factors into account in formulating energy policy, to "promote market-oriented price formation and a fuller reflection of environmental costs and benefits throughout the Energy Cycle", to promote the use of cleaner fuels and renewable energy sources, and to promote transparent and early environmental assessment of energy projects.[177] There is also a limited role for dispute resolution with respect to the environmental obligations set out in the ECT; where appropriate international fora do not exist for the resolving disputes over these provisions, they may be reviewed by the Charter Conference with an aim to resolving them.

7. Dispute resolution

The dispute-resolution provisions of the ECT reflect an approach similar to the NAFTA in at least one important respect – both agreements provide for dispute settlement not only as between the contracting parties to the treaty, but also as between investors and parties directly. As noted earlier in the context of the NAFTA, this represents a divergence from the traditional position at international law that it is up to states to espouse the claims of their nationals who have been injured by the actions of another state (although the NAFTA was not the first treaty to allow a direct right of action by nationals against other states). As to the settlement of disputes between the parties themselves, in the event that it cannot be decided through diplomatic channels, the treaty provides – with certain exceptions – for the possibility of binding arbitration, the procedures for which are established in the ECT[178] and which are typical of international arbitral practice. With respect to state-investor disputes – that is, disputes with respect to Part III of the ECT

[175]The energy cycle is defined as "the entire energy chain including activities related to prospecting for, exploration, production, conversion, storage, transport, distribution and consumption of the various forms of energy, and the treatment and disposal of wastes, as well as decommissioning, cessation or closure of these activities, minimizing harmful Environmental Impacts." ECT, Article 19(3)(a).

[176]The ECT defines an environmental impact as "any effect caused by a given activity on the environment, including human health and safety, flora, fauna, soil, air, water. climate, landscape and historical monuments or other physical structures or the interactions among these factors; it also includes effects on cultural heritage or socio-economic conditions resulting from alterations to those factors": ECT, Article 19(3)(b).

[177]ECT, Article 18(1). The Article includes a series of other measures of a general nature including increasing the awareness of environmental issues and cooperating on environmental programmes.

[178]ECT, Article 27.

(Investment Promotion and Protection) – again the first recourse is amicable settlement, failing which the investor may submit the dispute for resolution either to the courts or administrative tribunals of the state in question or to the mechanism established under the treaty.[179] This right is, however, subject to important qualifications. While the parties to the ECT give their "unconditional consent" to the submission of the dispute to arbitration, a significant number of the parties (including Russia) reserve this consent where the investor has previously submitted the dispute for resolution to domestic tribunals or to some other process previously agreed to by the state and investor.[180] In the event that arbitration goes forward, it is to be carried out through one of the internationally recognized arbitration mechanisms specified in the treaty.[181]

8. Other matters

The ECT contains a number of other provisions on issues of relevance to the energy sector. Some of these are of specific interest to the ECT context; others are of more general interest. An example of the former is the ECT provisions on transit of energy goods, a matter that is obviously of special concern to Europe – and which is not an issue that was addressed explicitly in the NAFTA. Under the ECT, parties are required to "take the necessary measures to facilitate the Transit of Energy Materials and Products" on a non-discriminatory basis.[182] There are also broad undertakings to encourage cooperation in the modernization of energy transport facilities and generally to facilitate the smooth operation (including interconnection) of such facilities.[183] However parties are not required to permit the construction of transport facilities or additional transit through new facilities where it can demonstrate that this "would endanger the security or efficiency of its energy systems, including the security of supply."[184] Of particular interest, and perhaps reflecting the special importance of energy transit in Europe, the article on transit includes

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[179]ECT, Article 26(2). There is also the possibility that the investor and state may have agreed to some other agreed dispute settlement procedure, which would then be applicable: Article 26(2)(b).

[180]ECT, Article 26(3)(b). The states reserving this consent are listed in Annex ID to the treaty. It should be noted that states parties cannot avail themselves of any such exception under the NAFTA; under the NAFTA, however, the investor must waive its right to initiate or continue any other dispute settlement processes, including those before domestic courts or administrative tribunals: NAFTA, Article 1121(1)(b). An even more striking reservation that is included in the ECT is the right of a party to reserve consent as to arbitration with respect to the last sentence in ECT Article 10(1), which provides: "Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party." But while this would seem to hold potentially far-reaching consequences for the ambit of arbitration procedures, the right to reserve consent in this respect is limited to parties listed in Annex IA to the treaty. In fact, there are only four such parties: Australia, Canada, Hungary and Norway.

[181]These include the International Centre for Investment Disputes, a sole arbitrator or ad hoc tribunal established pursuant to UNCITRAL, or a proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce: ECT, Article 26(4).

[182]ECT, Article 7 (1).

[183]ECT, Article 7(2).

[184]ECT, Article 7(5).

its own dispute-resolution provisions.[185] While these provisions are of interest, they probably hold relatively little significance for most petroleum-exporting states outside Europe or Central Asia, where the issue of pipelines is of major importance.

Other issues addressed by the ECT that may be of more general interest include taxation (Article 21) and trade-related investment measures (Article 5). The provisions on taxation (which have no precise equivalent in the NAFTA) are in fact primarily directed at emphasising that the ECT does not impose rights or duties with respect to taxation measures imposed by the parties. However, the treaty does include a number of provisions that – other than for taxes on income or capital – are designed to ensure that taxes will be applied in a non-discriminatory fashion. The provisions with respect to taxation probably reflect the fact that the normal constraints of GATT (which were applicable to all NAFTA parties) do not operate amongst all ECT signatories. As to the provisions on TRIMs, this is a matter that is dealt with in the NAFTA, although not with specific reference to the energy sector. The ECT in Article 5, however, reaches a similar GATT-like result to the NAFTA in its provision that parties "shall not apply any trade-related investment measure that is inconsistent with the provisions of article III or XI of the GATT"; the treaty goes on to describe what sort of measures are included under this provision. It has been noted that the provisions on TRIMS may hold special importance to foreign investors in the energy sector, since "[i]n international petroleum agreements, obligations to favour domestic suppliers, create domestic linkages, promote employment and training of local staff, develop local business and related economic development are frequent."[186] The question further arises then as to which of these measures would be included under the strictures of Article 5.

V. ASIA-PACIFIC ECONOMIC COOPERATION (APEC)

1. Introduction and background

The forum for Asia-Pacific Economic Cooperation (APEC) was created in 1989 as an informal arena for discussions among Asia-Pacific governments. It has since evolved into the major governmental forum for cooperating on trade and economic relations in the Pacific Rim. The APEC represents an important development in international trade relations. Unlike the other regional arrangements that have been discussed above, and particularly the NAFTA, the APEC does not represent a trade "bargain" in the conventional sense. There is, for example, no founding treaty creating the APEC, nor a finite list of binding obligations. Rather APEC is set up as a process. Moreover, it is a process that has only partly defined its objectives (for example, the achievement of free trade in the future); one of the important roles of the APEC process is to develop further goals though a continuing dialogue.

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[185]These are set out in Article 7(7) of the ETC.

[186]Thomas W. Wälde, "European Energy Charter Conference: Final Act, Energy Charter Treaty, Decisions and Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects, Introductory Note" (1995) 33 *International Legal Materials* 360, at 365.

It should be noted with respect to APEC that its initial promise has been at least temporarily clouded by the Asian economic crisis beginning in 1997. The November, 1998 APEC summit in Kuala Lumpur did not produce the type of trade liberalization in certain key sectors that had been hoped for, with the result that hopes for further significant trade liberalization now rest with the WTO. Similarly there has been a pronounced decline in enthusiasm on the part of some Asian leaders for the type of open international economic system that has been championed by APEC leaders in the past – especially with respect to the issue of free flows of currency. It is too soon, however, to suggest that APEC is no longer a factor in regional economic relations on the Pacific Rim; much will obviously depend on the nature and speed of the economic recovery in Asia.

As with the NAFTA, the APEC is grounded in the GATT (although not all its members are members of the WTO); unlike the NAFTA, however, APEC differs from the GATT/WTO both in process and result. With respect to the former, it has been noted that trade concessions within the APEC framework are offered on a unilateral basis, depending upon the circumstances of the particular economy, as opposed to emerging as the result of the traditional negotiating process that characterizes most regional and multilateral trade agreements. With respect to the results, while one of the most important features in the development of modern international trade law is the increasing "legalization" of norms and, equally important, of the dispute- resolution mechanisms to enforce those norms, much of what APEC generates is by nature unenforceable, and would at the most be considered "soft law". An important example of such soft law norms is the statement of non-binding energy policy principles adopted by APEC Energy Ministers. Indeed, the sectoral concentration on energy is more generally illustrative of a cooperative approach running throughout APEC, which emphasizes the identification of specific regional problems and their resolution by practical measures; this emphasis on practical solutions is further reflected in the prominent role played by business in virtually all aspects of APEC work.

The APEC model, then, particularly because it involves such a diverse range of economic actors, may be of particular interest to petroleum-exporting states. It may also be attractive because of its emphasis on dealing at a practical level with sectoral concerns. Finally, it is important to reiterate that APEC acts to complement other more traditional types of fora trade negotiation such as the WTO; it does not supplant them; nevertheless, soft law accommodations reached in the context of APEC-like fora may well be translated eventually into hard law through their importation into more formal trade arrangements. In this respect, one might make analogies to the development of positions within the OECD; the special significance of the APEC model, of course lies in the breadth of the membership and interests it embraces.

By 1995, the 18 APEC member economies[187] (which expanded in 1998 to 21) accounted

[187]APEC originally comprised Australia, Brunei Darussalam, Canada, Indonesia, Japan, the Republic of Korea, Malaysia, New Zealand, the Philippines, Singapore, Thailand, and the United States. These were joined in November 1991 by the People's Republic of China, Hong Kong, and Chinese Taipei; in November 1993 by Mexico and Papua New Guinea; in November 1994 by Chile; and in 1998 by Peru, Russia, and Vietnam.

for roughly 55 percent of world income and 46 percent of world trade.[188] APEC is, moreover, interesting in the scope of its membership, embracing economies at dramatically different stages of development (including the three NAFTA parties), and with significant differences in their degree of openness. APEC's objectives, as reflected in the 1991 Seoul Declaration are:

> "to sustain the growth and development of the region for the common good of its peoples and, in this way to contribute to the growth and development of the world economy;
>
> to enhance the positive gains, both for the region and the world economy, resulting from increasing economic interdependence, to include encouraging the flow of goods, services, capital and technology;
>
> to develop and strengthen the open multilateral trading system in the interest of Asia-Pacific and all other economies; and
>
> to reduce barriers to trade in goods and services among participants in a manner consistent with GATT principles, where applicable, and without detriment to other economies."[189]

Also arising out of the Seoul Declaration, the APEC leaders agreed to meet annually, beginning with the first summit in the United States in 1993.[190] These leaders' meetings have played an important role in shaping the direction that APEC has taken. For example, in the 1994 Bogor meeting, APEC leaders adopted a Declaration of Common Resolve[191], which included a commitment to move toward free trade and investment by 2010 for industrialized economies and by 2020 for developing economies. The leaders made it clear, however, that their actions to this end would be in conformity with the GATT, and indeed they committed themselves to accelerate the implementation of their Uruguay Round undertakings and to support the launch of the WTO. In recognition that trade and investment liberalization by themselves would not suffice to create the free flow of goods, services and capital, the leaders also pledged to accelerate programs to proactively facilitate trade and investment. In parallel with these efforts to increase trade and investment, APEC leaders additionally accepted the need to increase the level of cooperation on development issues, including the implementation of cooperative programs in such areas as human resource development, APEC study centres, science and technology, the promotion of small and

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[188]"Asia-Pacific Economic Cooperation – Introduction", found at APEC website, *apecsec.org.sg/97brochure*.

[189]*Id.*

[190]Subsequent summits were held in Bogor, Indonesia in 1994, in Osaka, Japan in 1995, in Manila, the Philippines in 1996, in Vancouver, Canada in 1997, in Kuala Lumpur, Malaysia in 1998, and in Auckland, New Zealand in 1999.

[191]Asia-Pacific Economic Cooperation Forum, *Declaration of Common Resolve* (Bogor Declaration), November 15, 1994, (1995) 34 *International Legal Materials* 758.

medium size businesses, and improvement of infrastructure (including energy); there is also a commitment to cooperation on environmental issues. Finally, there is an interesting commitment, which runs through the APEC process, to involve the business sector in the various APEC activities and programs.

The following year, at the Osaka summit, the APEC leaders adopted the ambitious Osaka Action Agenda[192], designed to flesh out the general principles enunciated in the Bogor Declaration. The Action Program consists of two major parts: the first dealing with trade and investment liberalization and facilitation, and the second dealing with economic and technical cooperation. Part I, Liberalization and Facilitation, sets out general principles for moving forward[193], establishes a framework for the liberalization and facilitation process[194], and specifies actions to be taken in fifteen different areas – areas that have similarly featured in discussions within the GATT/WTO and among FTA/NAFTA parties.[195] Part II, on Economic and Technical Cooperation, similarly has three sections: one on the essential elements of the cooperation[196], another on economic and technical cooperation in specific areas[197], and a final section on further development of economic and technical cooperation[198].

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[192]Asia-Pacific Economic Cooperation Forum, *Osaka Action Agenda on Implementation of the Bogor Declaration* (Trade Liberalization and Facilitation; Economic and Technical Cooperation" November 19, 1995, (1996) 35 *International Legal Materials* 1111.

[193]The nine general principles that apply to the liberalization and facilitation process are: comprehensiveness (ie. "addressing all impediments to achieving the long-term goal of free and open trade and investment"); WTO-consistency; comparability; non-discrimination (as among APEC economies); transparency; standstill (ie. refraining from taking measures that would increase the level of protection); simultaneous start, continuos process and differentiated timetables; flexibility (i.e. taking into account the diversity of APEC economies); and cooperation. Osaka Action Agenda, Part 1, Section A.

[194]Osaka Action Agenda, Part I, Section B; the framework provides for each APEC economy developing its own Action Plan, consulting with other APEC economies, submitting the Action Plan to the 1996 summit, with implementation to begin in January 1997. This implementation is to include continuing review and assessment of progress and revision of the Plan as necessary.

[195]These areas are: tariffs, non-tariff measures, services, investment, standards and conformance, customs procedures, intellectual property rights, competition policy, government procurement, deregulation, rules of origin, dispute mediation, mobility of business people, implementation of the Uruguay Round outcomes, and groundwork information gathering and analysis.

[196]The Osaka Action Agenda (Part II, Section A) adopts three essential elements in this respect: first, the development by APEC of common policy concepts; second, the pursuit by APEC of joint activities, and, third, the initiation of a policy dialogue on economic concerns.

[197]The Action Agenda sets out goals for the development of common policy concepts and joint activities and policy dialogues in 13 areas, with priority items for action in each area. The areas are: human resources development, industrial science and technology, small and medium enterprises, economic infrastructure, energy, transportation, telecommunications and information, tourism, trade and investment data, trade promotion, marine resource conservation, fisheries, and agricultural technology. Osaka Action Agenda, Part II, Section B.

[198]Osaka Action Agenda, Part II, Section C.

The 1996 APEC leaders meeting at Subic Bay translated the Osaka Action Agenda into the Manila Action Plan for APEC (MAPA). MAPA is organized into four "volumes": the *first* consists of an overview of MAPA; the *second* includes a detailed individual action plan (IAP) for each APEC economy; the *third* sets out the collective action plans by issue area; and the *fourth* provides a progress report on APEC economic and technical cooperation (ecotech) activities. While the action plans and the progress report follow the structure of issues as identified in the Osaka Action Agenda, Part I and II, respectively, perhaps more revealing is the selection in the MAPA overview of six themes for measuring the overall progress of APEC as a vehicle for achieving a more open economic relationship among its economies. These are: greater market access (tariff and non-tariff measures); enhancing market access in services; providing an open investment regime; reducing the cost of doing business; building an open and efficient infrastructure sector; and strengthening economic and technical cooperation. MAPA provides a description of a range of achievements under each theme.

The IAPs are a particularly distinctive feature of the MAPA, and of APEC more generally, insofar as they represent voluntary, unilateral initiatives on behalf of the various economies, rather than the outcome of concerted bargaining, as is typically the case for both multilateral and regional trade agreements. As the MAPA itself suggests, "[i]t might be said that the [IAPs] are a continuation or extension of unilateral liberalization initiatives which economies of the region have been implementing in the last two decades or so in their own economic interest ... [and which] were responsible ... from the very high rates of intra-regional trade even before APEC was established to accelerate the trend ..."[199] While the IAPs vary to reflect the different stages of trade liberalization of the various APEC economies, most of the action plans share a number of features. Under the theme of *tariff and non-tariff measures*, for example, these common features include:

- "Significant tariff reductions which provide greater market access and predictability, with [c]lear targets ... and [t]imebound schedules ...
- A re-affirmation of the standstill on new measures of protection
- A commitment to reduce and/or eliminate WTO-inconsistent non-tariff measures which affect trade
- Greater transparency and effective liberalization through [a range of measures]."[200]

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[199]MAPA, Introduction.

[200]*MAPA*, MAPA Highlights.

Box VI

Some Petroleum-Related Provisions from Individual Action Plans, 1998

Brunei Darussalam

"Objectives [include]:

- to encourage international oil companies to invest in Brunei Darussalam in exploration and development of natural gas
- to promote and identify potential downstream projects for development ...
- to promote and encourage efficient use of energy ...
- to position Brunei Darussalam to take maximum advantage of the anticipated increase [in] demand in the Asia Pacific region for oil and gas
- to study the possibility of setting up a regional service center for oil and gas related matters."

Indonesia

- "To allow greater private participation [in] petroleum and gas industries, in July 1997 the Indonesian Government ... issued a Presidential Decree ... regarding the opportunity given to ... private companies to build and operate petroleum and natural gas refineries as well as to sell their products. Private companies may conduct their petroleum or natural gas refinery activities after obtaining approval from the government."
- "private sector participation in upstream activities will be continued in accordance with current policy, while downstream activities will gradually be opened wider to private sector participation by government permit"

Malaysia

- "Liberalize new entry into the petroleum refinery industry by the end of 1998."

Mexico

- "Mexican NTBs [non-tariff barriers] are consistent with relevant provisions of WTO agreements. They include products such as petroleum oils ... Mexico continues to work on projects which update and publish clear and transparent procedures for the implementation of non-tariff barriers."

Peru

- "The State monopoly in this particular sector has been abolished and all provisions on investment in petroleum exploration and production activities have been liberalized. Present legislation expands the exploration period to seven years, permitting contractors to participate in different phases and simplifying procedures for approval of exploration and production contracts. Moreover, the framework law establishes measures for reducing contractor's costs and authorizes guarantees for the use of foreign currency and remittance of profits in foreign currency."

Box VI con't

Philippines

- "[T]he Downstream Oil Industry Act of 1998 ... provided for the following, among others:
  - implementation of [industry] deregulation in two phases;
  - a uniform rate of 3% on imported crude oil and refined petroleum products;
  - liberalization of downstream activities such as importation, exportation, manufacturing, marketing and distribution;
  - promotion of fair trade practices and prevention of cartelization, monopolies, combination in restraint of trade and any unfair competition in the industry; and
  - availment of incentives for five years ..."
- "EO 471 was signed on 14 March 1998 declaring the full deregulation of the downstream oil industry."

Russia

- "Licensing of the use of resources on Russian territory ... [is] regulated by a number of federal legislative acts ... Work on the establishment of a regulatory and legal framework for resource management is still underway."

From: APEC, Individual Action Plans, 1998

With respect to *improving access to services markets*, APEC members have moved generally towards adopting the key principles of national treatment and MFN, as well as contributing to and supporting the WTO General Agreement on Trade in Services (GATS); in some cases this has meant the inclusion in IAPs of commitments beyond those undertaken in the GATS. Under the theme of *open investment*, IAPs are designed to complement the 1994 APEC Non-Binding Investment Principles (NBIP), adopted by APEC leaders in 1994, and which reflected “a mutual understanding that the [investment] liberalization process needs to be done in a cooperative, consultative and non-confrontational manner.”[201] While it is conceded in the MAPA that many economies continue to restrict foreign investment in certain sensitive areas, it is also noted that some of the IAPs are moving towards the principle of national treatment in a growing number of sectors. *Reducing the cost of doing business* was another key element of MAPA’s implementation of the Osaka Action Agenda, and includes not only trade liberalization measures *per se*, but also steps designed to reduce the administrative and technical barriers that sometimes inhibit business. The MAPA cites a range of actions taken individually and collectively by APEC members in this respect, including measures with respect to customs procedures (stressing a “client-focussed” approach), standards and conformance, mobility of business people, government procurement (emphasizing greater transparency with respect to procedures and procurement opportunities), intellectual property, dispute mediation, and deregulation and competition policy. The theme of *building an open and efficient infrastructure sector* reflects more than merely a recognition that infrastructure is an important contributor to economic growth; it reflects also the consensus that there is a greater role for the private sector in the provision of infrastructure facilities. As the MAPA notes, historically “most infrastructure facilities were provided by government, and foreign participation tended to be excluded, resulting in monopolies and an absence of pressure to be innovative and efficient.”[202] However, the scale of infrastructure requirements in many APEC members is such that there is a pressing need to involve private capital – including foreign investment. This is reflected in the various IAPs – which are directed at such initiatives as permitting and encouraging foreign investment, including joint ventures, through a range of measures – and in the adoption in the MAPA of an Action Programme for Economic Infrastructure.[203]

The second component of MAPA – collective action plans (CAPs) – is also a unique feature of APEC. These collective action plans (some of which, such as the Action Programme for Economic Infrastructure, have been mentioned above) represent “measures agreed upon in different APEC fora through the process of consensus ... [and] focus essentially on facilitating

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[201]*MAPA* Vol. I, “Providing an Open Investment Regime”.

[202]*MAPA*, Vol. I, “Building an Open and Efficient Infrastructure Sector”.

[203]This Action Programme is designed “to improve the environment for private sector investment in infrastructure, drawing on business advice obtained though Public-Private/Business Sector Round tables on key issues such as “best practices” in risk management and mitigation, as well as discussions by APEC Finance Ministers on ways to improve the flow of funds to infrastructure and to use technical assistance and financing/guarantee facilities of international financing institutions. Sectoral infrastructure issues in the energy [and other] sectors are also a key part of APEC’s overall infrastructure work.” *Id.*

trade and investment and on making the conduct of business in the region easier, faster, more predicable and transparent ... in line with the important APEC goal to make APEC relevant to business."[204] This effort to move beyond intergovernmental contacts and involve business directly in APEC activities is also reflected in the creation of the APEC Business Advisory Council (ABAC) in order "to reach out to business generally and to provide a "reality check" on the APEC action plans, among others."[205] The preparation of the CAPs in the fifteen issue areas identified in the Osaka Action Agenda was coordinated primarily through the APEC Committee on Trade and Investment (CTI).[206]

The final component of the MAPA was the strengthening of economic and technical (ecotech) cooperation in the 13 areas identified at Osaka. The inclusion of ecotech cooperation in the MAPA is itself a distinctive feature of APEC, but even more so is the nature of the cooperation, which represents "a shift away from a donor-donee relationship achieved though relying on modes of cooperation that avoid transfer of resources by one economy to another."[207] Equally distinctive is the emphasis – running throughout APEC, but particularly striking in the context of ecotech cooperation – on a role for the private sector in this aspect of the MAPA. Ecotech cooperation in the MAPA is guided by the Manila Declaration on an Asia-Pacific Economic Cooperation Framework for Strengthening Economic Cooperation and Development. Other examples of ecotech cooperation cited in the MAPA, and which again reflect the importance attached to involvement of the private sector include the creation of the APEC Center for Technology Exchange and Training of Small and Medium Enterprises; the adoption of an APEC Economic Infrastructure Action Program (which emphasizes public-private sector partnerships); and the creation of an Asia Pacific Energy Research Center in Tokyo.[208]

2. Energy Working Group (EWG)

The Energy Working Group (EWG) of APEC[209] was created in 1990, and is one of ten such sectoral working groups. It is managed by Australia, which provides the Secretariat to the EWG though the Energy Division of the Australian Department of Primary Industries and Energy. The EWG typically meets twice a year, with meetings of APEC Energy Ministers held annually

[204] *MAPA*, Introduction.

[205] *Id.*

[206] The CTI took the lead in 14 of the 14 areas, and contributed to the other (where the APEC Economic Committee took the lead). The various CAPs are described in detail in *MAPA*, Vol. 3.

[207] *MAPA*, Vol. I, "Introduction".

[208] A detailed description of the completed and ongoing joint ecotech activities can be found in *MAPA*, Vol IV. For a summary of these activities, see *MAPA*. Vol. I, "MAPA Highlights, Strengthening Economic and Technical Cooperation".

[209] Originally referred to as the Working Groups on Regional Energy Cooperation.

(beginning in 1996)[210]. The EWG is assisted in its work by five Expert Groups: the Expert Group on Energy Data and Outlook, the Expert Group on Clean Fossil Energy, the Expert Group on Energy Efficiency and Conservation, the Expert Group on New and Renewable Energy Technologies, and the Expert Group on Minerals and Energy Exploration and Development.[211] The EWG work plan reflects both the Energy Action Program, adopted as part of the Osaka Action Agenda, and any relevant decisions taken by APEC Leaders, Trade Ministers or Energy Ministers.[212] More generally, it reflects the fourteen Non-Binding Energy Policy Principles agreed on by the Working Group in 1994, and endorsed by the APEC Energy Ministers at their inaugural meeting in 1996.[213] (See Box VII).

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[210]Four such meetings have been held to date: in Sydney in 1996, in Edmonton in 1997, in Okinawa in October 1998.

[211]The mandate of each Expert Group can be found in APEC Energy Working Group, "EWG Expert Groups", located at the EWG website:*www.dpie.gov.au/resources.energy/energy/apec*.

[212]APEC Energy Working Group, "Energy Working Group Background", located at the EWG website.

[213]Inaugural Meeting of APEC Energy Ministers, Sydney Australia, 28-29 August 1996, *Declaration*, para. 26.

Box VII

Agreed Non Binding Energy Policy Principles

1. Emphasise the need to ensure energy issues are addressed in a manner which gives full consideration to harmonisation of economic development, security and environmental factors.

2. Pursue policies for enhancing the efficient production, distribution and consumption of energy.

3. Pursue open energy markets for achieving rational energy consumption, energy security and environmental objectives, recommending action in the appropriate forum of APEC to remove impediments to the achievement of these ends.

4. Recognize that measures to facilitate the rational consumption of energy might involve a mix of market based and regulatory policies, with the relative components of the mix being a matter for the judgement of individual economies.

5. Consider reducing energy subsidies progressively and promote implementation of pricing practices which reflect the economic cost of supplying and using energy across the full energy cycle, having regard to environmental costs.

6. The regular exchange of experience on the various policies being used by member economies to achieve a more rational energy consumption.

7. Ensure that at least cost approach to the provision of energy services is considered.

8. Promote the adoption of policies to facilitate the transfer of efficient and environmentally sound energy technologies on a commercial and non-discriminatory basis.

9. Encourage the establishment of arrangements for the development of human resource skills relevant to the application and operation of improved technology.

10. Enhance energy information and management programs to assist more rational energy decision making.

11. Encourage energy research, development and demonstration to pave the way for cost effective application of new, more efficient and environmentally sound energy technologies.

12. Promote capital flows through the progressive removal of impediments to the funding of the transfer and adoption of more energy efficient and environmentally sound technologies and infrastructure.

13. Promote cost effective measures which improve the efficiency with which energy is used but reduce greenhouse gasses as part of a suggested regional response to greenhouse gas reductions.

14. Cooperate, to the extent consistent with each economy's development needs, in the joint implementation of projects to reduce greenhouse gas emissions consistent with the Climate Change Convention.

From: Inaugural Meeting of APEC Energy Ministers, Declaration, Sydney, Australia, 28-29 August, 1996.

The Osaka Agenda's Action Program for Energy was itself the result of EWG's work and recommendations. As with other APEC working groups, the EWG was requested "to contribute to the Action Agenda by designing mid-term and long-term action programs on economic and technical cooperation (including infrastructure), and, where possible, on trade and investment liberalisation and facilitation. Senior Officials called for short term tangible results which could serve as down payments for the Action Agenda."[214]Additionally, the EWG was asked to design its Action Program so as to give effect to the APEC Leaders' 3Es Initiative (economic growth, energy security and environmental protection). In agreeing on the common policy concepts for the energy sector, the EWG stated the goals of the Energy Action Program as:

- "Improving the understanding by the government and business sectors of member economies of regional energy markets, thus assisting policy making and business activities.[215]

- Reducing regulatory, institutional and procedural impediments to trade and investment in energy infrastructure, products and services.

- Reducing the environmental impacts of energy production, delivery and consumption through improving access to technology, training, services and investment opportunities.

- Reducing costs to both governments and business by the acceptance of equivalence in accreditation and the closer harmonisation of standards relating to energy products, appliance and services."

The ultimate aim underlying these subordinate goals is "to foster the development of APEC as a sustainable energy community."[216] The Energy Action Program proposed by the EWG for the Osaka Agenda did not attempt to comprehensively cover the Group's full mandate; rather, the EWG focussed "on a limited number of key initiatives that will produce outcomes of direct relevance to the achievement of the objectives of the Bogor Declaration and the 3Es initiative. The four themes selected for concentration were:

- "Fostering a common understanding on regional energy issues

- Facilitating investment in the energy sector

- Reducing environmental impacts in the energy sector

[214]APEC, *The Osaka Action Agenda, Annex*, "Action Program for Energy".

[215]*Id.*

[216]*Id.*

- Acceptance of equivalence in accreditation and increasing harmonisation of energy standards."[217]

With respect to the first theme of *improving the understanding of regional energy markets*, the focus of the planned activities is primarily on the short to medium term. The centrepiece of the joint activities in this area is the creation, under the auspices of the EWG, of the Asia Pacific Energy Research Centre (APERC) in Tokyo in 1996. One of the first tasks assigned the APERC was the compilation of a regional energy outlook for APEC; other anticipated roles for APERC are similarly intended to improve the shared data and research capacities of APEC members.[218] Over the longer run, it is intended that the knowledge base established by APERC would permit the development of more precise policy principles in a range of matters, including such concerns as potential disruption of energy supplies and environmental impacts of energy consumption. As to *facilitating investment in the energy sector*, the aim of the EWG is "to reduce regulatory, institutional and procedural impediments to trade and investment in energy infrastructure, products and services."[219] The primary focus of concern here is electricity infrastructure, and as such is not of special interest to the petroleum sector. The EWG's work with respect to the *reduction of environmental impacts in the energy sector* has two major aspects. First, the EWG is engaged in a range of activities directed at the facilitation of efficient and environmentally sound energy technologies; much of this work involves increasing the awareness of such technologies in member economies and facilitating their adoption. While some of this work may have implications for the petroleum sector, much of it is focussed on concerns over coal and coal-fired electricity generation.[220] The second focus of the EWG's environmental work is integrated demand-side management; again, the major efforts here are directed at sharing information, including the preparation of a manual on demand-side management for member economies. Finally, with respect to the theme of *acceptance of accreditation and improved harmonisation of energy standards*, the ultimate aim of EWG work in this area is the reduction in costs faced by both government and industry. In the short run, the workplan of the EWG essentially involves identifying and clarifying certain matters with respect to both standards and the facilities and processes by which they are implemented.[221] Given this knowledge base, the goal over the medium term is to achieve mutual recognition of testing protocols and laboratory

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[217]*Id.*

[218]For example, the creation of an energy Network through the Internet, the establishment of a fellowship system for energy researchers, and the delivery of workshops and training courses.

[219]"Energy Action Program", at 25-26.

[220]As of 1996, the composition of primary energy consumption in APEC economies was: oil, 41%; coal, 31%; natural gas, 18%; nuclear power, 7%; renewables, 3%. *(Id.*, at 27.)

[221]The sequence of actions proposed in the Action Plan included: [i]dentification and clarification of product performance standards; [i]dentification and documentation of methods-of-energy-test standards or protocols; [i]nvestigation and documentation of processes for the accreditation of laboratories and test facilities and the associated requirements of administrators; [and] [c]larification and documentation of market entry and commerce marking requirements in member economies." *(Id.*, at 29.)

accreditation. In the longer term, it will then be possible to consider energy standards with respect to individual products (for example, domestic appliances and industrial and commercial equipment). Again, any impact on the petroleum sector of this work is likely to be indirect and arise from the incidental impact of the measures on energy demand.

As noted earlier, the work of the EWG has reflected not only the work plan put in place in the Osaka Action Agenda, as further defined in MAPA, but also the guidance provided by meetings of APEC Leaders and Energy Ministers. In this respect it is useful to note the current issues of concern to APEC Energy Ministers, as reflected in their third meeting in October 1998. The Ministers reviewed the results APERC's regional energy outlook (referred to earlier) in the context of energy security. The Ministers noted particularly that while primary energy demand in the region was projected to increase by 41 percent between 1995 and 2010, energy production was projected to increase by only 31 percent over the same period, leading to a doubling of energy imports.[222] In light of these facts, the Ministers again emphasized the need for energy diversification and endorsed the EWG decision to address oil supply and demand issues. Other issues that will be the subject of EWG work given the priorities as established in the Ministerial Declaration include energy infrastructure, energy efficiency, interaction with business, and an initiative to accelerate investment in natural gas production and associated infrastructure.

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[222]Third Meeting of APEC Energy Ministers, "Energy: Driving Force for Economic Recovery and Development", Ginowan, Okinawa, Japan, October 9-10, 1998, *Declaration*, para 8.

CHAPTER 3

THE ENERGY TRADE POLICY OF THE UNITED STATES: SECURITY, EXPORT PROMOTION, AND ENVIRONMENTAL PROTECTION

I. Introduction

The purpose of this chapter is to examine U.S. energy trade policy, with particular emphasis on the current and prospective status of negotiations affecting this sector. Energy is a very special sector in U.S. foreign economic policy, important aspects of which have thus far been isolated from the main currents of multilateral trade agreements. While U.S. negotiators now hope to negotiate multilateral and regional agreements that affect trade in energy-related goods and services, their objectives in these negotiations are limited. The goals of U.S. negotiators are complicated by the sometimes complementary and sometimes competing demands of three distinct areas in national policy: economics (which entails both export promotion and access to raw materials), security (the United States needs reliable supplies of strategic goods but also has conflicts with some oil-rich states), and environmental protection. In its efforts to balance these objectives, the United States seeks to retain the authority to impose restrictions on imports for reasons of security or environmental protection, while also promoting U.S. exports of energy-related goods, services, and capital. The fora in which the United States will pursue its objectives include, but are not limited to, a new round of multilateral negotiations in the World Trade Organization (WTO), the Free Trade Area of the Americas (FTAA), and the Asia Pacific Economic Cooperation (APEC) forum.

The U.S. negotiators sometimes emphasize regional (i.e., discriminatory) initiatives such as the FTAA and APEC talks over global (i.e., nondiscriminatory) disciplines in the WTO. While the United States will pursue some of its energy-related trade objectives in the new round of multilateral negotiations, the commitments made in this forum will be neither absolute nor exclusive.

Energy-related goods are broadly defined here to include all fuels (raw and refined hydrocarbons, uranium, etc.); the machinery and equipment that are used to discover, extract, transport, refine, and distribute these fuels; and pollution-abatement equipment used at various stages of the energy product cycle. This wider definition inevitably includes many items that can be used both for energy-related and other purposes. Similarly, energy-related services include the full range of activities from exploration for raw materials to distribution of finished products. As a practical matter, hydrocarbons in general -- and oil in particular -- are the most important component of energy goods and services. In 1998, crude oil and petroleum products accounted for 5.5 percent of all U.S. merchandise imports, 86.0 percent of U.S. energy imports, and 40.8

percent of U.S. energy consumption.[223] Non-oil products and services may nevertheless increase in importance in the years to come.

II. The three-dimensional nature of energy trade

Trade in energy-related goods and services has three distinct dimensions: economics, security, and the environment. The first two dimensions have coexisted for generations, and the tension between them informs almost all of the issues explored in this chapter. The third dimension is a much more recent development. It promises to have a profound impact on all aspects of trade negotiations, but its effects will be especially acute in the energy sector.

1. Tensions between the economic and security dimensions

States have always had to balance economic and security objectives in pursuit of their trade policy. When these two objectives collide, security concerns usually triumph over economic considerations. Even Adam Smith observed that ultimately "defence … is of much more importance than opulence."[224] That aphorism is a fitting summary of how the United States resolves economic-security conflicts in its energy trade policy.

The U.S. policy on trade in energy has always reflected the tension between these two goals. Due to its special role in national security, this is a sector that is peculiarly resistant to full integration into the rules and disciplines of the global trading regime. "Energy security" for the United States entails three distinct considerations. One is the need to maintain secure access to a strategically vital commodity. Oil is as necessary to a modern economy — and indeed to a modern military — as food is to the human body. The United States has therefore taken a position on energy trade that is comparable to the "food security" concerns that rank so high in the priorities of policy makers in Japan and some other net food-importing countries. The second concern relates to the leverage that oil producers may employ. The energy crises of the 1970s are a vivid and bitter memory for American policy makers, who sometimes take a "balance of power" view of global energy markets (i.e., policy seeks to prevent too much concentration of energy resources in any one world region). The third consideration stems from the power that oil wealth can bring to currently or potentially hostile states such as Iran, Iraq, and Libya. Taken together, these three concerns lead the United States to treat energy in general, and oil in particular, as a special sector.

Energy-importing and energy-exporting countries have both found reasons in the past to isolate this sector from the normal set of rules, and to retain the sovereign ability to impose special

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[223]Percentages calculated by the author from data on pages 11, 9, and 7, respectively, of U.S. Department of Energy, Energy Information Administration, *Monthly Energy Review* June, 1999 DOE/EIA-0035(99/06) (Washington, D.C.: DOE, 1999).

[224]Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776), Book IV, Chapter ii.

restrictions for political, strategic, or diplomatic reasons. It may even be deceptive to define security considerations as an influence on trade calculations, when one could just as easily suggest the reverse order. Broadly defined, the Carter Doctrine[225] is a cornerstone of U.S. energy policy. It seems unlikely that the United States would have committed the same resources to the Gulf War, for example, if Iraq and Kuwait exported olive oil rather than crude oil.

The security orientation is reinforced by the division of labour within the U.S. Government. While the Office of the U.S. Trade Representative is the chief trade policy agency, the Department of Energy (DOE) has considerable authority in all matters affecting energy. DOE's approach reflects the security orientation of U.S. energy trade policy. This agency was established in the 1970s, in a policy environment that was dominated by concerns over resource scarcity and energy security. The department's "culture of security" is further reinforced by its jurisdiction over the country's nuclear weapons programs. It is DOE that is principally responsible for developing the Comprehensive National Energy Strategy, the most recent version of which is reproduced in Box VIII. Two of the five goals in this strategy relate to trade, and it is significant that the first one listed (Goal II) puts security ahead of economics: the U.S. economy is to be "protect[ed] … from external threat of interrupted supplies or infrastructure failure." Balanced against this objective is Goal V, which calls for the United States to "[c]ooperate internationally on global issues" such as open energy markets.

Security concerns notwithstanding, energy is also an economic sector of vast importance, and one in which the United States cannot afford to forego market opportunities. While the country is often seen as a net energy importer, the U.S. dependence on foreign sources of hydrocarbons is counterbalanced by its status as an exporter of goods, services, and capital used in the production of energy. The significance of these exports can be appreciated from the data in Table A, which shows U.S. exports of seventeen types of machinery that are commonly (but not exclusively) used to produce and distribute various forms of energy. These items include some of the more important items in the list of goods for which the United States is now seeking the reduction or elimination of foreign tariffs (as discussed in a later section). The United States exported $64.3 billion worth of these products in 1998, which was higher than the combined value of all U.S. imports of crude oil, refined petroleum products, coal, and natural gas. Compared in this fashion, energy-related trade between the United States and Canada was roughly in balance, and the United States enjoyed a significant surplus with Mexico. While the U.S. energy trade balance with the OPEC countries nevertheless remained well in the red, it was significantly more favourable with the remaining trading partners.

Beyond these exports of goods involved in the production and distribution of energy, there

[225] As delivered in President Carter's January 23, 1980 "State of the Union" address before a joint session of the Congress, the Carter Doctrine declared that, "An attempt by any outside force to gain control of the Persian Gulf region will be regarded as an assault on the vital interests of the United States of America, and such an assault will be repelled by any means necessary, including military force." This doctrine made explicit what had been a foundation of U.S. security policy since at least the end of the Second World War, and reflected the same strategic concept that led to U.S. participation in the 1991 Persian Gulf War (although in that instance the attempt to gain control of the region was not made by an *outside* force).

are many other areas in which the United States is a provider of energy-related goods, services, and capital. Consider the following points:

- The refining capacity of the United States is the world's largest, and in 1998 it accounted for 9.9 percent of global exports of refined petroleum products;[226]
- The United States has huge reserves of coal, and was responsible for 15.8 percent of global coal exports in 1997;[227]
- The country has the sixth-largest reserves of natural gas in the world,[228] and its gas exports to Mexico are projected to grow rapidly in the years to come;
- The United States is a substantial exporter of energy-related services, ranging from the education of engineers in U.S. universities to the employment of U.S. management consultants around the world; and
- Over $91 billion in U.S. capital is invested in foreign petroleum projects.

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[226]Calculated from British Petroleum-Amoco data, available at http://www.bpamoco.com/worldenergy/.

[227]Calculated from U.S. Department of Energy, *International Energy Outlook 1999* DOE/EIA-0484(99) (Washington, D.C.: U.S. Government Printing Office, 1999), page 70. The report is cited hereinafter as *IEO-1999.*

[228]*Ibid.*, at 38.

Box VIII

The U.S. Energy Strategy

Goal I. Improve the efficiency of the energy system — making more productive use of energy resources to enhance overall economic performance while protecting the environment and advancing national security.

Objective 1. Support competitive and efficient electric systems.

Objective 2. Significantly increase energy efficiency in the transportation, industrial, and buildings sectors by 2010.

Objective 3. Increase the efficiency of Federal energy use.

Goal II. Ensure against energy disruptions — protecting our economy from external threat of interrupted supplies or infrastructure failure.

Objective 1. Reduce the vulnerability of the U.S. economy to disruptions in oil supply.

Objective 2. Ensure energy system reliability, flexibility, and emergency response capability.

Goal III. Promote energy production and use in ways that respect health and environmental values — improving our health and local, regional, and global environmental quality.

Objective 1. Increase domestic energy production in an environmentally responsible manner.

Objective 2. Accelerate the development and market adoption of environmentally friendly technologies.

Goal IV. Expand future energy choices — pursuing continued progress in science and technology to provide future generations with a robust portfolio of clean and reasonably priced energy sources.

Objective 1. Maintain a strong national knowledge base as the foundation for informed energy decisions, new energy systems, and enabling technologies of the future.

Objective 2. Develop technologies that expand long-term energy options.

Goal V. Cooperate internationally on global issues — developing the means to address global economic, security, and environmental concerns.

Objective 1. Promote development of open, competitive international energy markets, and facilitate the adoption of clean, safe, and efficient energy systems.

Objective 2. Promote foreign regional stability by reducing energy-related environmental risks in areas of U.S. security interest.

Source: U.S. Department of Energy, Comprehensive National Energy Strategy *DOE/S-0124 (Washington, D.C.: DOE, 1998), available online at http://www.hr.doe.gov/nesp/cnesM.pdf*

These facts all point to one simple but highly significant observation: The United States is among the world's largest exporters in the energy sector (broadly defined). Those export interests serve to modify the objectives that U.S. policymakers pursue in trade negotiations, and account for the recent emphasis that U.S. energy and trade officials have placed on export promotion.

The energy export-promotion aims of the United States are primarily targeted towards developing countries. One reason for this targeting is that there are simply more opportunities in the developing world. These opportunities are not limited to the development of oilfields and other projects in resource-rich countries. Even countries without a single oil well or coal mine still need to generate or import electricity, for example, and distribute it over power lines. The U.S. officials hope to win as many contracts as possible for the American firms that seek to boost their sales of goods and services to gas utilities, power companies, oil refiners, and other prospective customers.

The energy markets of developing countries are more attractive than those of industrialized countries for two reasons. First, these countries are expected to experience higher rates of growth than the industrialized countries. DOE projects that the average rate of growth in developing countries through the year 2020 will be 4.8 percent, while growth in the industrialized countries will average just 2.3 percent.[229] Second, the "energy intensity" of economic growth in these countries is higher than in the industrialized countries. That is to say, the same increment of economic growth will *ceteris paribus* produce more demand for energy in a developing country than it will in an industrialized country. The forecast rate of annual growth for energy consumption in developing countries through 2020 is 3.6 percent, versus 1.2 percent in the industrialized countries.[230]

Economic and security objectives are not always in conflict. In fact, these two aspects of U.S. objectives are entirely consistent on one key point: it is in the interests of the United States to encourage the development and exploitation of multiple energy sources around the world, diversifying the global portfolio both by commodity and by region. This promotes U.S. security objectives by preventing excessive dependence on any one country or fuel, while also advancing U.S. economic objectives by creating new opportunities for the exportation of goods, services, and capital. In a happy coincidence for the United States, one region that is considered to be particularly secure and friendly -- Central and South America -- also has the highest forecast rate of growth in energy usage. DOE projects that energy consumption in this region will rise by 4.3 percent annually through 2020.[231]

Economic and security objectives are generally in harmony when it comes to exports, but can clash over energy imports. It is in the economic interests of the United States to maintain relatively open access for imported energy,[232] which is essential to virtually every segment of the economy, but the security implications of these imports are more complex. Energy imports are

[229] *IEO-1999*, at 17.

[230] *Ibid.*, at 16.

[231] *Ibid.*

[232] This point is true for the U.S. economy as a whole, but is not supported by all U.S. industries. Domestic U.S. producers of oil are opposed to import competition, and their protectionist campaigns are sometimes supported by producers of other fuels (e.g., coal in the 1950s and ethanol since the 1970s).

perceived to pose a threat to national security whenever (a) they reach a level that makes the United States vulnerable to disruptions in supply, or (b) they originate in states that are actively or potentially hostile to U.S. foreign economic policy interests. Both of these conditions were present in the aftermath of the Suez crisis and the oil shocks of the 1970s, and in both instances led to the imposition of import restrictions. During the 1980s and 1990s only the second condition has been present, and thus the United States has restricted imports only from certain countries. It nevertheless remains a principle of U.S. policy that the country must have the ability to restrict energy imports whenever deemed necessary for reasons of national security.

2. The third dimension: environmental issues

"Green trade" issues are among the highest-profile matters in contemporary trade policy. Nowhere is this more evident than in the case of energy and allied sectors, which are often identified as leading contributors to such environmental problems as oil spills, global warming, and potential nuclear disasters. For energy producers, this third dimension presents both a challenge (insofar as environmental rules may pose further barriers to the production, use, and trade of energy) and an opportunity (insofar as new rules may mandate the use of new technologies and services).

The WTO has not undertaken substantive negotiations on the trade-environment link (apart from a few ancillary articles in the Uruguay Round talks), but it has tackled this issue in some high-profile disputes. In fact, all three of the oil-related cases that have been handled in the GATT and WTO dispute-settlement system involved allegations that a U.S. environmental law constituted a violation of other countries' trade rights. The details of the Superfund, "gas guzzler," and reformulated gasoline cases are discussed at length in Chapter 1 of this volume. It is possible that other U.S. environmental laws will be the subject of WTO dispute-settlement cases in the future.

These issues also arise in negotiations over multilateral environmental agreements, such as the Kyoto Protocol of the Framework Convention on Climate Change. The terms of these agreements, as well as any U.S. moves to meet the goals that they establish, could have an important impact on demand for and imports of energy. It is nevertheless worth noting that U.S. energy forecasts are based on the implicit assumption that the Kyoto treaty will not in fact enter into force, and appear to reflect an expectation that it will not be ratified by the United States (see Chapter 1, IV., 3. above).[233]

While the United States has employed trade restrictions in pursuit of its environmental objectives, this issue can also be seen as an economic opportunity for some U.S. industries. One set of potential beneficiaries includes producers of alternative energy sources, such as solar and wind power. Perhaps the most politically influential of these alternative energy producers is the ethanol industry, which is popular among politicians because it offers a new market for corn and

[233]On page 8 of the *IEO-1999*, for example, the authors note that in their forecasts "the Kyoto Protocol is viewed … as a factor heightening uncertainties" over the projection "rather than one that alters it *per se*."

other forms of biomass. The U.S. ethanol industry is actively involved in efforts to promote this product, and has won a variety of benefits from the Federal and state governments (especially favourable tax treatment). The industry's most recent gain came from moves by the State of California and the U.S. Environmental Protection Agency to replace methyl tertiary butyl ether (MTBE) as the principal oxygenate used in reformulated gasoline, due to concerns over the impact of MTBE on ground water. The replacement of MTBE by ethanol and its derivatives could reduce U.S. imports of MTBE, reformulated gasoline, and methanol (the primary component of MTBE). The industry also hopes to benefit from energy integration in the Americas (see Chapter 2, III, 8. above)

Environmental trade initiatives also help U.S. providers of goods and services that are used to abate pollution. This is an industry in which the United States enjoys a strong competitive advantage, and U.S. producers hope that "clean energy" initiatives in trade negotiations and other fora will help to expand the market.

Green trade is a multifaceted issue that affects not only what the United States will seek in trade negotiations, but whether the U.S. negotiators will even have the authority to conclude agreements. Internal disagreements over the scope of U.S. objectives on environmental matters (as well as the politically related topic of labour rights) have produced a stalemate in Washington. The Clinton administration and Democrats in Congress insist that environmental matters be "on the table" in any new trade negotiations, but the Republican majority in Congress strongly opposes this position. With the two sides being unable to bridge their differences, the U.S. executive has now gone without "fast track" negotiating authority for five years. Unless and until Congress is willing to grant this authority to the president, the future of trade negotiations in the WTO, the FTAA process, and other arenas will be in doubt. Nor do these issues affect U.S. policy alone. The events in the streets of Seattle during the Third Ministerial Conference of the WTO in 1999 demostrated the passions that labour and environmental concernes can provoke.

3. Three principles of U.S. energy trade policy

The tension between the three dimensions of economics, security, and the environment has produced three guiding principles for energy trade policy. These three principles will drive U.S. objectives in multilateral and regional negotiations.

Principle 1: Security concerns override multilateral rules.

The GATT and now the WTO have been extremely important in the development and pursuit of U.S. trade policy overall, but significant parts of the energy sector have thus far formed an exception to the general rule. The past practice in GATT is exemplified by the unwritten, unacknowledged, but nonetheless real "gentleman's agreement" that has largely kept oil outside of the GATT/WTO system. This exception is not unique to the United States. Both energy-importing and energy-exporting countries have employed trade restrictions in pursuit of their diplomatic or security objectives, and neither side has opted to use this institution's rules to challenge their trading partners' major measures. More formally, this understanding is backed by

the general exception that GATT Article XXI provides for measures taken in pursuit of a country's security interests. Similarly, the United States has kept its options open by not binding its oil tariffs in the WTO.

This general principle does not constitute a wholesale exception. The energy sector holds a position somewhat akin to that of agriculture before the Uruguay Round: while it is not entirely exempted from multilateral disciplines, neither is it fully within those rules. Some aspects of energy sector trade are very clearly covered by GATT/WTO disciplines. The most obvious are those tariffs that are bound; while U.S. tariffs on crude oil are famously unbound, most other tariffs on energy-related goods are bound. The U.S. negotiators would certainly like to see bound reductions or complete phase-outs of other countries' tariffs on energy-related products that are exported by the United States. Some service sectors fall within the rules of the General Agreement on Trade in Services, but that is far from universal. Other energy-related issues that are subject to multilateral rules concern the trade-remedy laws, such as natural resource subsidies, and import restrictions imposed for reasons of environmental protection.

At bottom, however, the United States is highly reluctant to cede full sovereignty over the regulation of energy trade. When multilateral rules conflict with security objectives, the United States will take Adam Smith's advice and choose defence over opulence.

Principle 2: Regional agreements have advantages over global rules

Regional agreements allow the United States to concentrate on developing "secure" resources in friendly, energy-rich countries. The U.S. conception of energy security is based in large part on propinquity: The sources that are geographically closest are considered to be the most reliable, and hence have received the greatest attention and the most preferential treatment.

One might perceive a series of more or less concentric circles of energy security, in which sources become more vulnerable to disruption (for whatever reason) as one moves farther away from the centre. This conception is particularly clear in oil trade. Domestic production lies at the very centre, and this most secure source currently accounts for almost precisely half of U.S. consumption.[234] The first circle beyond the domestic, as illustrated in Table B, consists of Canada and Mexico. These two North American neighbours supply over one fourth of U.S. crude oil imports. As one moves further out from the centre, the second circle consists of producers in the rest of the Western Hemisphere. Venezuela in particular has long held a favoured position among U.S. planners, being the largest foreign supplier of crude oil and one of the most reliable.[235] Other producers in the Americas may acquire greater significance in the years to come. DOE believes that "[o]il producers in Central and South America have significant potential for increasing output

[234]One might draw a further distinction between oil in the "lower 48" states and the reserves in Alaska, in which Alaskan production is somewhat less secure due to the longer supply lines that it must follow.

[235]Most U.S. policymakers appear to have forgotten long ago that OPEC was originally a Venezuelan initiative, associating the cartel instead with its Arab members.

over the next decade," especially in Brazil, Colombia, and Ecuador.[236] Taken together, the producers in the first and second circles account for just over half of U.S. imports.

The perceived reliability of sources declines as one moves beyond these suppliers to the other circles. The United States has sought since the first oil shock to decrease its reliance on the Middle Eastern and North African suppliers that comprise the two outermost circles, and the data indicate that those efforts have been largely successful. Countries that account for over one-third of global production and two-thirds of global reserves contribute less than one-quarter of U.S. imports, and are ultimately responsible for less than one-eighth of all U.S. petroleum consumption. This comparative security may not last long, given the fact that both the United States and its Western Hemisphere partners are draining their reserves at a much faster rate than most Middle Eastern and North African producers. Unless new deposits can be discovered and developed, these two outer circles may once again become major sources of U.S. energy imports.

It is no coincidence that these circles roughly correspond to the trade agreements that the United States has negotiated or is now negotiating. Canada and Mexico are parties to NAFTA, which is a "WTO-Plus" arrangement that entails greater commitments both from energy-exporters and energy-importers. The FTAA may follow the NAFTA model in some respects, but might not be as comprehensive in its commitments. While the rules of GATT Article XXIV require that free trade agreements or customs unions cover substantially all trade, and the FTAA will therefore provide for duty-free trade in all (or virtually all) energy products, there is no such requirement that the United States extend to the other FTAA countries all of the special treatment currently enjoyed by Canada and Mexico (e.g., an exemption from import restrictions taken for reasons of national security). By the same token, the energy provisions that are negotiated in APEC — most of whose members are in the third circle — appear less likely to establish preferences than the FTAA talks.

Principle 3: Much of U.S. policy is devoted to trade promotion rather than trade regulation

This third principle reinforces the two previous points, insofar as the promotion of trade falls more within the competence of regional and national initiatives than the WTO. The principal focus of the multilateral institution is on the progressive reduction or elimination of regulatory barriers to trade (primarily in the form of tariffs and other border measures), but there are natural limits to how much can be achieved through the process of reducing or eliminating the existing barriers. Those limits are particularly apparent when the United States is unwilling to bind its tariffs or forswear the use of import restrictions for political reasons.

The beauty of export-promotion, from the perspective of U.S. policymakers, is that it satisfies all three dimensions of energy policy. It achieves economic goals both directly (by stimulating demand for exports) and indirectly (by making new sources of energy available), enhances security by preventing any one world region from dominating global production, and

[236] *IEO-1999*, at 28.

contributes to environmental objectives by spreading the use of clean-energy technologies.

The United States promotes these exports through an array of inducements that include cooperative scientific research programs, conferences, technical assistance, and related informational activities. Export-promotion programs are further assisted by grants, loans, and guarantees made available through the Agency for International Development, the Export-Import Bank, the Overseas Private Investment Corporation, and the Trade and Development Agency, many of which target "big ticket" public works projects such as the construction of power plants. The emphasis on trade promotion is particularly evident in the FTAA and APEC initiatives.

III. Issues for regional and multilateral negotiations

The proposed new round of multilateral trade negotiations in the WTO is expected to cover issues ranging from agriculture to electronic commerce. Several aspects of the negotiations may also affect trade in energy-related goods and services, but the U.S. negotiators are not interested in pursuing special sectoral negotiations on energy that are along the same lines as the special treatment that is accorded in the WTO to agriculture and textiles. They instead intend to address energy-related matters in separate aspects of the negotiations, such as market access, services, and so forth. These issues will also be addressed in the FTAA and APEC negotiations.

The United States is not the only WTO member country that is interested in pursuing energy-related issues in the negotiations. Changes in the composition of the system may also affect the overall willingness to address energy issues. As can be appreciated from the data reported in the Tables C, F and G, GATT began with few oil producers,[237] and many of the world's leading energy exporters remained outside of the GATT prior to the 1980s. This changed with the accession of Latin American and Persian Gulf states, most notably Mexico, the United Arab Emirates, and Venezuela. The size of the "oil bloc" in the WTO is now quite impressive.

The influence of oil producers may rise in the next few years. As is shown in the Table C, eight countries that collectively represent another 25.9 percent of global production are currently seeking accession. If and when these countries complete the process, net oil exporters that represent over two-thirds of production will be members of the WTO.[238] In the event that Iran also begins the process of accession, another 5.3 percent of global production will be in the pool of applicants. The only large producers that are not (a) already members, (b) seeking accession, or (c) known to be considering accession are Iraq and Libya. These two countries accounted for 5.0 percent of global production (a figure that is depressed by sanctions) and 11.3 percent of global reserves. In other words, within a few years the countries represented in the WTO may

[237] Norway and the United Kingdom were among the original contracting parties, but neither of them were major oil producers at that time. The data in Table C offer a better indication of the *current* percentage of global production represented in the WTO than they do the percentage represented at various points in the past.

[238] This figure does not include those oil-producing countries that are net oil importers, such as the United States (10.5 percent of global production) and China (4.6 percent).

account for the great majority of global oil production and exports. It seems reasonable to expect that the "gentleman's agreement" that prevailed in the past will be questioned when there are a growing number of oil-rich gentleman in the club.

Just as these oil exporters may hope to employ WTO rules to their benefit, the United States uses the accession process as an opportunity to obtain commitments and concessions from the acceding countries. This was true of the negotiations over Mexican and Venezuelan GATT accession in the 1980s, and is equally true for the current negotiations over the WTO accessions of oil-exporting countries in the Middle East and the former Soviet Union. From the U.S. perspective, accession negotiations have two great advantages over other WTO talks. One is that the concessions are entirely one-sided: the acceding country must pay an "entry fee" to the existing members, but can demand no concessions in return. A second advantage is that these negotiations can be conducted without fast-track negotiating authority.

The analysis that follows offers a review of the five principal issues that might arise in the WTO, FTAA, and APEC negotiations, and perhaps in other fora as well. This is not an exhaustive catalog of energy-related issues. Other topics not included here include sales and consumption taxes in the United States, U.S. subsidies to certain fuels (especially ethanol made from domestic grain), competition policy, intellectual property rights (e.g., in the petrochemical sector), initiatives affecting allied industries (e.g., automobiles), duty-drawback rules, customs formalities, and other matters. These additional issues might also affect the climate for trade relations and negotiations in the years to come.

1. Market access and preferences

The topic of market access is principally concerned with tariff barriers. In examining U.S. tariffs, four different issues arise:

> **MFN rates:** What tariff barriers are imposed on products imported from countries that have normal trade relations (NTR)[239] with the United States?
>
> **Bindings:** Are the MFN rates bound in the WTO? If not, the United States is free to increase them (provided that this is not done in a discriminatory fashion). Significantly, oil and electricity are among the very few items in the U.S. tariff schedule that remain unbound.[240]

[239]Congress mandated in 1998 that the "MFN" designation be replaced by "NTR". The rationale behind this change -- which has no substantive impact -- stems from the confusion arising over term "favoured". After years of explaining to angry constituents that the extension of MFN treatment to countries such as China did not mean treating these countries more favourably than others, legislators decided that a change in phrasing would simplify the problem.

[240]A relatively small number of other products are also unbound. Some of these goods have obvious strategic significance, such as communications satellites (HTS item 8802.50.30) and parts of communications satellites (HTS item 8803.90.30). In other cases, however, such as instant coffee (HTS item 2101.10.21), canned sardines (HTS item

Reciprocal preferences: Are U.S. partners in free trade agreements given special treatment? If the product is not bound and duty-free on an MFN basis, countries that negotiate free trade agreements with the United States will have permanent preferential access to the U.S. market. This is already the case for Canada and Mexico (under NAFTA), and is at issue for other energy-exporting countries that participate in the FTAA and APEC negotiations.

Non-reciprocal preferences: Are the beneficiaries of preferential trade programs given special treatment? Some products that are dutiable on an MFN basis are eligible for duty-free entry under one or more preferential trade programs. These include the Generalized System of Preferences (GSP), the Andean Trade Preferences Act (ATPA), and the Caribbean Basin Initiative (CBI). Unlike reciprocal preferences, however, these programs are temporary and autonomous (i.e., the United States can alter or terminate them at will).

The principal features of U.S. tariff barriers to energy-related goods are summarized in Table D. The list further identifies those products that fall within the scope of the market-access negotiations that began under the auspices of the APEC forum in November, 1997. The APEC Leaders issued a mandate to open world markets in fifteen key sectors, with the aim of completing work on nine of them in 1998. The results of the negotiations were to be multilateralized in the WTO. Included among the nine components of this "Immediate Action Package" were "energy sector goods and services," as well as "environmental goods and services." These talks failed in 1998, when APEC countries were unable to reach agreement on key sectors.[241] The APEC countries decided instead to pass the initiative along to the WTO. The U.S. negotiators put together a package of tariff concessions on these and other sectors that fell within the APEC initiative, which they hoped could be finalized at the Seattle ministerial of the WTO. After the failure of the conference, it is unclear whether and where this initiative will be cunsummated.

The most important observation to draw from this list -- and especially for the subset of items that are identified for negotiation in the energy-goods negotiations that were started in APEC -- is the limited scope of products that are subject to negotiation. As shown in Table D, the list of goods does not include crude oil and derivatives, and a number of other products that fall within a reasonable definition of "energy" are also excluded. This observation underlines the key point that the U.S. negotiators are interested primarily in reducing foreign tariffs on energy-related products that the United States exports, rather than U.S. tariffs on the energy-related goods that the country imports.

1604.13.30), red cedar shingles and shakes (HTS item 4418.50.00), and water-resistant bib and brace overalls (HTS item 6204.63.12), the strategic significance is not so immediately apparent. The largest number of unbound items is in the U.S. agricultural schedule.

[241]The failure related not to energy *per se*, but stemmed instead from U.S. and Japanese differences over other sectors.

The list indicates that U.S. tariff barriers in this sector are very low. Of the 59 lines in the table, 17 are duty-free on an MFN basis. All of the dutiable products are eligible for duty-free treatment under the GSP, although several of them -- especially petroleum products -- are eligible for GSP only when imported from least-developed countries.[242] Even when imported on a dutiable basis, the U.S. tariffs are generally low. Only seven of the items in the list are subject to tariffs in excess of five percent, and only one line exceeds ten percent. This all implies that the United States may find it difficult to negotiate comprehensive concessions with its trading partners by bargaining solely within this sectoral area. In order to obtain improved market access for U.S. energy-related goods, it may be necessary to for the U.S. negotiators to offer concessions in other areas of their tariff schedule.

Another implication that stems from this list is that countries that have duty-free access to the U.S. market, whether under a preferential trade program or a reciprocal trade agreement, enjoy relatively narrow margins of preference in the energy sector.

The situation is more complicated for crude oil. On the one hand, tariffs on the raw material are very low; crude oil is subject to a tariff of just 5.25¢ or 10.5¢/barrel (depending on its grade). On the other hand, there is no legal guarantee that this tariff will remain at such a low level. Crude oil is one of the very few products for which U.S. tariff rates remain unbound in the WTO system. In other words, the United States could impose a much higher tariff rate without violating the WTO rights of oil exporters.

Moreover, U.S. negotiators have a long-standing reluctance to make any further cuts in these tariffs. The United States first imposed tariffs on oil imports through the Revenue Act of 1932, which set the rate at 21¢ per barrel. This tariff rate still applies to imports from those countries that do not receive MFN treatment. The MFN rate was reduced in trade agreements reached with Venezuela in 1940 and 1952, and with Mexico in 1943. Following the U.S.-Venezuelan reciprocal trade agreement of 1952, the nominal levy on oil was 10.5¢ per barrel on "high test" crude, and half that rate on lower test oil. Those MFN tariffs remain in place to this day, but their significance has declined with the rising price of oil. Through a combination of negotiations and oil-price increases, therefore, the average tariff on "low test" oil has fallen from 29.9 percent in 1935 to 17.8 percent in 1940, 9.8 percent in 1945, and 4.2 percent in 1950. During the rest of the 1950s and through the 1960s, tariffs hovered between three and four percent. The huge increase in oil prices during the 1970s brought the tariff rate down to a virtually negligible level. When oil is valued at $18 per barrel, for example, the 5.25-10.5¢ tariff is the equivalent of 0.3-0.6 percent *ad valorem.*

Note also that the United States does not extend tariff preferences to oil products. These

[242] Note that by definition all of the products that are eligible for the GSP are also eligible for the CBI and ATPA. While there are many products in the U.S. tariff schedule that are eligible for the CBI and ATPA but not the GSP, that is not the case for any of the goods listed in this table.

goods are generally ineligible for duty-free treatment under the GSP,[243] the CBI, or the ATPA. The restriction is written into the authorizing laws for these three programs, meaning that it is not within the authority of the executive branch to extend GSP, CBI, or ATPA treatment to oil. That could be done only with the approval of Congress.

Tariffs represent one area in which Canada and Mexico, as oil-exporting NAFTA countries, are in a more advantageous position than other oil exporters. They face zero duties on both raw materials and refined products. Their duty-free access to the U.S. crude oil market[244] offers only a slight margin of preference *if* one assumes no change in U.S. policy, but their duty-free rights are legally protected by the treaty obligations of NAFTA. Other exporters face at least the hypothetical threat of increased tariffs. The most likely scenario for the imposition of such tariffs would be for reasons of national security, although it is also possible that some future administration might consider imposing an oil-import fee for either fiscal reasons (e.g., to raise revenue) or from environmental motives (e.g., to discourage the consumption of hydrocarbons).

2. Measures taken for reasons of national security

The strategically vital nature of energy, and especially oil, has led on several occasions to the imposition of import restrictions by the United States. These restrictions, which have variously been imposed on a global or country-specific basis, fall through a major "loophole" in GATT law. If challenged, the United States would justify these restrictions under the national security exception. One of the more interesting questions in the trading system is whether the national security exceptions in GATT/WTO rules, which countries have heretofore been allowed to invoke rather loosely, will come under tighter discipline. NAFTA offers a possible model, but it is unclear whether the United States would be willing to expand upon that precedent in regional or multilateral negotiations.

GATT Article XXI, which continues to be a part of WTO law, establishes a general exception for measures that countries impose in order to safeguard their essential security interests (see Chapter 1, IV., 1., above). This is a relatively open-ended clause providing *inter alia* that nothing in GATT shall be construed "to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests." While a literal reading of the article would suggest that these interests are limited to three sets of circumstances, in actual practice this provision has been employed quite liberally. One could interpret the article to mean that the definition of security interests is purely the prerogative of the country that undertakes a measure ("which *it* considers contrary to its essential security interests"), and the

[243]Oil products are nevertheless eligible for duty-free treatment under the GSP when imported from least-developed countries. Angola was the only major supplier of crude oil to the United States in 1998 that qualified for duty-free treatment under these terms.

[244]The tariffs applied to Mexican oil are still being phased out under the NAFTA schedule. Canadian oil already enjoys completely duty-free access to the U.S. market, having been phased out under the U.S.-Canada Free Trade Agreement (which entered into effect in 1989).

article suggests one such justification for taking measures ("other emergenc[ies] in international relations") that offers very wide leeway for interpretation. This GATT article does not explicitly require the prior approval of the other WTO members, nor indeed any explicit notification by a country that invokes it in defence of a measure.

Import restrictions were the main tool of U.S. energy security policy from the late 1950s through the late 1970s. Although the United States has not used this tool for half a generation (except for restrictions imposed specifically on imports from Iran, Iraq, and Libya), it retains this option. The "national security" provision of U.S. trade law (section 232 of the Trade Expansion Act of 1962; 19 USC 1862) is the domestic legal complement to GATT Article XXI. The principal language of this law is reproduced in Box IX. Investigations under this law can be initiated either by petition from private interests in the United States, or by the administration on its own authority. It generally provides that the president has broad authority to impose restrictions on imports of any product (including oil) that is "being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security." Any restrictions that the president imposes on oil imports can, however, be overturned by Congress.

Four U.S. presidents used this law and its predecessor to restrict imports of oil. The first use of this approach, which was based on a 1955 predecessor to the section 232 statute, came in response to the Suez crisis of 1956. This incident forced the Eisenhower administration to reconsider the security implications of reliance upon Middle Eastern oil. The administration requested in 1957 that all U.S. oil importers cooperate in a voluntary import-limitation program. In 1959 this voluntary program gave way to the Mandatory Oil Import Program (MOIP). With modifications over the years, the MOIP controlled U.S. oil imports until President Nixon terminated it in 1973.

The 1970s were a confusing period in global oil trade. At any given moment, oil might be subject to politically motivated import restrictions in the United States, politically motivated export restrictions or other disruptions on the part of the some OPEC countries, or both. Presidents Ford, Carter, and Reagan each used the section 232 authority to impose short-lived or geographically-limited restrictions on oil imports. In 1975, President Ford placed a $3/barrel fee on imported crude oil and a $1.20 fee on imported petroleum products. He lifted these fees the next year. In 1979, President Carter sought to impose an oil-import fee, but Congress voted down the proposal. Carter tried again the next year, hoping to impose a $4.62/barrel import fee, with allocation rules that effectively converted the fee into a 10¢/gallon gasoline tax. Congress passed a resolution of disapproval, and later overrode Carter's veto of that resolution. The Reagan administration turned down the requests that members of Congress made in 1981 and 1987 to restrict oil imports, but President Reagan did use this authority to restrict oil imports from Libya in 1982. That embargo remains in effect.

It is hypothetically possible that the U.S. Department of Commerce could invoke this law in support of the U.S. industry soon, based on an investigation initiated in April, 1999. It is universally expected that this pending section 232 investigation will reiterate the view that imports need not be restricted. Even domestic U.S. producers fully expect this result. The results of the

investigation are scheduled to be released by the end of January, 2000.

Box IX

The U.S. National-Security Statute
19 U.S.C. §1862 -- Partial text

(1)(A) Upon request of the head of any department or agency, upon application of an interested party, or upon his own motion, the Secretary of Commerce (hereafter in this section referred to as the "Secretary") shall immediately initiate an appropriate investigation to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion.

[…]

(3)(A) By no later than the date that is 270 days after the date on which an investigation is initiated under paragraph (1) with respect to any article, the Secretary shall submit to the President a report on the findings of such investigation with respect to the effect of the importation of such article in such quantities or under such circumstances upon the national security and, based on such findings, the recommendations of the Secretary for action or inaction under this section. If the Secretary finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the Secretary shall so advise the President in such report.

[…]

(1)(A) Within 90 days after receiving a report submitted under subsection (b)(3)(A) of this section in which the Secretary finds that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the President shall--

(i) determine whether the President concurs with the finding of the Secretary, and

(ii) if the President concurs, determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.

(B) If the President determines under subparagraph (A) to take action to adjust imports of an article and its derivatives, the President shall implement that action by no later than the date that is 15 days after the day on which the President determines to take action under subparagraph (A).

[…]

(f) Congressional disapproval of Presidential adjustment of imports of petroleum or petroleum products; disapproval resolution

An action taken by the President under subsection (c) of this section to adjust imports of petroleum or petroleum products shall cease to have force and effect upon the enactment of a disapproval resolution [by Congress].

In addition to invocations of Article XXI and section 232, the United States has also taken other measures for reasons of national security. These include restrictions on investment or trade with Iran, Iraq, and Libya. Because none of these countries are WTO members, however, the relevant laws and regulations have not been subject to dispute-settlement cases in that institution.

There are two different ways that the international law of national-security exceptions might evolve. One option is that the further interpretation or even the formal adjudication of Article XXI invocations might lead to changes in the operation of this GATT article. It is questionable whether this will happen, however, because the United States is highly reluctant to subordinate its security policies to economic rules.

Another possibility is that the United States will negotiate agreements with smaller circles of trading partners that provide for a narrower national security exception. It is here that NAFTA offers a possible model. Two provisions of that agreement contemplate a reduction in the scope of the national security exception. One is NAFTA Article 2102, which is a nearly *ver batim* repetition of GATT Article XXI. It is modified, however, by NAFTA Article 607. This latter provision states that a country cannot use Article 2102 to justify "a measure restricting imports of an energy or basic petrochemical good from, or exports of" such goods to another NAFTA country except in certain cases. These cases are drawn more narrowly than those in GATT Article XXI, applying to measures necessary to "supply a military establishment of a Party or enable fulfilment of a critical defence contract of a Party," "respond to a situation of armed conflict involving the Party taking the measure," or relating to nuclear weapons (thus involving uranium and other fissionable materials). Two aspects of this NAFTA article are particularly notable. One is that it applies both to oil imports *and exports*, and hence is reciprocal in nature. (Mexico managed to undercut the strength of this discipline, however, through the use of reservations.) Another interesting aspect of the article is that it makes no reference to who has the authority to pass judgment on the validity of an invocation. Where GATT Article XXI explicitly referred to a party imposing measures that *it considers* to be justified, this article might be read to imply that the other parties to an agreement have some say in the legitimacy of an invocation.

Will the United States consider the expansion of this precedent in other trade agreements? The collapse of the OECD negotiations on a Multilateral Agreement on Investment suggests that it may be difficult to expand upon this precedent. It also suggests that the United States is quite serious about its opposition to a narrowly drawn national-security exception.

3. Trade in energy-related services

One of the principal accomplishments of the Uruguay Round was to bring services into the trading regime, through negotiation of the General Agreement on Trade in Services (GATS). This agreement could affect a variety of services related to the exploration, extraction, refining, transportation, distribution, and sale of energy products. The array of energy-related service sectors is enumerated in Box X.

While GATS brought services within the WTO regime, it allowed countries to establish exceptions in specific sectors. A background note prepared by the WTO Secretariat summed up the status of the energy sector by noting that while "[a] few members undertook sparse commitments in various energy related services … the vast majority of the global energy services industry is not covered by GATS specific commitments."[245] These exceptions are subject to further negotiation in the WTO. Article XIX of the GATS calls for members to enter into successive rounds of negotiations in services. The next round is due to begin no later than January 1, 2000. The U.S. negotiators have shown greater interest in the certain sectors, two of which —

[245]World Trade Organization, Council for Trade in Services, "Energy Services: Background Note by the Secretariat," S/C/W/52 (September 9, 1998), page 1.

engineering and environmental services — are particularly important for the energy field. Although they did not elaborate on the point, the U.S. negotiators proposed that energy services form a part of these "Services 2000" negotiations. Energy-related services will also be subject to negotiations in the FTAA.

The transportation of oil involves two particularly sensitive service sectors. One is maritime transportation, an area in which the United States has sought to block or delay negotiations. Another is overland transportation through pipelines. This sector is sensitive not only insofar as the United States took MFN exceptions for certain measures applying to pipeline transportation of oil, but also because it relates to a key objective in U.S. relations with the states of the former Soviet Union. The United States is currently seeking to encourage new investment in Caspian Basin oil fields, and also -- on strategic grounds -- to influence the routing of pipelines in that region.

4. Anti-dumping and Countervailing Duties

The anti-dumping (AD) and countervailing duty (CVD) laws are a recurring source of friction between the United States and its trading partners. This has not previously been a key issue in the energy sector, but that could have changed with petitions filed in mid-1999 by the Committee to Save Domestic Oil (SDO). This regional U.S. group of independent oil producers filed AD and CVD petitions against Venezuela, Mexico, Iraq, and Saudi Arabia. If the U.S. Department of Commerce and U.S. International Trade Commission had found in favour of SDO in this case, tariffs of between 33 and 170 percent could have been applied to oil imports from the four countries.

Box X

Items in the Energy Sector Service Matrix

Oil & Natural Gas Development Services
- Exploration
- Drilling
- Processing, Gathering & Refining
- Design & Engineering
- Production (Construction, Operation & Maintenance)
- Storage
- Support Services
- Waste Management & Disposal

Natural Gas Sale, Transportation and Distribution Services
- Design & Engineering
- Transportation
- Distribution
- Storage
- Demand Side & Other Customer Services
- Commodity & Price Risk Management

Electricity Project Development, Generation, Transportation and Distribution Services
- Design & Engineering
- Generation (Construction, Operation & Maintenance)
- Transportation
- Distribution
- Waste Management & Disposal
- Demand Side & Other Customer Services
- Trading, Marketing & Brokering
- Commodity & Price Risk Management

Coal and Uranium Mining Services
- Exploration
- Regulatory Approvals & Environmental Permitting
- Development
- Extraction
- Processing
- Production/Technology
- Marketing
- Transportation
- Reclamation
- Recycling
- Engineering

The case did not make it past the first formal step, which was a Department of Commerce determination regarding whether the SDO has “standing” to file these petitions. In an ordinary

case, standing requires that producers of at least 25 percent of total domestic production support the petitions, and that at least 50 percent of those domestic producers express an opinion supporting the petitions. In this instance, however, the petitioners invoked a provision of law that -- if it were sustained -- would allow them to be considered a "regional" industry. The SDO asked that crude oil produced in Alaska and California be excluded from consideration, and also that the investigators exclude from the domestic industry those U.S. producers that also import crude from the targeted countries. The Department of Commerce decided two months after the filing that the petitioners indeed lacked the necessary standing. The decision was based in part on the fact that the major (i.e., multinational) U.S. oil companies opposed the initiative.

This case was almost unprecedented. While there have been four previous anti-dumping investigations of oil and petroleum products -- the most recent of which was conducted forty years ago -- none of them resulted in the imposition of AD orders.[246] Similarly, the only CVD case against crude oil was a 1958 investigation of imports from the Middle East; it was terminated without a result. There have, however, been trade-remedy orders imposed on other fuels (coal imported from England and Spain in the 1920s, and uranium imported from former Soviet republics in the 1990s), as well as on energy-related goods such as oil country tubular goods (a category of steel product) and aluminum conductor wire.

There are some energy-related aspects of the trade-remedy laws that might be considered in a new round of WTO negotiations, or alternatively in the FTAA negotiations. One such topic, which is examined at greater length in Chapter 1 of this volume, is the allegation that export restrictions on raw materials constitute a form of subsidy on downstream products. While the United States has not challenged the central policies of OPEC in the context of GATT/WTO rules, it reserves the right to take countervailing action against one specific aspect of oil-export restrictions. Under U.S. law and policy, restrictions on the exportation of raw materials can be treated as an indirect export subsidy to goods that are made from those materials. Variously referred to as "dual-pricing" or "natural-resource subsidies," this doctrine has been employed in such diverse cases as Mexican petrochemicals (where lower domestic prices of oil were alleged to constitute a subsidy to producers of carbon black feedstock), Argentine leather goods (where a ban on the exportation of hides was alleged to constitute a subsidy to the leather goods industry), and Canadian lumber (where the pricing practices of provincial authorities were alleged to constitute a subsidy to domestic softwood lumber producers). This issue is of particularly great interest to oil-rich countries.

5. Investment

A final issue of interest here concerns private investment in the energy industry. This is a topic that has been the subject of intense political disputes, both in domestic law and in U.S. relations with oil-exporting countries. Although energy firms are among the largest multinational corporations, the U.S. energy industry has historically been dominated by competing private firms

[246]The investigations concerned imports from the Dutch West Indies (1938), Mexico (1938 and 1940), and Romania (1959).

rather than large, state-owned industries. The "busting" of the Standard Oil trust in 1911 was an event of signal importance in U.S. economic history. The United States has long sought to promote a similar model overseas, and has encouraged foreign investment and privatization in foreign energy sectors. Conversely, expropriation cases involving energy firms in Mexico, Venezuela, and other countries have been the cause of some significant economic disputes between the United States and its trading partners.

As can be seen from the data in Table E, the petroleum sector remains one of the leading areas for U.S. direct investment abroad, as well as foreign direct investment in the United States. Oil accounts for two-thirds of U.S. investment in Africa, more than one-quarter of U.S. investment in the Middle East, and significant shares of U.S. investment in Canada, Asia, and Europe. One anomaly in the data concerns Latin America, where oil projects account for less than ten percent of total U.S. investment. If accurate, these data suggest that the FTAA initiative -- if accompanied by privatization and liberalization of investment -- may open up major new opportunities for U.S. capital in the region.

The United States strongly encourages the privatization of state-owned enterprises, and the expansion of opportunities for foreign investors in specific stages of oil exploration, extraction, and refinement. This is an area that has heretofore not been subject to extensive disciplines in the GATT/WTO regime. Although the Uruguay Round produced an agreement on Trade-Related Investment Measures (TRIMs), the terms of this pact fell far short of what the United States sought.

This is an issue that might arise in the new round. The WTO built-in agenda calls for a review of the operation of the TRIMs agreement, and discussion on whether provisions on investment policy and competition policy should be included in the agreement, by January 1, 2000. The WTO members accelerated this pace by setting up working parties in 1997. In the FTAA, the issues that fall within the scope of the investment working group are national treatment, most-favoured-nation status, expropriation, repatriation of profits, performance requirements, and dispute settlement.

The U.S. negotiators have also pursued their objectives through other instruments, especially bilateral investment treaties (BITs). The United States has reached 45 BITs since the early 1980s. All of these treaties were reached with developing countries and economies in transition, including oil-exporting countries such as Ecuador, Kazakhstan, and Trinidad & Tobago. Venezuela is among the several countries that are currently negotiating such a treaty with the United States. The bilateral option might supplement the WTO, FTAA, or APEC negotiations for some countries.

ANNEX

Table A

U.S. Exports of Selected Energy-Related Goods

Millions of dollars of domestic exports in 1998

HTS Number and Description	Canada	Mexico	OPEC Countries	Rest of World	Total
8207 Drilling & boring tools	461	142	43	526	1,172
8411 Turbines	1,354	402	446	10,455	12,657
8413 Pumps	836	243	167	1,650	2,896
8414 Compressors	824	476	286	1,596	3,182
8419 Distilling machinery	365	178	144	1,107	1,794
8421 Separation equipment	858	276	116	1,773	3,023
8428 Elevators & conveyors	242	139	60	625	1,066
8429 Earth-moving machinery	812	189	104	888	1,993
8431 Lifting, handling, load./unload. machinery	638	240	1,951	5,912	8,741
8479 Oil & gas field wire. & downhole equipment	719	671	216	4,857	6,463
8501 Generators & generating sets	459	218	69	544	1,290
8502 Generators & generating sets	229	58	74	662	1,023
8504 Transformers	488	719	55	1,471	2,733
8536 Fuses & circuit breakers	1,048	1,298	74	1,838	4,258
8538 Parts for electric power delivery	188	866	11	524	1,589
8544 Electric conductors for power delivery	944	1,835	81	1,346	4,206
8704 Dumpers for off-highway use	3,430	904	306	1,544	6,184
Total of above	13,895	8,854	4,203	37,318	64,270
Imports of mineral fuels (HTS chapter 27)	14,662	4,891	21,477	14,079	55,109

Source: Calculated from U.S. International Trade Commission data.

Note: Several of the four-digit items listed above cover a broader range of products than is indicated by the descriptions, which are taken from the APEC list of energy-related goods.

Table B

U.S. Perceptions of Energy Security: Five Circles of Foreign Oil Suppliers

U.S. imports of crude oil (HTS item 2709) in 1998 and percentage shares

	Group/Country Share of —		
	U.S. Imports	**Global Production**	**Global Reserves**
Inner Circle: Domestic	—	10.5%	2.9%
First Circle: NAFTA	28.6%	8.5%	5.1%
Mexico	14.4%	5.0%	4.5%
Canada	14.2%	3.5%	0.6%
Second Circle: Other Western Hemisphere	23.3%	9.7%	8.5%
Venezuela	16.0%	4.9%	6.9%
Colombia	4.2%	1.1%	0.2%
Ecuador	1.0%	0.5%	0.2%
Argentina	0.8%	1.3%	0.2%
Trinidad & Tobago	0.6%	0.2%	0.1%
Peru	0.5%	0.2%	0.1%
Rest of Western Hemisphere	0.2%	1.5%	0.8%
Third Circle: Other Non-M. East/N. Africa	25.5%	35.2%	15.5%
Nigeria	8.8%	3.0%	2.1%
Angola	5.3%	1.1%	0.5%
Gabon	2.9%	0.5%	0.2%
Norway	2.6%	4.3%	1.0%
United Kingdom	2.1%	3.8%	0.5%
Republic of Congo	0.7%	0.3%	0.1%
Indonesia	0.6%	2.0%	0.5%
Rest of World	2.5%	20.2%	10.6%
Fourth Circle: Middle East/N. Africa	19.3%	25.8%	46.0%
Saudi Arabia	15.6%	12.6%	24.8%
Kuwait	3.5%	3.1%	9.2%
Algeria	0.2%	1.7%	0.9%
United Arab Emirates	0.0%	3.4%	9.3%
Rest of Middle East/N. Africa	0.0%	5.0%	23.8%
Fifth Circle: Subject to Sanctions	3.3%	10.3%	22.0%
Iraq	3.3%	3.0%	10.7%
Iran	0.0%	5.3%	8.5%
Libya	0.0%	2.0%	2.8%

Source: U.S. import data calculated from U.S. International Trade Commission data. Global production and reserves from British Petroleum-Amoco data, available at http://www.bpamoco.com/worldenergy/.

Table C
Net Oil Exporters: Production Data in Percentages of the Global Total at Year-End 1998

	Country	Country's Share of Production	Cumulative Share of Production[1]
	WTO Members		
1948	Canada	3.5%	3.5%
1948	Norway	4.3%	7.8%
1948	United Kingdom	3.8%	11.6%
1950	Indonesia	2.0%	13.6%
1951	Peru	0.2%	13.8%
1957	Malaysia	1.0%	14.8%
1960	Nigeria	3.0%	17.8%
1962	Trinidad and Tobago	0.2%	18.0%
1963	Cameroon	0.1%	18.1%
1963	Republic of Congo	0.3%	18.4%
1963	Gabon	0.5%	18.9%
1963	Kuwait	3.1%	22.0%
1967	Argentina	1.3%	23.3%
1970	Egypt	1.2%	24.5%
1981	Colombia	1.1%	25.6%
1986	Mexico	5.0%	30.6%
1990	Tunisia	0.1%	30.7%
1990	Venezuela	4.9%	35.6%
1993	Brunei	0.2%	35.8%
1994	Angola	1.1%	36.9%
1994	Papua New Guinea	0.1%	37.0%
1994	Qatar	0.4%	37.4%
1994	United Arab Emirates	3.4%	40.8%
1995	Ecuador	0.5%	41.3%
Total of above		**41.3%**	
Countries in Accession			
	Algeria	1.7%	
	Azerbaijan	0.3%	
	Kazakhstan	0.7%	
	Russian Federation	8.7%	
	Saudi Arabia	12.6%	
	Oman	1.3%	
	Uzbekistan	0.2%	
	Vietnam	0.4%	
Total of above		**25.9%**	

Source: Calculated from British Petroleum-Amoco data, available at http://www.bpamoco.com/worldenergy.

[1] Cumulative production is the total production of oil by all the countries listed above the selected country (the numbers in the column represent the percentage of world oil production produced by GATT/WTO Members).

Table D
Tariff Treatment of Selected Energy Products in the U.S. Market

HTS Item	Product Description	NTR/MFN Tariff	Bound	APEC List	Preference Programs
2612.10	Uranium ores & concentrates	Free	Yes	No	___
2701-2706	Coal, lignite, peat, coke, coal gas, tars	Free	Yes	No	___
2709.00.10	Crude oil less than 25° API	5.25¢/barrel	No	No	LDC
2709.00.20	Crude oil 25° API or more	10.5¢/barrel	No	No	LDC
2710.00.05	Distillate & residual fuel oils <25° API	5.25¢/barrel	Yes	No	LDC
2710.00.10	Distillate & residual fuel oils >25° API	10.5¢/barrel	Yes	No	LDC
2710.00.15	Motor fuel	52.5¢/barrel	Yes	No	LDC
2710.00.18	Motor fuel blending stock	52.5¢/barrel	Yes	No	LDC
2711	Natural gas & other petroleum gases	Free	Yes	No	___
2716	Electrical energy	Free	No	No	___
2844.10.10	Natural uranium metal	5%	Yes	No	GSP
2844.10.20	Natural uranium compounds	Free	Yes	No	___
2844.20	Uranium enriched in U235	Free	Yes	No	___
2844.30.20	Compounds of uranium depleted in U235	Free	Yes	No	___
73	Steel items (pipes, tubes, drill rigs, etc.)	0-4%	Yes	Yes	LDC
7403.12.00	Refined copper, wire bars	1%	Yes	No	GSP
7408.11.30	Refined copper, wire, over 9.5 mm	1%	Yes	No	GSP
7408.11.60	Refined copper, wire, 6-9.5 mm	3%	Yes	No	GSP
7408.19	Refined copper, wire, under 6 mm	3%	Yes	No	GSP
8207	Drilling & boring tools	2.9-5%	Yes	Yes	GSP
8401.10	Nuclear reactors	3.9%	Yes	No	GSP
8401.14	Parts of nuclear reactors	3.9%	Yes	No	GSP
8401.30	Fuel elements	3.9%	Yes	No	GSP
8404.20.00	Condensers for vapor power units	5.9%	Yes	No	GSP
8401.14	Parts of nuclear reactors	3.9%	Yes	No	GSP
8402-8404	Boilers	3.9-5.9%	Yes	Yes	GSP
8406.82.10	Steam turbines	6.9%	Yes	Yes	GSP
8410-8411	Turbines	0-4.5%	Yes	Yes	GSP
8413	Pumps	0-2.5%	Yes	Yes	GSP
8414	Compressors	0-4.7%	Yes	Yes	GSP
8416	Furnace burners	Free	Yes	Yes	___
8419	Distilling machinery	0-4.2%	Yes	Yes	GSP
8421	Separation equipment	0-2.5%	Yes	Yes	GSP
8428	Elevators & conveyors (coal & uranium)	Free	Yes	Yes	___

(continued next page)

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HTS Item	Product Description	NTR/MFN Tariff	Bound	APEC List	Preference Programs
8429	Earth-moving machinery	Free	Yes	Yes	___
8430	Tunneling mach., drilling platforms, etc.	Free	Yes	Yes	___
8431	Lifting, handling, loading/unloading mach.	Free	Yes	Yes	___
8437	Machinery for working corn/biomass	Free	Yes	Yes	___
8467	Pneumatic drills	0-4.5%	Yes	Yes	GSP
8474	Sorting, crushing, grinding, mixing mach.	Free	Yes	Yes	___
8479	Oil & gas field wireline & downhole equip.	0-2.8%	Yes	Yes	GSP
8481	Valves	0-5.6%	Yes	Yes	GSP
8501-8502	Generators & generating sets	0-6.7%	Yes	Yes	GSP
8504	Transformers	0-6.6%	Yes	Yes	GSP
8535-8536	Fuses, circuit breakers	0.9-3.2%	Yes	Yes	GSP
8537	Boards, panels, & other bases	2.7%	Yes	Yes	GSP
8538	Parts for electric power delivery	1.1-3.7%	Yes	Yes	GSP
8541.40	Solar cells	Free	Yes	Yes	___
8544	Electric conductors for power delivery	3.5-3.9%	Yes	Yes	GSP
8546	Electrical insulators for power delivery	0-3%	Yes	Yes	GSP
8547	Electric conduit/joints for power delivery	0-4.6%	Yes	Yes	GSP
8704	Dumpers for off-highway use	0-25%	Yes	Yes	LDC
8705.20	Mobile drilling derricks	Free	Yes	Yes	___
8905.20	Floating or submersible drilling platforms	Free	Yes	Yes	___
9015	Seismographs & geophysical instruments	0-3%	Yes	Yes	GSP
9026	Apparatus for level/pressure of liq. fuels	[complex]	Yes	Yes	GSP
9028	Meters for gas, liquid fuels or electricity	[complex]	Yes	Yes	GSP
9030	Apparatus for elec. voltage/current/resist.	0-1.7%	Yes	Yes	GSP
9032	Thermostats & regulat./control. insts.	1.1-1.7%	Yes	Yes	GSP

***Note**: Many of the descriptions for products at the four-digit level identify products that form part of that category; other products within the same category may not be energy-related.*

NTR Tariff is the tariff applied in 1999 to imports from countries receiving normal trade relations **(MFN)**.

APEC List indicates that the product appeared on the USTR's illustrative list of products subject to the energy initiative in APEC.

GSP products are eligible for duty-free treatment when imported from any beneficiary country of the Generalized System of Preferences (for some products not all GSP countries are eligible). All GSP products are also designated for the Caribbean Basin Initiative (CBI) and the Andean Trade Preferences Act (ATPA).

LDC products are eligible for GSP treatment only when imported from one of the 33 least developed countries (most of which are African).

Sources: Product list compiled by the author, based in part on the APEC illustrative list. Tariff rates and preferences are from the Harmonized Tariff Schedules of the United States.

Table E

U.S. Direct Investment Position, Total and Petroleum

Millions of dollars, historical-cost basis, 1998

	U.S. Investment Abroad			Foreign Investment in U.S.		
	Total	**Petroleum**	**Petro %**	**Total**	**Petroleum**	**Petro %**
World	980,565	91,113	9.3%	811,756	53,254	6.6%
European Union	433,658	24,953	5.8%	481,731	41,330	8.6%
Asia and Pacific	161,797	23,228	14.4%	156,085	2,720	1.7%
Canada	103,908	12,559	12.1%	74,840	2,633	3.5%
Africa	13,491	8,984	66.6%	884	-4	___
Latin America	129,677	8,374	6.5%	11,916	-457	___
Middle East	10,599	3,010	28.4%	7,831	1,061	13.5%
Eastern Europe	8,143	1,531	18.8%	N/A	N/A	___
Caribbean	66,978	1,338	2.0%	20,294	4,529	22.3%
Rest of World	52,314	7,136	13.6%	58,175	1,442	2.5%

Source: Calculated from data published by U.S. Department of Commerce, Bureau of Economic Analysis (http://www.bea.doc.gov/bea/di/diapos_98.htm and http://www.bea.doc.gov/bea/di/fdipos-98.htm)

Table F
OPEC Member countries and their status in GATT and WTO
(as of December 1999)

Countries	Status in GATT	Status in WTO
Algeria	Applying GATT on a *de facto* basis since independence (3 July 1962)	In the process of accession since June, 1987
Indonesia	24 February 1950	1 January 1995
Iran, Islamic Republic of * #	Observer	None
Iraq * #	Observer	None
Kuwait *	3 May 1963	1 January 1995
Libyan Arab Jamahiriya	Observer	None
Nigeria	18 November 1960	1 January 1995
Qatar	7 April 1994	13 January 1996
Saudi Arabia *	Observer	In the process of accession since July, 1993
United Arab Emirates	8 March 1994	10 April 1996
Venezuela *	31 August 1990	1 January 1995

** Founder Member of OPEC*

 # Signed the Havana Final Act, but did not become a GATT Contracting Party.

Table G
Non-OPEC petroleum-exporting developing countries and economies in transition and their status in GATT and WTO
(as of December 1999)

Countries	Status in GATT	Status in WTO
Angola	Applying GATT on a *de facto* basis	1 December 1996
Argentina	11 October 1967	1 January 1995
Azerbaijan	None	In the process of accession since July, 1997
Brazil	29 July 1948	1 January 1995
Brunei Darussalam	9 December 1993	1 January 1995
Cameroon	1 January 1960	13 December 1995
China	GATT Contracting Party from 1947 to 1949	In the process of accession since March, 1987
Colombia	3 October 1981	30 April 1995
Congo	15 August 1960	27 March 1997
Ecuador	Observer	21 January 1996
Egypt	9 May 1970	30 June 1995
Gabon	3 May 1963	1 January 1995
India	8 July 1948	1 January 1995
Kazakhstan	None	In the process of accession since February, 1996
Malaysia	31 August 1957	1 January 1995
Mexico	24 August 1986	1 January 1995
Oman	None	In the process of accession since June, 1996
Papua New Guinea	Applying GATT on a *de facto* basis since independence (16 September 1975)	9 June 1996
Peru	7 October 1951	1 January 1995
Russian Federation	Observer	In the process of accession since June, 1993
Syrian Arab Republic	Contracting Party from 1947 to 1950	None
Trinidad and Tobago	31 August 1962	1 March 1995
Tunisia	19 August 1990	29 March 1995
Uzbekistan	None	In the process of accession since December, 1994
Viet Nam	None	In the process of accession since January, 1995
Yemen	Applying GATT on a *de facto* basis since indipendence (30 November 1967)	Observer

Table H
OVERVIEW OF THE GATS COMMITMENTS IN ENERGY SPECIFIC SERVICES SECTORS[1]: commercial establishment

Transportation via pipeline of crude or refined petroleum and petroleum products and of natural gas	
No sector specific restrictions in:	**Australia, Kyrgyz Republic and New Zealand**.
Some sector specific restriction exist:	**Hungary** - Services may be provided through a Contract of Concession granted by the state or the local authority
Services incidental to energy distribution: transmission and distribution services on a fee or contract basis of gaseous fuels to household, industrial, commercial and other users	
No sector specific restrictions in:	**Nicaragua, United States, Kyrgyz Republic, Latvia**
Some sector specific restrictions exist:	**Australia and Hungary**: limited to consultancy services **Dominican Republic**: national treatment may not be granted **Gambia**: conditions for market access not clear, except that individuals/companies must be certified and registered by the Professional Associations or Registrar General's Office; subject to payment of fee, tax deposit and professional qualification of the individual. **Sierra Leone**: through joint venture only. **Slovenia** - for gas only.
Services incidental to mining: rendered on a fee or contract basis at oil and gas fields	
No sector specific restrictions in:	**Argentina, Canada, Columbia, Dominican Republic, Ecuador, Hungary, Israel, Kyrgyz Republic, Latvia, Malawi, Mongolia, Nicaragua, Pakistan, Panama, South Africa, Turkey, United States, Venezuela, Zambia**
Some sector specific restrictions exits:	**Australia, Austria, European Union, Finland, Republic of Korea, Singapore, Sweden** - for consulting services only, **Poland** - excluding natural resources, Switzerland, **Liechtenstein** - excluding exploration, exploitation, prospect and survey services, **Thailand** - 49% limit on foreign equity participation.

[1]None of the countries have made provision for market access of specialists in any of the relevant categories for supply of the energy services (except Turkey for mining services).

Table I

OVERVIEW OF THE GATS COMMITMENTS IN ENERGY SPECIFIC SERVICES SECTORS: cross-border supply

<table>
<tr><th colspan="2">Horizontal (affecting all industries) commitment</th></tr>
<tr><td colspan="2">In Canada with respect to cross border and consumption abroad: Alberta - First consideration may be given to service suppliers from within Alberta or Canada where competitive in terms of price and quality in the case of all large scale energy projects needing Industrial Development, Forest Management, Oil Sands, Power Plant or Gas Plant and Coal Development Permits.</td></tr>
<tr><th colspan="2">Transportation via pipeline of crude or refined petroleum and petroleum products and of natural gas</th></tr>
<tr><td>No sector specific restriction in:</td><td>Australia, Kyrgyz Republic and New Zealand</td></tr>
<tr><td>Some sector specific restriction:</td><td>Hungary - conditions for market access not defined</td></tr>
<tr><th colspan="2">Services incidental to energy distribution: transmission and distribution services on a fee or contract basis of gaseous fuels to household, industrial, commercial and other users</th></tr>
<tr><td>No sector specific restriction in:</td><td>Australia, Gambia, Hungary, Nicaragua, Sierra Leone, Slovenia, United States, Latvia</td></tr>
<tr><td>Some sector specific restriction:</td><td>Dominican Republic: national treatment may not be granted</td></tr>
<tr><th colspan="2">Services incidental to mining: rendered on a fee or contract basis at oil and gas fields</th></tr>
<tr><td>No sector specific restriction in:</td><td>Argentina, Canada, Columbia, Dominican Republic, Hungary, Kyrgyz Republic, Latvia, Malawi, Mongolia, Nicaragua, Panama, Turkey, United States, Zambia</td></tr>
<tr><td>Some sector specific restriction:</td><td>Australia, Austria, European Union, Finland, Republic of Korea, Singapore, Sweden - for consulting services only, Poland - excluding natural resources, Switzerland, Liechtenstein - excluding exploration, exploitation, prospection and survey services.</td></tr>
</table>

Table J
MFN EXEMPTION IN ENERGY SERVICES

Country	**Measure**
United States of America *With respect to Pipeline Transport due to lack of reciprocity*	Pursuant to the Mineral Lands Leasing Act of 1920, aliens and foreign corporations may not acquire rights-of-way for oil or gas pipelines, or pipelines carrying products refined from oil and gas, across on-shore federal lands or acquire leases or interests in certain minerals on on-shore federal lands, such as coal or oil. Non-US citizens may own a 100 percent interest in a domestic corporation that acquires a right-of-way for oil or gas pipelines across on-shore federal lands, or that acquires a lease to develop mineral resources on on-shore federal lands, unless the foreign investors' home country denies similar or like privileges for the mineral or access in question to US citizens or corporations, as compared with the privileges it accords to its own citizens or corporations or to the citizens or corporations of other countries. Nationalization is not considered to be denial of similar or like privileges. Foreign citizens, or corporations controlled by them, are restricted from obtaining access to federal leases on Naval Petroleum Reserves if the laws, customs or regulations of their country deny the privilege of leasing public lands to US citizens or corporations.

Table K

Tariff Treatment for Crude Oil (HS 2709):

a) Applied and post-Uruguay Round tariff averages

	Applied Rates (1998)				Post-Uruguay Round Rates*			
	Mean**	% Duty Free	% Specific	% No AVE ***	Mean **	% Duty Free	% Specific	% No AVE ***
Australia	0.00	100.00	0.00	0.00	0.00	100.00	0.00	0.00
Brazil	6.00	50.00	0.00	0.00	35.00	0.00	0.00	0.00
Canada	0.00	100.00	0.00	0.00	0.40	50.00	50.00	0.00
EU	0.00	100.00	0.00	0.00	0.00	100.00	0.00	0.00
Hungary[1]	0.00	100.00	0.00	0.00	0.00	100.00	0.00	0.00
Iceland[2]	0.00	100.00	0.00	0.00	0.00	100.00	0.00	0.00
Indonesia [2]	2.50	50.00	0.00	0.00	40.00	0.00	0.00	0.00
Japan	0.85	0.00	100.00	0.00	-	0.00	100.00	100.00
Korea, Rep. of [2]	5.00	0.00	0.00	0.00	5.00	0.00	0.00	0.00
Malaysia[1]	2.50	50.00	0.00	0.00	2.50	50.00	0.00	0.00
Mexico	10.00	0.00	0.00	0.00	50.00	0.00	0.00	0.00

[1]1997 rates.
[2]1996 rates.

* Rates implemented or to be implemented in accordance with specific country schedules
** Simple average
*** No ad-valorem equivalent.

Source: UNCTAD Trains and WTO.

	Applied Rates (1998)				Post-Uruguay Round Rates*			
	Mean**	**% Duty Free**	**% Specific**	**% No AVE *****	**Mean ****	**% Duty Free**	**% Specific**	**% No AVE *****
New Zealand	0.00	100.00	0.00	0.00	0.00	100.00	0.00	0.00
Norway	0.00	100.00	0.00	0.00	0.00	100.00	0.00	0.00
Poland[2]	0.00	100.00	0.00	0.00	0.00	100.00	0.00	0.00
Switzerland	0.00	100.00	0.00	0.00	0.90	0.00	100.00	50.00
Thailand[3]	0.00	100.00	0.00	0.00	25.00	0.00	0.00	0.00
Turkey [1]	0.00	100.00	0.00	0.00	-	0.00	100.00	100.00
USA	0.40	0.00	100.00	0.00	0.47	0.00	100.00	0.00

[2]1996 rates.
[3]1995 rates.
[1]1997 rates.

* Rates implemented or to be implemented in accordance with specific country schedules
** Simple average
*** No ad-valorem equivalent.

Source: UNCTAD Trains and WTO.

b) Detailed pre- and post-Uruguay Round MFN tariffs in selected developed country markets

	Pre-Uruguay Round	Post-Uruguay Round
	Tariff ranges	**Tariff ranges**
European Union	0%	0%
United States	5.5 cts/bbl (u)	5.5 cts/bbl (u)
Japan	350 yen/KL (u)	350 yen/KL (u)

Notes: u refers to unbound tariffs.

KLT = kilolitre.

cts/bbl = cents per barrel.

Table L
Tariff Treatment for Petroleum Products (HS 2710)
a) Applied and post-Uruguay Round tariff averages

	Applied Rates (1998)				Post-Uruguay Round Rates *			
	Mean **	% Duty Free	% Specific	% No AVE ***	Mean **	% Duty Free	% Specific	% No AVE ***
Australia	86.94	27.30	72.70	0.00	0.00	100.00	0.00	0.00
Brazil	6.05	47.40	0.00	0.00	35.00	0.00	0.00	0.00
Canada	3.25	50.00	0.00	0.00	5.82	20.00	0.00	0.00
EU	3.19	30.00	0.00	0.00	4.23	0.00	0.00	0.00
Hungary[1]	2.13	76.10	0.00	0.00	3.70	33.30	0.00	0.00
Iceland[2]	0.33	93.30	0.00	0.00	8.67	66.70	0.00	0.00
Indonesia[2]	3.67	26.70	0.00	0.00	40.00	0.00	0.00	0.00
Japan	1.85	9.80	56.10	0.00	2.97	8.20	61.20	61.20
Korea, Rep. of[2]	6.78	0.00	0.00	0.00	11.09	0.00	0.00	0.00
Malaysia[1]	11.01	45.80	45.80	0.00	5.00	0.00	87.00	87.00

[1] 1997 rates.
[2] 1996 rates.

*	Rates implemented or to be implemented in accordance with specific country schedules
**	Simple average
***	No ad-valorem equivalent.

Source: UNCTAD TRAINS and WTO.

	Applied Rates (1998)				Post-Uruguay Round Rates *			
	**Mean ** **	**% Duty Free**	**% Specific**	**% No AVE *** **	**Mean ** **	**% Duty Free**	**% Specific**	**% No AVE *** **
Mexico	7.27	27.30	0.00	0.00	35.00	0.00	0.00	0.00
New Zealand	1.69	79.30	0.00	0.00	6.40	66.70	0.00	0.00
Norway	0.00	100.00	0.00	0.00	0.00	100.00	0.00	0.00
Poland[2]	23.38	0.00	0.00	0.00	22.60	0.00	100.00	0.00
Switzerland	0.00	100.00	0.00	0.00	44.84	0.00	100.00	0.00
Thailand[3]	3.83	0.00	57.10	14.30	29.17	0.00	93.80	62.50
Turkey[1]	4.86	0.00	0.00	0.00	-	0.00	100.00	100.00
USA	2.79	0.00	81.80	0.00	2.22	0.00	81.80	0.00

[3] 1995 rates.
[2] 1996 rates.
[1] 1997 rates.

* Rates implemented or to be implemented in accordance with specific country schedules
** Simple average
*** No ad-valorem equivalent.

Source: UNCTAD TRAINS and WTO.

b) Detailed pre- and post-Uruguay Round MFN tariffs in selected developed country markets

	Pre-Uruguay Round	Post-Uruguay Round
	Tariff ranges	Tariff ranges
European Union	5.0% - 7.0%	3.5% - 4.7%
United States	5.8% - 84 cts/bbl	5.8% - 84 cts/bbl
Japan	0% - 3033 yen/KLT (p)	0% - 3033 yen/KLT (p)

Notes: p refers to partially bound tariffs.

KLT = kilolitre.

cts/bbl = cents per barrel.

Table M
Tariff Treatment for Hydrocarbons (HS 2901-2907):
a) Applied and post-Uruguay Round tariff averages

	Applied Rates (1998)				Post-Uruguay Round Rates *			
	Mean **	**% Duty Free**	**% Specific**	**% No AVE** ***	**Mean** **	**% Duty Free**	**% Specific**	**% No AVE** ***
Australia	1.59	68.20	0.00	0.00	8.13	0.00	0.00	0.00
Brazil	9.04	0.00	0.00	0.00	19.59	0.40	0.00	0.00
Canada	2.74	52.00	0.00	0.00	3.95	29.30	0.00	0.00
EU	4.18	30.30	2.40	0.00	4.74	32.50	4.40	0.00
Hungary[1]	5.58	16.40	0.00	0.00	3.56	31.70	0.00	0.00
Iceland[2]	0.00	100.00	0.00	0.00	0.07	98.70	0.00	0.00
Indonesia[2]	5.35	19.00	0.00	0.00	38.69	0.00	0.00	0.00
Japan	3.06	18.30	0.80	0.00	2.75	28.40	0.00	0.00
Korea, Rep. of[2]	7.55	0.00	0.00	0.00	5.05	10.90	0.00	0.00
Malaysia[1]	0.34	98.30	0.00	0.00	4.68	0.00	1.20	1.20

[2] 1996 rates.
[1] 1997 rates.

* Rates implemented or to be implemented in accordance with specific country schedules
** Simple average
*** No ad-valorem equivalent.

Source: UNCTAD TRAINS and WTO.

	Applied Rates (1998)				Post-Uruguay Round Rates *			
	**Mean ** **	**% Duty Free**	**% Specific**	**% No AVE *** **	**Mean ** **	**% Duty Free**	**% Specific**	**% No AVE *** **
Mexico	7.99	18.40	0.00	0.00	35.04	0.00	0.00	0.00
New Zealand	0.06	98.90	0.00	0.00	0.61	92.50	0.00	0.00
Norway	1.18	78.40	0.00	0.00	1.93	63.30	0.00	0.00
Poland[2]	8.56	0.00	0.00	0.00	8.03	0.00	2.60	0.00
Switzerland	0.28	39.40	65.00	0.00	0.96	27.90	72.10	24.30
Thailand[3]	10.40	3.50	0.00	0.00	30.89	0.00	0.00	0.00
Turkey[1]	5.00	21.70	0.00	0.00	30.01	0.00	0.00	0.00
USA	5.48	18.20	8.50	0.00	3.27	29.30	0.00	0.00

[3] 1995 rates.
[2] 1996 rates.
[1] 1997 rates.

* Rates implemented or to be implemented in accordance with specific country schedules
** Simple average
*** No ad-valorem equivalent.

Source: UNCTAD TRAINS and WTO.

b) Detailed pre- and post-Uruguay Round MFN tariffs in selected developed country markets

	Pre-Uruguay Round	Post-Uruguay Round
	Tariff range	Tariff range
European Union	0% - 14%	0% - 5.5%
United States	0% (18%)[a]	0% - 5.5%
Japan	0% (24%)[b]	0% - 5.5%

Notes:

[a] Specific duties ranging from 2.7 to 3.7 cents/kg.

[b] Specific duties ranging from 14 to 720 yen/kg.

*	Rates implemented or to be implemented in accordance with specific country schedules
**	Simple average
***	No ad-valorem equivalent.

Source: UNCTAD TRAINS and WTO.

Table N
Tariff Treatment for Plastics in Primary Forms (ex HS 39):
a) Applied and post-Uruguay Round tariff averages

	Applied Rates (1998)				Post-Uruguay Round Rates *			
	Mean **	**% Duty Free**	**% Specific**	**% No AVE *****	**Mean ****	**% Duty Free**	**% Specific**	**% No AVE *****
Australia	4.64	7.10	0.00	0.00	9.21	0.00	0.00	0.00
Brazil	15.14	0.00	0.00	0.00	22.40	0.00	0.00	0.00
Canada	4.91	37.60	0.00	0.00	6.49	0.00	0.00	0.00
EU	8.34	12.40	0.00	0.00	6.49	0.00	0.00	0.00
Hungary[1]	6.19	35.20	0.00	0.00	5.08	36.90	0.00	0.00
Iceland[2]	1.79	64.00	0.00	0.00	4.88	48.40	0.00	0.00
Indonesia[2]	14.70	3.00	0.00	0.00	39.49	0.00	0.00	0.00
Japan	4.38	1.80	5.40	0.00	3.77	0.00	0.00	0.00
Korea, Rep. of[2]	8.00	0.00	0.00	0.00	6.74	0.00	0.00	0.00

[1] 1997 rates.
[2] 1996 rates.

* Rates implemented or to be implemented in accordance with specific country schedules
** Simple average
*** No ad-valorem equivalent.

Source: UNCTAD TRAINS and WTO.

	Applied Rates (1998)				Post-Uruguay Round Rates *			
	Mean **	% Duty Free	% Specific	% No AVE ***	Mean **	% Duty Free	% Specific	% No AVE ***
Malaysia[1]	17.16	25.50	2.00	0.00	25.84	0.50	2.80	2.00
Mexico	11.60	6.30	0.00	0.00	34.74	0.00	0.00	0.00
New Zealand	4.61	36.30	0.00	0.00	16.18	0.90	0.00	0.00
Norway	8.92	20.20	0.00	0.00	5.88	7.90	0.00	0.00
Poland[2]	11.00	0.00	0.00	0.00	9.00	0.00	0.00	0.00
Switzerland	1.28	9.10	90.90	0.00	1.49	9.20	90.80	0.00
Thailand[3]	28.60	0.00	0.00	0.00	31.49	0.00	100.00	0.00
Turkey[1]	7.46	19.70	0.00	0.00	44.87	0.00	0.00	0.00
USA	5.42	9.40	17.00	0.00	4.74	8.00	0.00	0.00

[1] 1997 rates.
[3] 1995 rates.

* Rates implemented or to be implemented in accordance with specific country schedules
** Simple average
*** No ad-valorem equivalent.

Source: UNCTAD TRAINS and WTO.

b) Detailed pre- and post-Uruguay Round MFN tariffs in selected developed country markets

	Pre-Uruguay Round	Post-Uruguay Round
	Tariff range	Tariff range
European Union	8% - 13½ %	5.7% - 6.5%
United States	0% - (16%)[a]	0% - 6.5%
Japan	4.1% (7.2%)[b]	0% - 6.5%

Notes:

[a] Specific duties up to 18.7 cents/kg.

[b] In a few cases, specific duties up to 32 yen/kg.

Table O

Tariff Treatment for All Petroleum Products (HS 2709, 2710, 2901-2907, ex HS 39):

Applied and post-Uruguay Round tariff averages

	Applied Rates (1998)				Post-Uruguay Round Rates *			
	Mean **	% Duty Free	% Specific	% No AVE ***	Mean **	% Duty Free	% Specific	% No AVE ***
Australia	8.36	40.60	4.70	0.00	8.22	5.70	0.00	0.00
Brazil	11.11	2.80	0.00	0.00	21.45	0.20	0.00	0.00
Canada	3.87	44.60	0.00	0.00	5.13	15.80	0.60	0.00
EU	6.42	20.40	0.90	0.00	5.39	16.00	2.10	0.00
Hungary[1]	5.39	16.00	2.10	0.00	4.28	34.70	0.00	0.00
Iceland[2]	1.01	79.70	0.00	0.00	3.59	65.30	0.00	0.00
Indonesia[2]	10.69	10.30	0.00	0.00	39.30	0.00	0.00	0.00
Japan	3.40	10.20	11.60	0.00	3.28	11.70	12.50	12.50

[1] 1997 rates.
[2] 1996 rates.

* Rates implemented or to be implemented in accordance with specific country schedules
** Simple average
*** No ad-valorem equivalent.

Source: UNCTAD TRAINS and WTO.

	Applied Rates (1998)				Post-Uruguay Round Rates *			
	**Mean ** **	**% Duty Free**	**% Specific**	**% No AVE *****	**Mean ** **	**% Duty Free**	**% Specific**	**% No AVE *****
Korea, Rep. of[2]	7.53	0.00	0.00	0.00	6.62	4.70	0.00	0.00
Malaysia[1]	10.85	52.20	4.30	0.00	22.00	0.60	6.30	5.80
Mexico	9.58	13.20	0.00	0.00	34.94	0.00	0.00	0.00
New Zealand	2.50	65.70	0.00	0.00	9.14	43.40	0.00	0.00
Norway	4.67	53.50	0.00	0.00	3.43	43.40	0.00	0.00
Poland[2]	11.23	0.70	0.00	0.00	8.51	0.70	2.10	0.00
Switzerland	0.59	33.50	69.10	0.00	4.92	19.30	80.70	14.60
Thailand[3]	22.21	1.50	1.50	0.40	31.06	0.00	51.10	5.70
Turkey[1]	5.94	19.10	0.00	0.00	36.32	0.00	9.10	9.10
USA	5.32	14.10	15.10	0.00	3.77	19.60	4.20	0.00

[2] 1996 rates.
[3] 1995 rates.
[1] 1997 rates.

* Rates implemented or to be implemented in accordance with specific country schedules
** Simple average
*** No ad-valorem equivalent.

Source: UNCTAD TRAINS and WTO.