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ABSTRACT

Ensuring a steady supply of energy remains a priority for every nation's energy policymaking because most countries import energy resources. Therefore, trade in energy—in particular the export policies of major energy resources exporting countries—plays a crucial role in energy security planning. This article questions whether the legal principles of non-discrimination and prohibition on quantitative restrictions under the World Trade Organization (WTO) assist WTO Members in achieving energy security and, if so, why some WTO Members negotiate regional agreements with very strong energy connections, such as the North American Free Trade Agreement and the Energy Charter Treaty. Does this imply that the WTO's role in energy security will be increasingly diminished and replaced by regional agreements? While this article finds that export controls under these regional agreements are more attuned to cater to the energy security needs of energy importing countries, this article concludes that the WTO will not, and cannot, be substituted by regional agreements in the context of energy security.

I. INTRODUCTION

Energy is the driving force behind every nation's economic activities. How to ensure steady supplies of energy remains a top priority of every nation's energy policies. Nonrenewable energy resources such as coal, oil, and natural gas are located in only a handful of countries or regions around the world, resulting in a situation where most countries are dependent upon imported energy resources.[1] Therefore, policies concerning energy security and energy supply increasingly take into account international trade in energy—in particular, export policies of the

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1. *See 2008 Key World Energy Statistics*, IEA REPORTS 11, 13, *available at* http://www.iea.org/textbase/nppdf/free/2008/key_stats_2008.pdf. For example, according to the statistics of the International Energy Agency (IEA), the top 10 crude oil producing countries accounted for 61.6 percent of world crude oil production in 2007 and their combined exports account for 65.32 percent of total world export in 2006. *Id.* The top 10 natural gas producing countries accounted for 64.5 percent of world natural gas production in 2007, and their combined export accounted for 75.57 percent of total world export in 2007. *Id.*

major energy resources-producing countries. Only two out of the top 10 oil-producing countries—Russia and Iran—are not yet Members of the World Trade Organization (WTO).[2] In the 12-member Organization of the Petroleum Exporting Countries (OPEC), only four members—Algeria, Iran, Iraq, and Libya—are not WTO Members. Nevertheless, all these oil-producing countries, which are not yet WTO Members, are currently applying for accession to the WTO.[3] Does this imply that international trade in energy, in particular in energy resources, will be subject to the non-discrimination and trade liberalization principles embodied in the WTO? Does this further imply that, as a result, WTO Members dependent on imported energy can achieve their policy goals of energy security and energy supply?

On another front, it has been noted that the multilateral trading system (MTS) under the General Agreement on Tariffs and Trade (GATT) mainly addresses market access issues, rather than access to supplies.[4] In addition, industrialized countries have realized that the success of OPEC in using supply restriction measures to raise oil prices in the 1970s demonstrates how ill-equipped the MTS was to deal with problems of access to key energy supplies such as crude oil. Therefore, the International Energy Agency (IEA) was established by industrialized countries in 1974 to respond to the oil crisis and national policies by raising energy efficiency and diversifying energy supply, and was adopted by governments sensitive to energy security issues. More importantly, some countries began to negotiate and conclude regional agreements with very strong energy content—such as the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty (ECT). Such regional agreements have one characteristic in common, they try to "reverse the traditional GATT emphasis on access to market in favor of access to supplies."[5] Does this trend imply that the role of the MTS, established by the GATT/WTO, will be increasingly marginalized and

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2. According to the 2008 Key World Energy Statistics, the top 10 oil-producing countries are Russia, Saudi Arabia, the United States, Iran, China, Mexico, Canada, Venezuela, Kuwait, and United Arab Emirates. *Id*. at 11. As for the membership of the WTO, please visit the "members and observers" section of the official WTO website at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

3. For information on the OPEC countries, please visit the official OPEC website at http://www.opec.org/aboutus. As for the status of countries that are in the WTO accession negotiation, please visit the "accession" section of the official WTO website at http://www.wto.org/english/thewto_e/acc_e/acc_e.htm.

4. Melaku Geboye Desta et al., *The Organization of Petroleum Exporting Countries, the World Trade Organization, and Regional Trade Agreement*, 37 J. OF WORLD TRADE 523, 532 (2003).

5. Desta et al., *supra* note 4, at 538–39.

replaced by such regional agreements with regard to energy trade and energy security concerns?

These central themes are examined throughout the article. Part II begins by briefly introducing the concept of energy security—in particular the importance of the supply of energy resources—followed by detailed analysis regarding the different dimensions of energy trade and the corresponding provisions under the GATT/WTO. Export control regulations will be identified as the crucial component of energy security for those WTO Members that rely on imported energy resources. Export control regulations, such as export tariff, quantitative restrictions on export, and exceptions clauses, under the GATT/WTO will be examined in Part III to determine whether such regulations can assist WTO Members in ensuring a steady supply of energy resources. Part IV will then focus on two regional agreements with strong energy content—NAFTA and the ECT. This part will analyze the agreements' relevant provisions on export control and transit, and compare these provisions with those under the GATT/WTO in order to identify the best approach to energy security through trade policies. Lastly, Part V offers some conclusions and suggestions.

II. ENERGY SECURITY AND ENERGY TRADE UNDER THE GATT/WTO

A. Energy Security

Energy security is a multi-faceted issue. Energy security is assured when a nation can reliably, economically, environmentally, and safely deliver energy in quantities sufficient to support growing economy and defense needs. Such a goal requires policies that "support expansion of all elements of the energy supply and delivery infrastructure, with sufficient storage and generating reserves, diversity and redundancy, to meet the demands of economic growth."[6] Energy security issues at the international level embrace a set of issues ranging from physical security of personnel and of infrastructure, and security of supply against disruption, to security of a stable legal and political climate for energy investment and trade.[7] In recent years, environmental issues relating to energy use—for example, the emissions of greenhouse gases from the burning of fos-

6. U.S. Energy Association, *National Energy Security Post 9/11*, 7 (2002), *available at* http://www.usea.org/Publications/Documents/USEAReport.pdf.

7. Catherine Redgwell, *International Energy Security*, *in* ENERGY SECURITY: MANAGING RISK IN A DYNAMIC LEGAL AND REGULATORY ENVIRONMENT, 17 (Barry Barton et al., ed., 2005).

sil fuels—have also become part of the energy policy concerns.[8] Such a dimension has also been incorporated into energy security issues. For example, the United Nations Development Program (UNDP) in its *World Energy Assessment* report defines energy security as "a term that applies to the availability of energy at all times in various forms, in sufficient quantities, and at affordable prices, without unacceptable or irreversible impact on the environment."[9]

In the global marketplace, a country's energy and economic security are directly related to its supply of energy.[10] Thus, "energy security at its simplest means the security of energy supply."[11] However, key concerns for energy security issues can be quite different for countries with different levels of development and natural resources endowment. For most of the industrialized countries, one crucial aspect of energy security is the supply of oil and natural gas at reasonable prices. For developing countries without natural or energy resources, the following dimensions are their key energy security concerns: (1) access to sufficient primary energy sources to generate electricity in various sectors; (2) obtain enough oil for the transportation sector; and (3) provide, in the short and medium term, access to traditional fuels for the poor before transferring to a modern energy system.[12] For developing countries with abundant energy resources, such as Saudi Arabia and some OPEC countries, the most important energy security concern might, on the other hand, require "unfettered access to the downstream petroleum sectors of the United States and other major industrial countries via exports of crude oil, products, and capital for further investment in refining and product marketing."[13] As a result, governments inevitably adopt very diverse

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8. According to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) in February 2007, "Most of the observed increase in globally averaged temperatures since the mid-20th century is *very likely* due to the observed increase in anthropogenic greenhouse gas concentrations." IPCC, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS SUMMARY FOR POLICYMAKERS, 10 (2007), *available at* http://ipcc-wg1.ucar.edu/wg1/docs/WG1AR4_SPM_Approved_05Feb.pdf.

9. U.N. DEVELOPMENT PROGRAMME, WORLD ENERGY ASSESSMENT: OVERVIEW 2004 UPDATE, 42, (2004), *available at* http://www.undp.org/energy/docs/WEAOU_full.pdf; *see* Black, Alexander J., *Environmental Impact Assessment and Energy Export*, 16 LOY. L.A. INT'L & COMP. L. REV. 799 (1994).

10. Stacey L. Middleton, *How the Petroleum Addict Negotiates with the Dealer: Challenges to the Bush Administration's North American Energy Policy*, 11 CARDOZO J. OF INT'L & COMP. L. 177, 180 (2003).

11. Robert Pritchard, *Global Energy Security and Middle East Oil*, 2006 INT'L ENERGY L. & TAX'N REV. 13, 13 (2006).

12. Ambuj D. Sagar et al., *Climate Change, Energy and Developing Countries*, 7 VT. J. OF ENVTL. L. 4, Part III (2005).

13. Edward L. Morse, *A Rational International Petroleum Regime for the 1990s*, 27 TULSA L.J. 479, 491 (1992).

policies to implement their respective energy security goals depending on their different energy security concerns. Nevertheless, as has been noted in the introduction, the majority of countries depend on imported energy resources. This phenomenon highlights the indispensable role of international trade in energy, in particular export control of major energy resources countries, as it is closely linked with the policy goal of security of supply.

B. Energy Trade and the GATT/WTO

1. Dimensions and Content of Energy Trade

Energy trade is also a multi-faceted issue that covers a wide range of issues ranging from trade in goods to trade in services relating to energy. Various dimensions of energy trade will depend on different aspects of energy—its production, generation, transmission, conversion, storage, distribution, utilization, consumption, etc. For example, the production of energy entails converting various types of energy resources into consumer goods, such as electricity and petroleum. This process involves, first of all, export and import of nonrenewable energy resources, which consist mostly of mineral fuels such as coal, crude oil, liquefied natural gas, natural gas (via pipelines or transmission lines), etc. Renewable energy (natural energy) cannot be traded in itself. However, usable energy converted from renewable energy into consumer products, such as electricity from solar cells, can be traded internationally. In addition, various types of equipments and services required from the production stage—prospecting and exploration—through the conversion stage, to the final stage of utilization and consumption can also be traded. Thus, energy trade not only covers the most traditional dimension of trade in mineral fuels but also incorporates various trades in goods and services that are associated with different dimensions of energy.

As previously noted, energy security concerns vary among different countries. This, in turn, reflects the diverse dimensions and features of energy trade in different countries. In addition to the most typical and traditional trade policies of tariff and non-tariff measures, investment policies and industrial policies have also been taken into consideration in the overall framework and design of international energy trade concerns by countries with different levels of development and natural resources endowments. As mineral fuels are still the dominant energy resources for most countries, revenue from export of mineral fuels for developing countries with abundant mineral fuels resources (such as the OPEC

countries) continue to be the most important source of national income.[14] Determining how to secure market access for their mineral fuels is, thus, of primary importance for such countries.[15]

Furthermore, in the process of industrialization, such developing countries not only need to address new market access issues for their value-added products, like petrochemical products, but they also need to adopt industrial policies to protect their domestic industries, such as the refinery and petrochemical sectors.[16] Investment policies to attract foreign capital and technologies in resources exploration and in the process of industrialization can also be crucial in such developing countries. From this perspective, developed countries with advanced technologies will be interested in how to secure market access and opportunities in these developing countries. Their main concern will focus on whether developing countries with mineral resources will allow private or foreign participation in the exploration and exploitation of mineral resources and whether the legal systems, concerning direct foreign investment, in these countries can provide adequate protection to investors. For countries that depend on imported energy resources, their primary concerns will be to ensure that their supply of energy resources will not be affected or disturbed by export control measures adopted by the countries exporting energy resources and to ensure the safety and freedom in the transportation of those energy resources. For countries with rich nonrenewable resources that seek to develop their resources to become less import-dependent, industrial and investment policies that establish and protect relevant industries, on the one hand, and selectively attract foreign capital and technologies, on the other hand, will be their main energy trade concern. Similarly, from this perspective, developed countries with advanced technologies will, again, be interested in securing market access and opportunities in these nonrenewable resource-rich countries.

In the context of energy security, a steady supply of energy remains a top priority. Not surprisingly, issues relating to energy supply—including a diversified source of imported energy resources, stability in their main supplying regions, and safety of transportation—turn out to be the major concern of energy trade for countries that depend on imported energy resources. Therefore, energy trade in the context of sup-

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14. *See* IEA, 2006 Key World Energy Statistics, IEA REPORTS, at 19, *available at* http://www.iea.org/textbase/nppdf/free/2006/key2006.pdf. For example, hydropower only accounted for 16.1 percent of the total sources of energy in 2004. *Id.*

15. For example, import tariffs and internal taxes and charges on the import of mineral fuels should not be raised to the level that might reduce the income of such exporting countries.

16. The problem of tariff escalation is a good case in point.

plying energy resources remains the most significant policy goal of energy security for energy importing countries.

In order to determine whether the MTS and its trade rules established by the GATT/WTO adequately provide a legal framework for its Members with different energy trade and energy security concerns, the GATT/WTO's provisions relating to the diverse policy concerns and dimensions of energy trade must be analyzed.

2. GATT/WTO, Energy Trade, and Energy Security

Energy goods and energy resources are not subject to different or special treatment under the GATT 1947. In other words, regulations relating to trade in goods under the GATT are, in principle, applicable to trade in energy resources. However, international energy trade has been little developed in the debate or the jurisprudence of international economic and trade law. The main reason is that it was only in the 1990s that "privatization, followed by liberalization of former national energy monopolies, has opened up increasingly competitive national and then regional markets in energy."[17] In addition, take the most important energy resource—oil—as an example. Most of the oil fields were under the control of the American, British, Dutch, or French multilateral enterprises back in the 1940s when the GATT was under negotiation. As these countries would have liked to avoid tensions over the control of resources, they seemed to implicitly exclude the most strategic international commodity—crude oil—from the GATT negotiations. In any case, the main oil-exporting countries were non-Contracting Parties to the GATT at the time.[18] A "gentlemen's agreement," perhaps, was in place in the GATT's early history to continue excluding issues relating to trade and price of crude oil from the GATT framework.[19] After the oil crisis in the 1970s, however, the United States and other industrialized countries attempted to include the subject of export restrictions in the Tokyo Round. Nevertheless, this attempt failed as objections were raised by many countries.[20] During the Uruguay Round of negotiations, export control measures on oil began to surface again as several petroleum-producing countries—Mexico and Venezuela—were in the process of acces-

17. *See* Thomas W. Walde & Andreas J. Gunst, *International Energy Trade and Access to Energy Network*, 36 J. WORLD TRADE 191, 191 (2002). Only electricity and natural gases are referred to in this article; however, the prevailing industrial development in the energy sector is quite similar to trade in other types of energy resources.

18. *See* U.N. CONFERENCE ON TRADE AND DEVELOPMENT, TRADE AGREEMENTS, PETROLEUM AND ENERGY POLICIES, 14–15 (2000), *available at* http://www.unctad.org/en/docs/itcdtsb9_en.pdf.

19. *Id.* at 15.

20. *Id.*

sion to the GATT 1947.[21] After the Uruguay Round, the only four non-WTO Members in OPEC—Algeria, Iran, Iraq, and Libya—had either applied or were in the process of accession to the WTO.[22]

It seems that, when compared to the GATT 1947, the international trade in petroleum could be controlled more effectively by multilateral trade rules within the WTO. New disciplines, such as trade in services, have also been incorporated into the WTO. These factors seem to bring out the conclusion that multilateral trade rules under the GATT 1994 and the WTO can play a more significant role in regulating international trade in energy than the GATT 1947. If this is the case, then why do some WTO Members actively seek and conclude regional agreements with strong energy content to regulate their trade in energy? Before embarking on this query, this section will briefly analyze relevant provisions under the GATT/WTO that might affect international trade in energy.

One of the characteristics of the energy industry is that, traditionally, the industry has not distinguished between energy goods and energy services. The failure to distinguish between energy goods and energy services could be due to the market structure of the energy sector which, until recently, was dominated by state-owned, vertically integrated suppliers that performed all energy-related economic activities—including the production and distribution of energy products.[23] Such an integrated structure has been broken down in some countries by privatizing certain public suppliers and introducing partial or full competition in the energy sector.[24] Such trends also lead to the identification of energy services as distinct from energy goods.[25]

For WTO Members, imports and exports of all types of energy resources need to comply with various GATT 1994 provisions on tariffs, non-tariff measures, and non-discrimination principles. For resources exporting WTO Members, the following measures taken by importing WTO Members will affect their export earning: (1) whether the import tariffs on energy resources are bounded under Article II of the GATT 1994; and (2) whether such resources are subject to discriminatory taxes

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21. *Id.* at 15–20.

22. Algeria applied to the GATT on June 16, 1987. Iran applied to the WTO on July 19, 1996. Iraq applied to the WTO on September 30, 2004. Libya applied to the WTO on June 10, 2004. For the status of countries that are in the WTO accession negotiation, please visit the "accession" section of the official WTO website, http://www.wto.org/english/thewto_e/acc_e/acc_e.htm (last visited Aug. 25, 2009).

23. *See* World Trade Organization, Energy Services: Background Note by the Secretariat, ¶ 3 (1998) [hereinafter WTO Secretariat].

24. *Id.*

25. *Id.*

or measures.[26] For resources-importing WTO Members, on the other hand, the following measures taken by exporting Members will affect the security of supply on energy resources: (1) whether export tariffs and other charges can be raised; and (2) whether export restriction measures can be adopted at will and unpredictably. For WTO Members that largely depend on imported energy, increasing energy demand and the inelasticity of nonrenewable energy resources supply cause those Members to question whether export control regulations under the GATT/WTO can provide energy stability and security by ensuring that the supply and trade in energy, especially energy resources, will not be affected by discriminatory measures of the exporting Members.

In addition to the above-mentioned export-control regulations, freedom of transit as provided under Article V of the GATT 1994 is also of great importance in energy trade—in particular for trade in those types of energy resources (e.g., natural gases) that require pipelines and transmission lines. The question of whether Article V applies to transit of energy has, however, been debated and is not yet settled.[27] Despite its potential importance, Article V has played a very limited role in cross-border energy transit for the following two reasons. First, many of the states where transit problems occur, such as Ukraine, are not yet WTO Members. Second, a large number of important pipelines and transmission lines have been under the ownership and control of state-owned companies or monopolized private companies, and Article V has not yet been developed into an effective obligation for WTO Members to ensure that these state-owned companies comply with transit obligations.[28]

A prevailing practice concerning energy resources is the so-called dual pricing or two-tiered pricing scheme in which the domestic prices in resource-rich countries remain substantially lower than the world market price.[29] By imposing high export tariffs or other export controls, resource-rich countries maintain a below-world-market domestic price of energy resources with an aim of ensuring a sufficient and cheap supply of raw materials for its domestic manufacturing industries. In addition to GATT/WTO regulations on export controls to deal with such schemes, another possible set of regulations might be those concerning subsidies—e.g., does dual pricing represent a subsidy by the exporting coun-

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26. For oil-exporting countries, high consumption taxes and excise taxes imposed on cars and other petrochemical products can seriously affect the benefits of exports. U.N. CONFERENCE ON TRADE AND DEVELOPMENT, *supra* note 18, at 27 & n. 27.

27. *See* Pascal Laffont, *An Energy Charter Protocol on Transit*, 2003 INT'L ENERGY L. & TAX'N REV. 239, 240.

28. Walde & Gunst, *supra* note 17, at 211–12.

29. Stephen J. Powell & John D. McInerney, *International Energy Trade and the Unfair Trade Laws*, 11 U. PA. J. INT'L BUS. L. 339, Part 1.1. (1989).

try that must comply with GATT/WTO's regulations? The United States and some other industrialized countries attempted to bring up such issues in the Uruguay Round, which failed to address such issues because a consensus was difficult to reach.[30] Interestingly, there has been no dispute over these practices under the GATT 1947 and the WTO. However, as the world market price of nonrenewable energy resources increases, the question as to whether the two-tiered pricing scheme becomes more trade distorting and controversial and whether the Agreement on Subsidies and Countervailing Measures is capable, or even eligible, to tackle such controversy remain to be seen.[31]

In addition to issues on subsidies, energy resources or related petrochemical products might be subject to anti-dumping investigation in the importing countries. According to WTO documents, there are a number of anti-dumping actions affecting the petrochemical sector.[32] For example, in June of 1999, the U.S. Department of Commerce received a petition from the Committee to Save Domestic Oil, Inc. (SDO), a group of American independent producers from the American Midwest, alleging market dumping of crude oil by Venezuela, Mexico, Iraq, and Saudi Arabia.[33] The petition was dismissed on August 16, 1999, on the ground that SDO did not have sufficient industry support to continue the investigation.[34] Nevertheless—as provided under the "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994," known as the "Anti-dumping Agreement"[35]—this incidence has significant implications on exporting countries as their trade activities could be scrutinized under the WTO anti-dumping discipline.

As has been mentioned, economic activities in the energy sector have traditionally been left to state-owned companies or monopolized private enterprises. Despite privatization and liberalization that took place in the 1990s, most resource-rich countries maintain state monopolies to control the export of energy resources. For example, "the top ten

30. U.N. CONFERENCE ON TRADE AND DEVELOPMENT, *supra* note 18, at 15–20.

31. For a more detailed discussion on whether dual pricing measures are consistent with the definition of "subsidy" under the Agreement on Subsidy and Countervailing Measures, whether importing countries can impose countervailing duties, and the future development of dual pricing policies, please see U.N. CONFERENCE ON TRADE AND DEVELOPMENT, *supra* note 18, at 29–35.

32. U.N. CONFERENCE ON TRADE AND DEVELOPMENT, *supra* note 18, at 36.

33. William C. Smith, *Save Domestic Oil, Inc.'s Crude Oil Market Dumping Petition: Domestic and International Political Considerations*, 8 TULSA J. COMP. & INT'L L. 147, 147 (2000).

34. For detailed discussion and analysis concerning this dispute, see *id.*

35. *See* World Trade Organization, http://www.wto.org/english/docs_e/legal_e/19-adp_01_e.htm (last visited Jan. 22, 2010).

oil companies in 2003 in terms of reserves are state monopolies."[36] Such national oil companies and governments now take almost 80 percent of industry profits.[37] Thus, Article XVII of the GATT 1994 on state trading enterprises and relevant jurisprudence, developed via dispute cases, could also be relevant to international trade in energy because of state-owned oil companies. A related issue concerns the conduct of international commodity organizations—such as OPEC—or agreements that are formed to control world market prices for commodities, and whether such conduct represents unfair competition.[38] Take OPEC as an example. Two cases alleging violation of U.S. antitrust laws were brought against OPEC in late 1978 by a U.S. labor union and, again, in April 2000 by a U.S. company. Both of these cases were dismissed pursuant to the "act of state" doctrine and on procedural grounds, respectively.[39] Such incidences demonstrate the importance of competition law in energy trade. However, competition law is not yet part of the legal framework under the GATT/WTO and was not addressed under the 2004 Doha Round negotiation.[40]

As mentioned previously, domestic markets that used to be closed to foreign competition began to be liberalized after privatization and liberalization took place in the energy sector. Part II.B.1 of this article also pointed out that energy trade encompasses new market access for technologically advanced countries in terms of foreign investment opportunities, as well as in the energy-services sectors. Hence, in addition to provisions on trade in goods, regulations under the WTO on trade related investment activities and trade in services also affects trade in energy. For the former, the Agreement on Trade-Related Investment Measures (the TRIMs Agreement) seems to be most relevant. The TRIMs Agreement mainly prohibits WTO Members from adopting trade balancing or domestic content requirements in their domestic investment measures in order to comply with the principles of national treatment and

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36. Jacqueline Lang Weaver, *The Traditional Petroleum-based Economy: An "Eventful" Future*, 36 CUMB. L. REV. 505, 544 (2005–06).

37. *Id.* at 544–545.

38. Negotiation on export monopoly was included in Article 31.1 of the Havana Charter, but later disappeared when the Soviet Union decided to withdraw from the International Trade Organization. Michael Rom, *Export Controls in GATT*, 18 J. WORLD TRADE LAW 125, 136 (1984). For the legal status and operation of various types of export cartels in the United States, Germany, European Union and Japan, and how they interact with trade and competition policies, see generally Ulrich Immenga, *Export Cartels and Voluntary Export Restraints Between Trade and Competition Policy*, 4 PAC. RIM L. & POL'Y J. 93 (1995).

39. *See* Desta et al., *supra* note 4, at 541–43 (analyzing these two legal disputes).

40. Visit the World Trade Organization's website, http://www.wto.org/english/tratop_e/comp_e/comp_e.htm., for an introduction to the work regarding trade and competition policy of the WTO.

the prohibition on quantitative restrictions.[41] Other crucial elements in the overall regulations concerning foreign direct investment are, however, not provided under the TRIMs Agreement. For technologically advanced WTO Members that seek investment opportunities in resource-rich countries, the TRIMs Agreement under the WTO does not seem to provide an adequate legal framework. Recourses to domestic legislations regulating direct foreign investment or bilateral/regional—or even sectoral—investment protection agreements might be necessary to provide more legal certainty in this aspect of energy trade.

For trade in energy services, the most relevant regulations under the WTO are the General Agreement on Trade in Services (GATS) and its Annexes. Whether energy, in the form of electricity, should be categorized as a good or a service has been subject to academic debate.[42] Apart from the element of uncertainty regarding electricity, it seems generally accepted that the production of primary and secondary energy is subject to the GATT 1994, as the production service is incorporated in the value of the good produced. Transportation and distribution of energy, if provided independently, might constitute services under the GATS. Construction, engineering, and consulting services could also be used in the energy value-added chain. These services, however, are better defined as energy-related services.[43] The WTO Services Sectoral Classification List (W/120 list), prepared by the GATT Secretariat as a reference point in scheduling specific commitments to assist the negotiation on services, does not include a separate comprehensive entry for energy services.[44] By using oil and gas as examples, the W/120 list has been criticized for its inability to fully reflect the commercial reality of the energy supply system.[45] The various aspects of energy production, generation, transmission, distribution, storage, consumption, etc., all involve highly professional and technical services. Not only do they involve specialized services unique to the energy sector, they also include other service sectors—such as construction services and transportation services—which have general applicability. Thus, it is rather difficult to categorize all the

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41. *See* Article 2.1, 2.2 & Annex (Illustrative List) of the TRIMs Agreement. A brief introduction to the TRIMs Agreement is available at World Trade Organization, http://www.wto.org/english/tratop_e/invest_e/invest_info_e.htm.

42. *See, e.g.*, Philip Pierros, *Exploring Certain Trade-Related Aspects of Energy Under GATT/WTO: Demarcation Questions Regarding Electricity*, 5 INT'L TRADE LAW & REGULATION 26 (1999).

43. WTO Secretariat, *supra* note 23, ¶ 9.

44. *Id.* ¶ 10.

45. Simonetta Zarrilli & Irene Musselli, *Oil and Gas Services: Market Liberalization and the Ongoing GATS Negotiations*, 8 J. INT'L ECONOMIC L. 551, 559 (2005). Note the various proposals by WTO Members concerning the classification of energy sectors. *Id.* at 559–61.

relevant service sectors into one "energy service" sector. Important energy services—transport, distribution, construction, consulting, engineering, etc.—are covered by the respective horizontal categories in the W/120 list, with an exception represented by 11(G)(a) "pipeline transportation of fuels" that is listed as a separate sub-sector of transport services. Meanwhile, some energy-related services are listed as separate subsectors. For example, 1(F) "Other business services" covers some energy-related services. In addition to the W/120 list, the United Nations Provisional Central Product Classification (UNCPC) 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 UNCPC, including energy-related services. Technologically advanced WTO Members are concerned as to whether energy-related services are committed to be liberalized and, more importantly, whether specific commitments will be listed in Members' Schedules. Since an energy service is not listed as a separate entry in the W/120 list, each Member is free to tailor the sectoral coverage of its specific commitments on energy services as it wishes.[46] In light of such ambiguities in the definition of energy services, WTO Members have undertaken very limited and vague commitments in energy services in the Uruguay Round.[47] It is, thus, important for such technologically advanced WTO Members to secure more market access opportunities through new service negotiations. On a different note, energy trade in the service sector encounters other obstacles such as domestic regulations and restrictive business practices,[48] not to mention that the whole energy sector is subject to tight environmental, health, and safety regulations.[49] Another aspect of regulation concerns public service obligations—as most governments maintain tight regulatory control to ensure that privatized energy suppliers continue to provide certain essential services for the public's general interest. From this perspective, another key concern seems to be whether, and under which circumstances, certain types of energy services may qualify as "public services" under Article I:3(b) and be excluded from the GATS discipline.[50] Lastly, as governments remain the dominant buyers in the energy market, provisions relating to government procurement are likely to affect trade in energy services as well.[51]

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46. *Id.* at 564.

47. For specific commitments in the energy sector made by WTO Members under the Uruguay Round, see WTO Secretariat, *supra* note 23, ¶¶ 72–76, Table 9–11.

48. *Id.* ¶ 37; Zarrilli & Musselli, *supra* note 45, at 578–79.

49. WTO Secretariat, *supra* note 23, 69.

50. *Id.* ¶ 70; Zarrilli & Musselli, *supra* note 45, at 575–77.

51. Zarrilli & Musselli, *supra* note 45, at 567–72.

In summary, the legal framework of the GATT/WTO seems to provide many, albeit not all, of the essential multilateral trade rules concerning the various dimensions of energy trade. Note also that one major dimension of energy security relating to energy trade has always been the steady supply of energy resources. Considering the above-mentioned GATT/WTO provisions most relevant to the supply of energy resources, export control regulations definitely play a key part. The next Part will continue to provide more detailed analysis of the export control regulations under the GATT/WTO, with an aim of examining their adequacy to deal with the energy security concerns of most WTO Members.

III. EXPORT CONTROL UNDER THE GATT 1994

A. Export Tariffs and Tariff Negotiations

A tariff is the only permissible trade policy tool under the GATT/WTO legal regime to restrict imports and exports. Export tariffs, thus, are not prohibited. Many countries impose high tariffs on the export of domestic raw materials and, meanwhile, impose low or no export tariffs on processed goods in order to further the development of domestic processing industries. Such practice is similar to the problem of tariff escalation—where raw material importing countries impose import duties that rise with the degree of processing.[52] The drafters of the GATT 1947 considered a complete abolition of export restrictions but ultimately rejected the idea due to insufficient consensus among the original 23 contracting parties.[53] It has been proposed that negotiation on export tariff bindings could be made "product by product or sector by sector on a reciprocal and mutually advantageous basis."[54] However, such a proposal has not materialized.

According to Article XXVIII *bis*:1, WTO Members can negotiate the reduction and concession of export tariffs on a reciprocal basis.[55] However, whether the result of such negotiation can be incorporated in the Members' Schedules of Concessions and, as a result, become part of the legal regime under the WTO is not clear. Professor John Jackson argues that Article II refers to importation only, in particular Article II:1(b) and II:1(c) where Members' obligation under the Schedules are laid down. Therefore, he feels that it would not be possible to include the results of negotiation on export tariffs in the goods Schedules. As a re-

52. Frieder Roessler, *GATT and Access to Supplies*, 9 J. WORLD TRADE LAW 25, 31 (1975).
53. *Id.* at 28.
54. *Id.*
55. General Agreement on Tariffs and Trade 1994 art., XXVIII *bis*:1, Apr. 15, 1994, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994].

sult, export commitments could not become part of the GATT and would be treated as "any independent bilateral agreement between two members of GATT and would apply for the benefit of all GATT members under the "most favored nation (MFN)" obligations of Article I."[56] However, a scheduled concession incorporated into the GATT can only be withdrawn if procedures safeguarding the interests of affected third countries are observed, while a bilateral concession can be withdrawn by agreement between the two parties concerned.[57] In addition, the prohibition of raising custom duties in Article II:1(b) only applies to those goods and tariff rates that are listed in the Members' Schedules.

Other scholars, such as Roessler and Rom, reached a different conclusion on this matter based mainly on Article II:1(a), which provides that Members shall accord to the *commerce* of the other Members' treatment "no less favorable than that provided for in the appropriate Part of the appropriate Schedule annexed to [the GATT]."[58] It was noted that the language speaks of *commerce*, rather than imports, in this introductory paragraph.[59] Therefore, obligations contained in Article II can be applicable to the negotiation on export tariffs concessions as well as the import tariffs concessions. Furthermore, the possibility of negotiating export duties was discussed during the preparatory work. Article XXVIII *bis*:1 also recognizes the importance of substantially reducing the general level of tariffs and other charges on imports *and exports*. This conclusion can also find support in the preparatory work; some of the relevant provisions included in Article XXVIII were discussed and appeared together with Article I in the International Trade Organization draft charter at some point. "The differentiation between export and import tariffs did not exist in principle when the articles were read or discussed successively during the negotiations, but rather are explained by the preoccupation, at the time, of the issue of imports."[60] In practice, nonetheless, few export bindings have been incorporated. Concessions on tin exports that were included in Malaysia's and Singapore's Schedules in the 1950s are two such examples.[61]

Both arguments have their legal merits. According to Article XXVIII, WTO Members can engage in negotiation on the reduction of the general level of tariffs and other charges on export. Although Article II:1(b) and (c) only refer to "importation," it does not indicate that only

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56. JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 499, n.12. (1969); MITSUO MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION 220 (2003).

57. Roessler, *supra* note 52, at 34; Rom, *supra* note 38, at 128.

58. GATT 1994, *supra* note 55, art. II:1(a).

59. Roessler, *supra* note 52, at 35; Rom, *supra* note 38, at 128.

60. Rom, *supra* note 37, at 128 & nn. 2–3.

61. Roessler, *supra* note 52, at 35–36.

the result of "import tariffs" negotiations can be incorporated in the Members' Schedules. Nothing prevents the results of negotiations that reduce export tariffs from being incorporated into Members' Schedules, which are an integral part of the GATT in accordance with Article II:7. The controversial debate concerns whether WTO Members are permitted to impose export tariffs higher than those inscribed and bound in their Schedules, as such obligations are derived from Article II:1(b). The text of Article II:1(b) refers only to "importation" with respect to the obligations of WTO Members in terms of exempting "ordinary customs duties in excess of those set forth and provided therein."[62]

The textual reading of this sub-paragraph indicates that, even if export tariffs are incorporated in the Schedules, Members may impose export duties in excess of those set forth in their Schedules. In other words, Members will still be acting consistently with Article II:1(b) when they impose export duties higher than those set forth in their Schedules. From this perspective, Professor Jackson's argument seems quite laudable. However, assuming that the results of the negotiation on export tariffs produce a certain level of tariffs rate as the highest rate and is recorded in the Schedules, imposing export tariffs in excess of those set forth therein might result in treatment "less favourable than that provided for in the appropriate Part of the appropriate Schedule."[63] Under such circumstances, WTO Members could arguably violate Article II:1(a).[64] This is what scholars like Roessler and Rom have argued. From the jurisprudence regarding Article II, the importance of Article II:1(a) as part of the context in the interpretation and application of Article II:1(b) has indeed been addressed a few times. In *Argentina—Measures Affecting Imports of Footwear, Textile, Apparel and Other Items*, the Appellate Body states: "In accordance with the general rules of treaty interpretation set out in Article 31 of the *Vienna Convention* [on the law of the treaty], Article II:1(b), first sentence, must be read in its context and in light of the object and purpose of the [GATT 1994]. Article II:1(a) is part of the context of Article II:1(b); it requires that a Member must accord to the commerce of the other Members 'treatment no less favourable than that provided for' in its Schedule."[65] The Panel in the *European Communities—Customs Classification of Frozen Boneless Chicken Cuts* also adopts such an

62. GATT 1994, *supra* note 55, art. II:1(b).

63. *Id.* art. II:1(a).

64. However, such a Member bears the burden of proof in demonstrating that treatment received as a result of higher export tariffs is less favorable than those listed under the Schedule of Concession. This will depend on how such a negotiated export tariff is prescribed under the Schedule of Concession.

65. WTO Appellate Body Report, Argentina—Measures Affecting Imports of Footwear, Textile, Apparel and Other Items, ¶ 47, WT/DS56/AB/R (Mar. 27, 1998).

interpretation.[66] However, Article II:1(a) has not been subject to interpretation and application by the panel or the Appellate Body and it is not yet certain whether this paragraph can be invoked independently as the legal base of a WTO dispute. The above-mentioned jurisprudence nevertheless shows that there might still be some legal space for the arguments put forward by Roessler and Rom, that the GATT regime also applies to export tariffs in incorporating such tariffs in the Members' Schedules and being subject to the obligations for "bound tariffs" contained in Article II.

If such argument stands, the result of negotiations on export tariffs can be inscribed in the Members' Schedules. Under such circumstances, should a certain export tariff rate imposed on a product be recorded in a Member's Schedule and this Member seeks to change this rate, this will amount to a modification of the Schedule. Article XXVIII sets out the conditions for the modification of Schedules and these conditions are applicable to both the export and import tariffs set forth in the Schedules. Consequently, Members that are affected by the change of export tariffs by other Members who have prescribed such tariffs in their Schedules might be able to request negotiations with those Members, as provided for in Article XXVIII. Nonetheless, the GATT contains a balanced legal framework for import tariff bindings "to ensure, on the one hand, that the concession is not invalidated by other governmental measures and, on the other hand, that the concession can be withdrawn in emergency situations."[67] However, such a balanced legal framework does not exist in the case of export tariff bindings. For example, safeguard measures under Article XIX and the Agreement on Safeguard only refer to import, not export. Consequently, it seems that remedies for the withdrawal of binding export tariffs will only be provided under general exceptions such as Article XX.[68] Such an asymmetry will need to be taken into consideration when Members engage in export tariff concession negotiations.

Under the WTO, Members are free to impose export duties on products such as crude oil, coal, natural gas, etc. For WTO Members that rely on a steady supply of such energy resources that are free from unreasonably high export tariffs or unexpected rise in such tariffs, it seems possible to engage in tariff negotiations with Members that are exporters of such products and to request that tariffs be set at the highest ceiling

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66. WTO Report of the Panel, European Communities—Customs Classification of Frozen Boneless Chicken Cuts, ¶¶ 7.63–7.65, WT/DS269/R (May 30, 2005).

67. Roessler, *supra* note 52, at 37.

68. *See id.* at 37–39.

that is recorded in the Schedules of Concessions.[69] Such a negotiation, as provided under Article XXVIII, needs to be conducted on a reciprocal and mutually advantageous basis. To provide adequate incentives to request resource-rich Members to engage in the negotiation on the reduction of export tariffs, importing Members could offer to reduce their import tariffs on processed or manufacturing products from exporting Members in exchange for lower export tariffs on raw materials.[70]

B. Quantitative Restrictions on Export and Minimum Export Prices

According to Article XI:1, WTO Members are prohibited, in principle, from imposing measures that prohibit or restrict both import and export of their goods. Very few disputes have dealt directly with quantitative restrictions on exports in the GATT 1947 era or in the WTO.[71] In *Argentina—Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*,[72] the European Community (EC) alleged that Argentina, through promulgating a series of resolutions, authorized the Argentinean tanning industry to "participate in customs control procedures of hides before export" and that such practices lead to a de facto export ban from Argentina on bovine hides, which contravened Article XI:1. The Panel stated that the disciplines of Article XI:1 extend to restrictions of a de facto nature.[73] The EC, alleging that this Argentinean measure constituted a de facto export restriction, bore the burden of proof. The Panel found that the EC failed to provide sufficient evidence concerning: (1) the mere presence of tanners' representatives acted as an export restriction;[74] (2) the presence of tanners' representatives enabled them to have access to confidential business information which resulted in a reluctance to export;[75] and, (3) the tanners' representatives, having access to confidential information, abused such information so that exporters were unwilling to export.[76] The Panel, thus, concluded that there was insufficient evidence to prove that there was an export restriction made effec-

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69. There are some instances where countries currently applying for accession to the WTO are being requested to "bind" export duties at zero. U.N. CONFERENCE ON TRADE AND DEVELOPMENT, *supra* note 18, at 3.

70. Roessler, *supra* note 52, at 30–33.

71. *See generally* WTO Analytical Index, Guide to WTO Law and Practice, http://www.wto.org/english/res_e/booksp_e/analytic_index_e/analytic_index_e.htm (last visited May 8, 2008).

72. WTO Report of the Panel, Argentina—Measures Affecting the Export of Bovine Hides and the Import of Finished Leather, WT/DS155/R (Dec. 19, 2000).

73. *Id.* ¶¶ 11.15–11.21.

74. *Id.* ¶¶ 11.22–11.35.

75. *Id.* ¶¶ 11.36–11.43.

76. *Id.* ¶¶ 11.44–11.54.

tive by the measure in question within the meaning of Article XI.[77] This dispute, strictly speaking, did not involve export restrictions or per se prohibitions adopted by WTO Members. It is to be noted, however, that the Panel drew references to previous GATT or WTO cases addressing quantitative restrictions on import,[78] indicating that the jurisprudence concerning quantitative restrictions on import in the interpretation and application of Article XI:1 also applies to exports.

In addition to quantitative restrictions, Article XI also applies to price-based prohibitions or restrictions on imports and exports. For example, the adoption of a minimum price for imported products has been found to be inconsistent with Article XI:1. In *European Communities—Programme of Minimum Import Prices, Licences, and Surety Deposits for Certain Processed Fruits and Vegetables*,[79] the United States alleged that the EC violated Article XI:1 by setting the minimum import price for tomato concentrates and imposing the import licensing system and the associated security deposit system.[80] The EC argued that such measures were qualified for the exemptions offered by Article XI:2(c)(i) and (ii).[81] The GATT Panel concluded that the minimum import price system, as enforced by the additional security, was a restriction "other than duties, taxes or other charges" within the meaning of Article XI:1 and did not qualify for the exceptions contained in Article XI:2(c)(i) and (ii).[82]

In *Japan—Trade in Semi-Conductors*,[83] the European Economic Community (EEC) alleged that Japan violated Article XI by adopting a series of measures to implement a Japan/U.S. arrangement in the semiconductor trade. One such measure concerned the commitment made by the Japanese government to monitor cost and export prices on the products exported by Japanese semi-conductor firms from Japan to certain markets (non-U.S. markets) to prevent below-cost exports. The EEC re-

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77. *Id.* ¶ 11.55.

78. For example, the Panel referred to the GATT Panel Report, *Japan—Trade in Semi-Conductors* and the Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Banana* when it concluded that Article XI extends to restrictions of a de facto nature. It also referred to the Panel Reports, *Japan—Taxes on Alcoholic Beverages II* and *Japan—Measures Affecting Consumer Photographic Film and Paper* when it stated that action taken by private party might be regarded as governmental measures should there be sufficient governmental involvement. *Id.* ¶¶ 11.17–11.21 and accompanying footnotes.

79. WTO Report of the Panel, European Communities—Programme of Minimum Import Prices, Licences, and Surety Deposits for Certain Processed Fruits and Vegetables, L/4687 BISD 25S/68 (Oct. 18, 1978).

80. *Id.* ¶¶ 3.1, 3.2.

81. *Id.* ¶¶ 3.6, 3.16, 3.22, 3.34, 3.29–3.32

82. *Id.* ¶¶ 4.9–4.14.

83. WTO Report of the Panel, Japan—Trade in Semi-Conductors, L/6309 BISD 35S/116 (May 4, 1988).

garded such a measure, albeit not legally binding, as contravening Article XI:1, since its implementation acted as export controls with price and had quantitative effects on the exports of semi-conductors.[84] Japan maintained that such a monitoring program was not intended to prohibit or restrict trade and did not set minimum price requirements. It was the firms, not the Japanese government, that set the export prices and decided whether to export or not. Such a measure, argued Japan, did not fall under Article XI:1.[85]

Referring to previous panel reports adopted by "CONTRACTING PARTIES" confirming the inconsistency of minimum import price with Article XI:1, this Panel considered that such a principle applies to restrictions on exports below certain prices.[86] The Panel also noted that Article XI:1 did not refer to laws or regulations but referred more broadly to measures, irrespective of the legal status of the measure.[87] Under these circumstances, the Panel found that, by monitoring export prices to third-country markets, requiring exporters to supply information on export prices with heavy penalties attached for failure to comply, and setting up the operation of supply and demand forecast to intervene in the production level of semi-conductors, the Japanese government exerted maximum possible pressure on the private sector to cease exporting at prices below company-specific costs.[88] Such complex measures, therefore, constituted a coherent system restricting the sale for export of monitored semi-conductors at prices below company specific-costs to markets other than the United States and were inconsistent with Article XI:1.[89]

According to *Japan—Trade in Semi-Conductors*, the imposition of minimum export prices constitutes quantitative restrictions and will be inconsistent with Article XI:1. Can supply restrictive measures, such as controlling the production of goods to influence prices, also be characterized as quantitative restrictions that potentially violate Article XI:1? This is the key question addressing the issue of whether the production quotas imposed by OPEC countries that are also WTO Members contravene their legal obligations under the GATT/WTO. By referring to *Japan—Trade in Semi-Conductors*, Professor Desta argues that this principle is also applicable to restrictions on exports below certain prices: "[A]s long as OPEC decisions to restrict supplies are caused by falling prices below the OPEC-approved price range or any other threshold, such measures

84. *Id.* ¶¶ 49–55.
85. *Id.* ¶¶ 50, 54.
86. *Id.* ¶ 105.
87. *Id.* ¶ 106.
88. *Id.* ¶¶ 113–17.
89. *Id.* ¶¶ 109–17.

could well qualify as quantitative restrictions effected through minimum export prices requirements."[90]

Such an argument has been questioned by others. Broome cautions that a material distinction remains between export restrictions and production restrictions.[91] He argues that oil in its natural state—oil still in the ground—cannot be characterized as a "product" within the meaning of Article XI, as it has not gone through a production process.[92] Only oil in commerce—oil that is extracted and produced for consumption—can be regarded as falling under the GATT jurisdiction.[93] Therefore, only when OPEC countries restrict the quantity of oil in commerce made available for export to foreign consumers could they then violate Article XI:1.[94] He further points out that, while the jurisprudence tends to interpret Article XI:1 broadly, absurd and unintended consequences could arise if the panel or the Appellate Body does not pay attention to such differences; when a WTO Member took some measure to reduce domestic production in a particular industry, any WTO Member could complain that the country was violating Article XI:1 by influencing prices via supply restrictions.[95] In other words, "any measure that prevents an industry from operating at maximum capacity might constitute an export restriction."[96] Broome, thus, concludes that the production quotas maintained by OPEC countries should not constitute quantitative restrictions that contravene Article XI:1.[97]

Both arguments are persuasive. On one hand, per *Japan—Trade in Semi-Conductors*, one of the measures adopted by the Japanese government, and later found to be inconsistent with Article XI:1, was to "persuade" the domestic firms to control their production level via the supply and demand forecast mechanism.[98] Although this aspect was not found to be influencing or producing the minimum export prices, which are inconsistent with Article XI:1, this does demonstrate that production control can influence export prices and might, indirectly, be regarded as quantitative restrictions on export. From this perspective, imposing pro-

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90. Desta et al., *supra* note 5, at 534.

91. Stephen A. Broome, *Conflicting Obligations for Oil Exporting Nations?: Satisfying Membership Requirements of Both OPEC and the WTO*, 38 GEO. WASH. INT'L L. REV. 409, 416 (2006).

92. *Id.* at 416–17.

93. *Id.* at 417.

94. *Id.* at 416–17.

95. *Id.* at 418.

96. *Id.*

97. *Id.* at 418–19.

98. See the previous discussion on *Japan—Trade in Semi-Conductors*, *supra* note 83, ¶¶ 113–17.

duction quotas with an aim of maintaining the export price for crude oil at a certain level, or as a means of controlling export price, might be perceived as influencing and imposing a minimum export price; a form of quantitative restriction on export that contravenes Article XI:1.

On the other hand, rather than regarding production restriction as a means of achieving minimum export price, Broome seems to perceive such a measure as simply controlling the amount and level of production. Following this logic, Article XI:1 could be regarded as prohibiting or restricting the rate of resources exploitation if production restrictions are prohibited. Such a perception on production restriction has its merits in differentiating between "oil in commerce" and "oil in natural state," especially if Article XI:1 is not to be used as a tool to dictate to WTO Members how and to what extent they should exploit their natural resources.[99]

However, the differentiation between oil in commerce and oil in natural state does not seem to find any support under the GATT/WTO legal regime. Even if such a differentiation exists, it seems applicable to commodities rather than processed or manufactured products and this distinction, itself, cannot be found under the GATT/WTO. In addition, legal obligations under the WTO legal framework could be undermined if such a differentiation is permitted. For example, if "material" in its natural state is not regarded as "products" and, thus, is not regulated under the GATT/WTO, does this mean that export subsidies to agricultural products that are not yet harvested—in their natural state—are not prohibited subsidies under the Agreement on Subsidy and Countervailing Measures? Would these agricultural products have to comply with obligations under the Agreement on Agriculture, as these are not "products" under the GATT/WTO?

Apparently such implications are contrary to the object and purpose of the WTO. Therefore, it is neither legal nor suitable to have such a differentiation under the WTO legal framework. The concerns expressed by Broome, i.e., the sovereign right of WTO Members to determine their use of natural resources, can be addressed by other provisions under the GATT/WTO, such as Article XI:2(a) or Article XX(g), which provide an exception to Article XI:1. Therefore, it seems that the argument by Desta is more credible in concluding that production quotas mandated by OPEC countries, when the price of crude oil falls below a certain level, might be regarded as quantitative restrictions on export that contravene Article XI:1.[100]

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99. Broome, *supra* note 91, at 418–19.

100. However, countries adopting such a production quota might rely on general exceptions contained in the GATT to justify such measures. See the following discussion.

In addition to Article XI, Article XIII also provides relevant provisions when Members adopt quantitative restrictions on import and export. Article XIII:2–4 sets down principles of applying import restrictions via quota allocation and import licensing requirements, such as transparency and non-discrimination. Article XIII:5 states, "[I]n so far as applicable, the principles of this Article shall also extend to export restrictions."[101] In other words, principles concerning import quota and import licensing requirements, as laid down in Article XIII:2–4, are applicable to export quota and export licensing requirements *in so far as applicable*. It has been suggested that the GATT instructions for non-discriminatory administration of import restrictions are broad enough to be applicable, in most cases, to non-discriminating treatment of export restrictions.

Nevertheless, it needs to be pointed out that Article XIII:4 states: "With regard to restrictions applied in accordance with paragraph 2 (*d*) of this Article or under paragraph 2 (*c*) of Article XI." And Article XI:2(c) only refers to *import* restrictions.[102] Other than this, most of the principles in Article XIII:2–4 should be applicable to export restrictions as well.[103] However, the meaning of the term "in so far as applicable" is rather vague and has not been interpreted or applied by previous panels or Appellate Body reports. This might result in uncertainty among WTO Members when they seek to challenge, for example, export quotas adopted by oil exporting countries under the WTO.

It also needs to be noted that Article XI and Article XIII specifically state that the terms "export restrictions" included in these articles "include restrictions made effective through state-trading enterprises."[104] Considering the prevailing practices in the developing countries where the exploitation and trade in energy resources are conducted by state trading enterprises, these provisions are also quite important in energy trade.

C. Exceptions to Export Control Under the GATT/WTO

Article XI:2 provides several exceptions to the obligations contained in Article XI:1 and such exceptions are relevant to quantitative restrictions on exports. In the 1987 *Canada—Measures Affecting Exports of*

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101. GATT 1994, *supra* note 55, art. XIII:5.

102. Article XI:2(c) states, "The provisions of paragraph 1 of this Article shall not extend to the following: . . . (c) Import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate." GATT 1994, *supra* note 55, art. XI:2(c).

103. Rom, *supra* note 38, at 131–32.

104. GATT 1994, *supra* note 55, arts. XI, XIII.

Unprocessed Herring and Salmon case,[105] the United States alleged that the export restrictions maintained by Canada on unprocessed sockeye salmon, pink salmon, and herring were inconsistent with the obligations under Article XI:1 and could not be justified under Article XX. Canada argued that such export restrictions were consistent with Article XI:2(b) and Article XX(g). For Article XI:2(b), Canada argued that unprocessed salmon and herring were "commodities" and the regulation in dispute dealt with "standard" and "marketing" within the meaning of Article XI:2(b).[106] Canada further argued that without these prohibitions, Canadian processors would not have been able to develop a superior quality fish product for marketing abroad and would not have been able to maintain their share of the market for herring roe in the international markets.[107]

The Panel noted, first, that Canada prohibited export of certain unprocessed salmon and unprocessed herring even if they could meet the standards generally applied to fish exported from Canada.[108] The Panel therefore found that these export prohibitions could not be considered "necessary" to the application of standards within the meaning of Article XI:2(b).[109]

Second, the Panel noted that this provision referred to "regulations . . . for the marketing of commodities in international trade," which suggests that the regulations covered by the provisions are not all regulations that facilitate foreign sales but only those that apply to the marketing as such. During the drafting of Article XI:2(b), mention was made only of export restrictions designed to promote foreign sales of the restricted product but not of export restrictions on one commodity designed to promote sales of another commodity.[110] The broad interpretation of the term "marketing regulation" implied in Canada's argument would have the consequence that any import or export restriction protecting a domestic industry and enabling it to sell abroad would be exempted from the GATT prohibition of import and export restrictions.[111] Such an interpretation would therefore expand the scope of the provision far beyond its purpose. The Panel, thus, found that the export prohibitions on certain unprocessed salmon and unprocessed herring

105. WTO Report of the Panel, Canada—Measures Affecting Exports of Unprocessed Herring and Salmon, L/6268-35S/98 (Mar. 22, 1988).

106. *Id.* ¶ 3.17

107. *Id.* ¶¶ 3.16–3.18, 3.22.

108. *Id*. ¶ 4.2.

109. *Id*.

110. WTO Report of the Panel, Canada—Measures Affecting Exports of Unprocessed Herring and Salmon, ¶ 4.3, L/6268-35S/98 (Mar. 22, 1988).

111. *Id.*

were not "regulations for the marketing" of processed salmon and herring in international trade within the meaning of Article XI:2(b).[112] In light of the considerations set out above, the Panel concluded that the export prohibitions were not justified by Article XI:2(b).[113]

This is the only GATT/WTO dispute that deals directly with the interpretation and application of Article XI:2(b) and there have been no cases concerning Article XI:2(a). In fact, there is very limited jurisprudence invoking these two sub-paragraphs to justify quantitative restrictions on exports.[114] As a result, key terms such as "critical storages of food stuff," "products essential" to the exporting countries, "temporarily applied" under Article XI:2(a), or "necessary" under Article XI:2(b) have never been subject to examinations or interpretations in the relevant jurisprudence.

In addition to Article XI:2, Article XII and Article XVIII:B also provide exceptions to Article XI:1 and Article XIII for WTO Members encountering balance of payment (BOP) difficulties. Both Article XII and Article XVIII:B refer only to "import restrictions."[115] The exceptions for BOP purposes set forth in these two articles provide the opportunity for Members with BOP deficits to adopt measures to increase their monetary reserves. The prevailing measure has been to impose quantitative or price-based import restrictions with an aim of decreasing the drawing of monetary reserves.[116]

Furthermore, export earning remains an important source of monetary reserve and, hence, countries facing BOP deficit are unlikely to impose quantitative export restrictions or minimum export prices. This could be the main reason behind the use of the term "import restrictions" in Article XII and Article XVIII:B. However, sometimes an export surcharge or control that raises revenue from export can be the best

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112. *Id.*

113. *Id.* ¶ 4.3.

114. MATSUSHITA ET AL., *supra* note 56, at 218.

115. Article XII:1 states: "Notwithstanding the provisions of paragraph 1 of Article XI, any contracting party, in order to safeguard its external financial position and its balance of payments, may restrict the quantity or value of merchandise permitted to be *imported*, subject to the provisions of the following paragraphs of this Article." GATT 1994, *supra* note 55, art. XII:1 (emphasis added). Article XVIII:B:9 states: "In order to safeguard its external financial position and to ensure a level of reserves adequate for the implementation of its programme of economic development, a contracting party coming within the scope of paragraph 4 (*a*) of this Article may, subject to the provisions of paragraphs 10 to 12, control the general level of its *imports* by restricting the quantity or value of merchandise permitted to be imported." GATT 1994, *supra* note 55, art. XVIII:B:9 (emphasis added).

116. WTO, Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994, ¶ 2, *available at* http://www.wto.org/english/docs_e/legal_e/09-bops_e.htm.

method of improving the foreign exchange deficit.[117] A quantitative export control on valuable or rare products might also increase the export prices, resulting in the similar effect of raising revenue from export. Nevertheless, as only "import restrictions" are mentioned in Article XII and Article XVIII:B, whether such export control measures are authorized under these two articles is questionable. In other words, while such quantitative or price-based export restrictions can also meet the need for Members encountering BOP difficulties, the explicit treaty language and terms used in Article XII and Article XVIII:B regarding export control measures are not likely to be invoked as exceptions for BOP difficulties under the GATT/WTO.

With regard to Article XIII, Article XIV provides that restrictions under Article XII or under Article XVIII:B may deviate from the provisions of Article XIII under specific conditions.[118] As has been mentioned, Article XIII:2–4 deals with import restrictions and, hence, Article XIV seems to apply mainly to import restriction measures.[119] However, note that Article XIV:4 states:

> A contracting party applying import restrictions under Article XII or under Section B of Article XVIII shall not be precluded by Article XI to XV or Section B of Article XVIII of this Agreement from applying *measures to direct its exports in such a manner as to increase its earnings of currencies* which it can use without deviation from the provisions of Article XIII.[120]

Does the "measures to direct its exports" clause permit Members to adopt import-restriction measures for BOP purposes and to adopt export quota or export licensing requirements, with the aim of selecting the destination countries? For example, does it only allow exports to the countries that offer the highest prices or to markets with the highest historical import price? Nevertheless, as this paragraph has not been subject to interpretation in previous cases, it would be difficult to speculate how such measures would actually be applied. Furthermore, as the use of such measures cannot deviate from Article XIII, the ambiguity concerning the application and interpretation of Article XIII:5 should also be taken into consideration.

There are two provisions under the GATT 1994 that provide exceptions to other general principles: Article XX on General Exceptions

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117. Rom, *supra* note 38, at 131.
118. *See* GATT 1994, *supra* note 55, arts. XIV:1–2.
119. Rom, *supra* note 38, 132.
120. GATT 1994, *supra* note 55, art. XIV:4 (emphasis added).

and Article XXI on Security Exceptions. For export control involving energy products, these two exceptions are very crucial.

For the general exceptions provided in Article XX, the following sub-paragraphs might be most relevant concerning export control of energy goods: Article XX(g), (h), (i), and (j). If energy resources exporting countries adopt export restrictive measures, can such measures be justified under these exceptions?

There are quite a few GATT and WTO disputes involving Article XX(g), but most of them relate to import restrictions. The only dispute that concerns export restrictions is the above-mentioned case, *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*.[121] Nevertheless, key terms and their interpretations in the application of Article XX(g), such as "exhaustible natural resources," "relating to," and "in conjunction with"[122] seem applicable to both import and export restrictions. Mineral energy resources such as coal and crude oil are no doubt "exhaustible natural resources."

Should a Member adopt export restrictions on oil or coal and invoke Article XX(g) as an exception, it also has to demonstrate that this measure is "relating to" the conservation of exhaustible natural resources and is made effective in conjunction with restrictions on domestic production or consumption. The term "relating to" has been interpreted as meaning "primarily aimed at."[123] In the 1998 case, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, the Appellate Body proposed that there must be "a close and genuine relationship of ends and means" before it can determine whether such a measure is "relating to" the conservation of exhaustible natural resources.[124] Following such an interpretive approach, a production quota adopted by OPEC with an aim of stabilizing the oil price might not be regarded as a measure "primarily aimed at" the conservation of oil, and, thus, might be difficult to justify under Article XX(g).

However, one commentator has argued that "conservation of a mineral resource such as oil cannot be seen in isolation from the financial return of its exploitation for its owners, and production restriction deci-

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121. *See* WTO Report of the Panel, Canada—Measures Affecting Exports of Unprocessed Herring and Salmon, L/6268-35S/98 (Mar. 22, 1988). The interpretations of the terms "relating to" and "in conjunction with" in Article XX(g) in this GATT dispute are widely referred to in future cases concerning the application of Article XX(g).

122. Article XX(g) permits exception measures which are "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." GATT 1994, *supra* note 55, art. XX(g).

123. *Id.* ¶ 4.6.

124. WTO Report of the Appellate Body, United States—Import Prohibition of Certain Shrimp and Shrimp Products, ¶ 136, WT/DS58/AB/R (Oct. 12, 1998).

sions caused by falling market prices should be construed as 'relating to the conservation' of the resources."[125] In addition, another commentator also argued that, for countries that rely heavily on the export earning of such natural resources, market stability would permit them to receive dependable income, which can be seen as an essential element in their efforts to manage and ensure conservation of their resources.[126] From this perspective, production restrictions adopted as a response to falling commodity prices and the conservation of energy resources seem to have a "close and genuine relationship of ends and means."[127]

Second, such measures need to be made effective "in conjunction with" restrictions on domestic production or consumption. Note that Article XX(g) only requires the exporting country to have simultaneous domestic restriction on production *or* consumption. Decision-based supply restrictions and production quotas taken by OPEC countries are necessarily implemented via domestic production cuts.[128] Therefore, it will be quite straightforward to prove that such supply restrictive measures are made effective in conjunction with domestic production.[129]

As for Article XX(h), the Panel in *EEC—Import Regime for Bananas* noted that Article XX(h) sets out three methods by which an intergovernmental commodity agreement can be brought within the exception in this sub-paragraph:

> [(1)] either it conforms to criteria which have been submitted to the CONTRACTING PARTIES and not disapproved by them, or, [(2)] the agreement itself is submitted to and not disapproved by the CONTRACTING PARTIES, or, [(3)] the agreement conforms to the principles approved by the ECOSOC Resolution 30(IV) of 28 March 1947.[130]

The Panel noted that no criteria for commodity agreements had ever been submitted to the CONTRACTING PARTIES, nor had any commodity agreements themselves been "so submitted and so disapproved." The Panel considered that, to benefit from the exception in Article XX(h), such criteria or agreements had to be submitted to the CONTRACTING PARTIES with an explicit invocation of that provision.[131]

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125. Desta et al., *supra* note 4, at 536.
126. Broome, *supra* note 91, at 427.
127. *Id.*
128. Desta et al., *supra* note 4, at 537.
129. *Id.*
130. WTO Report of the Panel, EEC—Import Regime for Bananas, ¶ 166, DS38/R (Feb. 11, 1994).
131. *Id.*

As for the principles in the Economic and Social Council (ECOSOC) Resolution 30(IV), the Panel noted that this Resolution required that "the negotiation of, and participation in, an international commodity agreement must be open to all interested countries and must avoid, as also stipulated in the requirements set out at the beginning of Article XX of the General Agreement, unjustifiable discrimination between countries."[132] From the criteria set forth in this case, it seems rather difficult to successfully invoke Article XX(h) as an exception, as the OPEC or any other international commodity agreements does not seem to have met such criteria.

As has been mentioned, most energy resource exporting countries maintain a two-tiered pricing mechanism by imposing an export price higher than the domestic price. Can such a measure be justified under Article XX(i)? This provision requires that such export restrictions shall not operate to increase the protection afforded to the domestic processing industry or to increase the export of such industry. As has been indicated, the main purpose of the two-tiered pricing scheme is to protect the relevant domestic industry. From this perspective, such measures might fail to be justified under Article XX(i).

Article XX(j) is quite similar to Article XI:2(a) as both articles involve temporary measures adopted to deal with shortage of supply. However, while export "restrictions" are permitted under Article XX(j), both export "prohibition" and "restrictions" are permitted under Article XI:2(a).[133] Under Article XX(j), when a Member adopts restrictive measures to respond to short supply, all other Members are "entitled to an equitable share of the international supply of such products." But under Article XI:2(a), a Member can prohibit the export of products essential to itself.[134] Nevertheless, conditions set forth under Article XX(j) seem to be more stringent than those under Article XI:2(a), as the latter does not require an equitable distribution to all Members or require such prohibition or restriction to be discontinued as soon as the conditions giving rise

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132. *Id.*

133. GATT 1994, Article XI:2(a) states that, "*Export* prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party," but Article XX(j) does not limit its application to "export" only. GATT 1994, *supra* note 55, art. XI:2(a) (emphasis added).

134. GATT 1994, Article XX(j) states that: "[E]ssential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960." GATT 1994, *supra* note 55, art. XX(j). Article XI:2(a) does not contain such conditions. *Id.* art. XI:2(a).

to them have ceased to exist. Such differences matter because Members that seek complete export prohibition, rather than export restriction, might have better chances to apply the exception under Article XI:2(a) and, perhaps, can only resort to Article XI:2(a).

The relationship between the Article XI:2(a) and Article XX(j) needs to be further clarified, as a failure to do so might result in difficulties and controversies in their application. For export control measures imposed in energy resources, it might be quite burdensome to invoke Article XX(j) as an exception because, under this provision, Members adopting export control measures need to ensure that all WTO Members are "entitled to an equitable share of the international supply." In other words, when a Member adopts export control measures under Article XX(j), all other WTO Members seem to have the "entitlement" to an equitable share of such product in international supply. From the perspective of importing countries, however, this requirement seems able to provide a certain amount of security, in terms of acquiring the right to a share of such a product.

In addition to meeting individual requirements contained in each sub-paragraph, Members that seek to resort to Article XX also need to comply with the requirements under the chapeau. The Article XX chapeau "poses a critical question for trade-environment policy" as it determines the conditions under which national governments can pursue ecological goals by restricting international trade.[135] Furthermore, Members invoking Article XX exceptions bear the burden of proof. Therefore, it seems quite difficult to invoke Article XX to justify export restrictive measures on energy resources.

Apart from Article XX, the exceptions that have been particularly relevant to export restrictions on energy goods are the national security exceptions under Article XXI.[136] It has been observed that:

> [M]any aspects of international trade in energy have developed outside the structure of GATT or with the implied assumption that Article XXI or another GATT exception would take them out of normal GATT arrangements. National security matters have often played a role in energy law and policy in a way that overrides free trade objectives.[137]

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135. Sanford Gaines, *The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT'L ECON. L. 739, 739 (2001).

136. Roessler, *supra* note 52, at 29–30.

137. Donald N. Zillman, *Energy Trade and the National Security Exception to the GATT*, 12 J. ENERGY, NAT. RESOURCES & ENVTL. L. 117, 117 (1994).

Because the national security exceptions under Article XXI could be invoked to avoid the GATT/WTO obligations of restricting and prohibiting export control measures, this Article must be analyzed.

There have been very few disputes involving Article XXI and only one panel report was adopted under the GATT.[138] "In the late 1940s when the provision was drafted, atomic technology was the most visible example."[139] Other types of energy and their related issues had not yet emerged. Articles XXI, thus, was not drafted with energy trade in mind. A crucial issue in the application of Article XXI in international trade in energy concerns the concept of "security"; specifically, whether energy security, as identified in this paper, is a part of the "security" Article XXI seeks to address. In addition, for OPEC countries or any countries that rely heavily on the revenue from oil export, could the decrease of oil prices result in an emergency in international relations? Such an emergency is another condition under which exception measures can be adopted according to Article XXI(b)(iii).

First, referring to the few disputes in the GATT, as well as the negotiation history, Broome concludes that economic security interests might not be considered as falling under the concept of "security" in Article XXI.[140] However, national security is an evolving concept. From 1949 to 1990, "essential security interests" centered on the use of military force (including two World Wars and the ensuing Cold War)[141] to preserve national sovereignty. From 1989–1991, however, the concept of "essential security interests" changed as a result of the fall of the Berlin Wall and the break-up of the former Soviet Union.[142] The rise of Middle East tensions, nuclear threats from countries such as North Korea, internal conflict and the threat of disintegration for religious or ethnic identity reasons, humanitarian activity that requires military involvement, along with many other issues, are all part of the "essential security interests" and suggest the degree of diversity that might lie behind the concept of "security."[143] Second, Article XXI itself is a mix of references to the narrowly tailored concept of military security, as defined in Article XXI(b)(ii), and the more extensive concept of "security" defined in Article XXI(b)(iii). Finally, countries such as the United States have defined "essential security" to include matters beyond military threats since the

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138. For a detailed analysis of the GATT 1994 Article XXI and its relevant disputes, see Catherine Li, *International Trade and National Security—An Analysis of Article XXI of GATT on Security Exception*, 34 NAT'L TAIWAN U. L.J. 229 (2005) (this article is written in Chinese).

139. Zillman, *supra* note 137, at 118.

140. Broome, *supra* note 91, at 429–31.

141. Zillman, *supra* note 137, at 124.

142. *Id.* at 124–25.

143. *Id.* at 126.

1980s.[144] All these factors suggest that concerns for energy security might be brought under the evolving meaning and concept of "security" under Article XXI.

From the relevant disputes, Members invoking Article XXI to justify their trade restrictive measures often argue that "essential security interests" should be based on their own determinations.[145] Panels and the CONTRACTING PARTIES in the GATT 1947 era have not adopted any standards in the interpretation of this term.[146] Whether the panel or the Appellate Body will leave such discretion to Members invoking Article XXI is yet to be observed. However, assuming that such a dispute does arise and that the panel or the Appellate Body finds that such measures cannot be justified under Article XXI, what kind of recommendations will be adopted by the Dispute Settlement Body (DSB)?

Due to the political sensitivity usually involved with such disputes, it seems unlikely for the DSB to recommend that a Member's measure, purported to be relevant to the defense of an essential security interest, should be withdrawn.[147] Furthermore, assuming that the DSB does make such a recommendation and the defending Member refuses to implement such a recommendation, the complaining Member could seek authorization from the DSB for retaliation under the prevailing practices and according to the legal rules of the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).[148] This scenario, from the perspective of a complaining Member that depends on the importation of energy resources from a defending Member, does not provide any relief from the shortage of energy. Only when the complaining Member is considerably more powerful than the defending Member will this threat of retaliation seem credible. If this is the case, the more powerful complaining Member might as well apply other pressure through diplomatic channels and exert other political or economic pressures to "persuade" the defending Member to withdraw its export control measures, rather than resorting to the lengthy and costly litigation process under the WTO.

From this viewpoint, Article XXI seems to have serious impacts on those WTO Members that are dependent on imported energy resources but are without strong political power or economic status. On one hand,

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144. *Id*.

145. Such an argument was put forward by the United States in the 1949 United States vs. Czechoslovakia dispute and by Ghana in the 1961 Ghana vs. Portugal dispute in the GATT era. *See* Zillman, *supra* note 137, at 119.

146. Li, *supra* note 138, at 246–47.

147. *Id.* at 251, 266.

148. *See* WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 22, *available at* http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm.

the possibility of successfully invoking Article XXI seems quite small or unpredictable, while on the other hand, even if the defending Member fails to justify its export restrictive measure under Article XXI and the withdrawal of such measure is recommended by the DSB, the consequent implementation and retaliation provided under the DSU cannot provide any assurance for the complaining Member to address its energy security concern.

D. Summary

The main energy security concern for countries that rely on imported energy is the stable and uninterrupted access to reasonably priced energy resources. Therefore, any export control measures, including export tariffs and quantitative restrictions, instituted, maintained, or intensified by the energy resource exporting countries will affect these energy security concerns because these measures influence the price and quantity available to the importing countries. According to Article XXVIII, the reduction and elimination of export tariffs can be subject to negotiation. Importing Members can of course bring such negotiation to the attention of exporting Members under the WTO, however, Article XXVIII provides that such negotiation needs to be based on reciprocity. Importing Members need to be prepared to hand out concessions in exchange for export tariff reductions. In addition, as Article II:1(b) only refers to "import" duties, whether the principle of tariff binding applies to export tariffs remains debatable. Article II:1(a) might provide some assurance, but its actual application remains to be seen. As a result, provisions relating to export tariffs under the GATT/WTO seem to play a limited role in addressing WTO Members' energy security concerns.

With regard to quantitative restrictions on exports, relevant provisions and jurisprudence under the GATT 1994 provide that quantitative restrictions via quota or licensing requirements on exports, as well as price-based restrictions—such as minimum export price—are prohibited or restricted. Nevertheless, whether the production quota maintained by OPEC countries constitutes a quantitative restriction is not yet conclusive. Regardless of such regulations, there are quite a few exceptions provided under the GATT 1994 that can be invoked by the exporting Members to justify their export restrictive measures. Considering the nonrenewable characteristics of mineral energy resources, there might be plenty of room for exporting Members to find legitimate exceptions under Article XI:2 and Article XX. In addition, considering the strategic importance of energy resources, Article XXI seems to be another "safe harbor" for exporting Members.

As has been mentioned, most of the major energy resource exporting countries are either WTO Members or are in the process of becoming

WTO Members. However, from the analysis of this Part, the export control regulations under the GATT/WTO do not seem adequate to address the energy security concerns for WTO Members relying on imported energy. Therefore, it must be determined whether these countries' energy security concerns can be addressed by the regional agreements instead of the GATT/WTO.

IV. REGIONAL AGREEMENTS AND ENERGY SECURITY: NAFTA AND THE ENERGY CHARTER TREATY

It has so far been concluded that legal framework under the WTO and its export control regulations, cannot adequately address Members' energy security concerns. As a result, some WTO Members that depend on imported energy began to negotiate and conclude regional agreements, or free trade agreements, with their major supply countries to provide more predictable and reliable legal frameworks for energy. This Part will use two such regional agreements—NAFTA (in particular Chapter 6) and the ECT (focusing on their trade-related provisions)—as case studies to examine whether such regional agreements can provide more security for countries that rely on imported energy than the WTO.

A. Chapter 6 of the North American Free Trade Agreement

According to the statistics of the U.S. Department of Energy, Canada and Mexico were the first and second largest exporters of crude oil and petroleum, respectively, to the United States in 2005 and 2006.[149] Canada and Mexico are also the first and second largest exporters of natural gases via pipeline to the United States respectively.[150] The United States began its bilateral negotiation with Canada in the mid-1980s and the Canada-U.S. Free Trade Agreement (CU-FTA) was formally concluded in 1998. The United States then began negotiation for a free trade agreement (FTA) with Mexico in 1990 and was joined by Canada in 1991. NAFTA was then formally created by these three countries in 1992.[151] A brief historical account on the negotiation history of NAFTA, with special concerns and historical background of Mexico concerning oil, will be

149. U.S. DEP'T OF ENERGY, CRUDE OIL AND TOTAL PETROLEUM IMPORTS TOP 15 COUNTRIES, *available at* http://www.eia.doe.gov/pub/oil_gas/petroleum/data_publications/company_level_imports/current/import.html.

150. U.S. DEP'T OF ENERGY, U.S. NATURAL GAS IMPORT BY COUNTRY, *available at* http://tonto.eia.doe.gov/dnav/ng/ng_move_impc_s1_m.htm.

151. NORTH AMERICAN FREE TRADE AGREEMENT, 32 I.L.M. 289 (pts. 1-3); 32 I.L.M. 605 (pts. 4-8) (entered into force Jan. 1, 1994) [hereinafter NAFTA]. For chronologies of the Canada—U.S. FTA and the NAFTA, *see* http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fast-facts-US.aspx?lang=EN.

presented. Chapter 6 (the Energy Chapter) of NAFTA will then be discussed.

1. Energy Trade Under NAFTA: Background and Controversies

When the United States, Mexico, and Canada agreed to negotiate the provisions of a free trade agreement, it was inevitable that energy would play a major role in the resulting agreement. "From a more national perspective, the possibility that NAFTA will foster increased energy trade among the U.S., Canada and Mexico has been advanced as a political argument in support of the treaty."[152] Nonetheless, considering the special position held by petroleum industries in these three countries, provisions relating to energy are rather unique under NAFTA, especially when compared to other FTAs.[153]

For the United States, more stringent domestic environmental regulations on energy-related activities "have caused a steep decline in U.S. oil exploration."[154] In addition, the following North American energy policy goals of the U.S. administration also fit within the NAFTA framework: to increase self-sufficiency in North America by cooperating with Canada and Mexico, to decrease dependency on Middle East oil, to increase domestic production, and to decrease soaring U.S. demand for petroleum.[155]

For Canada, "many Canadians feel that NAFTA prevents them from conserving their own natural resources," and some have called for the Canadian government "to follow Mexico's lead and reassert sovereignty over its energy resources."[156] While the U.S. government is pressed by their environmental proponents to preserve rich natural resources in the Arctic National Wildlife Refuge, some Canadians believe that NAFTA could lead to a situation where "Canadian corporations are depleting Canada's natural resources to meet American demand."[157] In addition, as the U.S. demand for gasoline has increased in recent years, gasoline prices in Canada have skyrocketed because NAFTA requires that a party charge the same prices domestically that they charge for

152. Ernest E. Smith & David P. Cluchey, *GATT, NAFTA and the Trade in Energy: A U.S. Perspective*, 12 J. ENERGY & NAT. RESOURCES L. 27, 33 (1994).

153. Richard D. English, *Energy in the NAFTA: Free Trade Confronts Mexico's Constitution*, 1 TULSA J. COMP. & INT'L L. 1, 2–3 (1993).

154. Middleton, *supra* note 10, at 201.

155. Middleton, *supra* note 10, at 180–84.

156. John Fohr, *How NAFTA Increases Global Energy Security*, 22 WIS. INT'L L.J. 741, 758 (2004).

157. *Id.* at 758–59.

their exports.[158] All these concerns of Canada have been expressed toward the Energy Chapter under NAFTA.

For Mexico, "Mexican history has seen oil transformed from a badge of 'foreign domination and interference' to a symbol of 'pride, self-respect, and independence.'"[159] The Mexican constitutional provisions on energy announce the general principle that "ownership of the lands and waters within the boundaries of the national territory is vested in the Nation."[160] When Mexico applied to the GATT, its energy industry became an issue in its accession negotiation in 1985–86.[161] Mexico attempted, but failed, to preclude any application of the GATT principles to the energy industry during the deliberations on its accession due to strong opposition from other contracting parties.[162] The final Protocol of Accession specifically states that:

> Mexico will exercise 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.[163]

Mexico has gradually relaxed its restrictions on the exploration and production of its natural resources since the late 1990s by reforming the operation of its state-owned company—Petroleos Mexicanos (PEMEX).[164] Nonetheless, this unique historical background has resulted in the reservation declared by Mexico under NAFTA's Energy Chapter.

2. Energy Chapter: Chapter 6 of NAFTA

There are nine provisions and five annexes within Chapter 6, which is entitled "Energy and Basic Petrochemicals," under NAFTA. Compared to the lack of definition of "energy good" under the GATT 1994, Article 602.2 of NAFTA defines "energy goods" by listing those

158. Middleton, *supra* note 10, at 192–93.

159. English, *supra* note 153, at 2. For a detailed discussion on Mexico's history of oil from the colonial period to the 1990s, *see id.* at 2–7.

160. *Id.* at 7.

161. *Id.* at 9–12.

162. *Id.*

163. *Id.* at 13 (citing *Protocol of Accession of Mexico to the General Agreement on Tariffs and Trade*, GATT Doc. L/6010; WTO, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 33rd Supp. 27, 1987).

164. English, *supra* note 153, at 6–7.

products under their Harmonized Commodity Description and Coding System (HS) codes.

Article 601.1 states that "[t]he Parties confirm their full respect of their Constitutions."[165] Such a provision echoes the unique regulatory background of the energy industry in Mexico. Article 603, "Import and Export Restrictions," is largely based on the relevant GATT 1994 provisions and emphasized the prohibition or restrictions on energy trade.[166] Article 603.2 prohibits the imposition of minimum import and export prices, which were not explicitly stated in Article XI of the GATT. Article 603.2 also imposes prohibitions on maximum import and export prices, which is not provided under the GATT.[167] Article 603.5 provides: "Each Party may administer a system of import and export licensing for energy or basic petrochemical goods provided that such system is operated in a manner consistent with the provisions of this Agreement, including paragraph 1 and Article 1502 (Monopolies and State Enterprises)."

As for the export taxes, Article 604 applies both the most favored nation and the national treatment principles to the imposition of export taxes by requiring:

> 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.[168]

Article 605, "Other Export Measures," permits the Party to maintain or introduce restrictions permitted under Article XI:2(a) and XX(g), (i) and (j) of the GATT *only if* three conditions are met. First, Article 605(a) provides:

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165. NAFTA, *supra* note 151, art. 601.1

166. NAFTA Article 603.1 states: "Subject to the further rights and obligations of this Agreement, the Parties incorporate the provisions of the General Agreement on Tariffs and Trade (GATT), with respect to prohibitions or restrictions on trade in energy and basic petrochemical goods." *Id.* art. 603.1.

167. GATT 1994, article XI:1 only states:

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

GATT 1994, *supra* note 55, art. XI:1.

168. NAFTA, *supra* note 151, art. 604.

> [T]he restriction *does not reduce the proportion of the total export shipments* of a specific energy good made available to the 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."[169]

Second, Article 605(b) states that "the Party *does not impose a higher price for exports* of an energy good to the other Party *than the price charged for such energy good when consumed domestically*, by means of any measure such as licenses, fees, taxation and minimum price requirements."[170] Third, Article 605(c) states that "the restriction *does not require the disruption of normal channels of supply to the other Party or normal proportions among specific energy goods supplied* to the other Party such as, for example, between crude oil and refined products and among different categories of crude oil and of refined products."[171] Articles XI:2(a) and XX(g), (i) and (j) of the GATT 1994, as has been discussed in the previous section, do not contain such conditions. Furthermore, these conditions provide greater security of supply for the importing Party even when the exporting Party invokes these exceptions to impose export control measures.

Article 607, "National Security Measures," provides security exceptions. Although modeled after Article XXI of the GATT 1994,[172] the definition of "security" offered in Article 607 is much narrower than that offered in GATT and, therefore, reduces the scope for abuse of these provisions at the cost of restricting their applicability. For example, Article 607 does not contain vague terms such as "essential security interests" or "emergency in international relations" as provided under the GATT 1994 Article XXI. Article 607, instead, provides clearer conditions under which national security measures can be adopted.[173]

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169. *Id.* art. 605(a) (emphasis added).

170. *Id.* art. 605(b) (emphasis added).

171. *Id.* art. 605(c) (emphasis added).

172. NAFTA Article 607 states: "Subject to Annex 607, no Party may adopt or maintain a measure restricting imports of an energy or basic petrochemical good from, or exports of an energy or basic petrochemical good to, another Party *under Article XXI of the GATT* or under Article 2102 (National Security). . . ." *Id.* art. 607 (emphasis added).

173. NAFTA Article 607 states:

> [E]xcept to the extent necessary to: a) supply a military establishment of a Party or enable fulfillment of a critical defence contract of a Party; b) respond to a situation of armed conflict involving the Party taking the measures; c) implement national policies or international agreements relating to the non-proliferation of nuclear weapons or other nuclear explosive devices; or d) respond to direct threats of disruption in the supply of nuclear materials for defence purposes.

Annex 602.3 contains reservations made by Mexico. Basically, Mexico reserves the following strategic activities, including investment and the provision of services in various activities: (1) exploration, exploitation, refining or processing of crude oil and natural gas, and production of artificial gas, and basic petrochemicals and their feed stocks and pipelines; (2) foreign trade, transportation, and storage and distribution (up to and including the first-hand sales of crude oil, natural and artificial gas, basic petrochemicals, and goods covered by the Energy Chapter that were obtained from the refining or processing of crude oil and natural gas); (3) supply of electricity as a public service in Mexico, including the generation, transmission, transformation, distribution, and sale of electricity; and, (4) handling of radioactive minerals and wastes.[174] Annex 603.6 further provides that, for goods listed in this Annex, Mexico "may restrict the granting of import and export licenses for the sole purpose of reserving foreign trade in these goods to itself." Annex 605 provides that Article 605, "Other Export Measures," "shall not apply as between the other Parties and Mexico." Annex 607.1 also provides that Article 607, "National Security Measures," "shall impose no obligations and confer no rights on Mexico." "Mexico's reservation of its energy sector to itself is clearly the most significant limitation of NAFTA's provisions on energy."[175] Despite these reservations under various Annexes, Mexico still has to comply with Article 603—apart from the licensing requirements—and Article 604, which provides the basic principles of trade liberalization in energy and basic petrochemical goods. Clearly, the most important consequence of the reservation is that foreign investment in the Mexican petroleum industry will continue to be impossible as long as Mexico maintains the reservation.[176]

To summarize, most of the provisions on the prohibition of export controls and limited exception to such controls in trade in energy goods in NAFTA's Energy Chapter, in spite of Mexico's reservation, are very similar to, but more comprehensive than, those under the GATT 1994.

B. The Energy Charter Treaty (ECT)

On March 2006, at a public hearing entitled "Green Paper on a European Energy Policy," Commissioner Piebalgs for DG-Energy and Transport stated that the core energy objectives of the European Union

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Id.

174. NAFTA, *supra* note 151, Annex 602.3, ¶ 1.

175. English, *supra* note 153, at 14.

176. *Id.* at 17–18.

(E.U.) are sustainability, competitiveness, and security of supply.[177] Hence, future energy policy of the E.U. "will be based on seeking diversification of energy sources and increased use of locally developed energy."[178] To decrease its reliance on Middle East oil, Western Europe has been trying to diversify the sources of its fuel supply. However, such a move has resulted in increasing reliance on imported Russian natural gas.[179] Rather than mitigating Western Europe's vulnerability to supply disruption and price increases, such a result renders "Western Europe more acutely exposed to interruptions in its energy supply than other regions."[180] In particular, as the majority of Europe's gas supplies are transported via pipelines, Western European states are "at risk of strategic behavior by Eastern European governments as it is difficult or impossible to redeploy energy infrastructure if gas transit is interrupted or stopped."[181] The controversy of the sudden cut-off of gas supplied by Russia to Ukraine in January 2006 is a good case in point. "The [Energy Charter Treaty] was, in part, designed to help buttress European energy security in the face of these risks."[182]

Based on the European Energy Charter (a political declaration that was signed in The Hague in December 1991), negotiation on the ECT took off in 1992. The ECT, together with its "Protocol on Energy Efficiency and Related Environmental Aspects," was opened for signature in Lisbon in December 1994. The ECT came into effect on April 16, 1998.[183] Fifty-two countries have signed the ECT and 47 signatories have ratified it, including the E.U. and three non-European countries—Australia, Japan, and Mongolia. The Contracting Parties of the ECT adopted the "Amendment to the Trade-Related Provisions of the Energy Charter Treaty" (Trade Amendment) in April 1998.[184]

The main purpose of the Trade Amendment includes replacing the references to the GATT provisions under the ECT with the relevant WTO provisions and expanding the scope of trade regulations from "en-

177. *Piebalgs Reviews Progress Towards European Energy Policy*, E.U. FOCUS, 195, at 12 (2006).

178. *Id.* at 12; *see also* Commission of the European Communities, Brussels, 10.1.2007; *An Energy Policy for Europe*, COM, 1 final (2007).

179. Chris Flynn, *Russian Roulette: The ECT, Transit and Western European Energy Security*, INT'L ENERGY L. & TAX'N REV. 12, 12 (2007).

180. *Id.*

181. *Id.* at 12.

182. *Id.*

183. THE ENERGY CHARTER TREATY, 34 I.L.M. 360 (1995) [hereinafter ECT]; *see also* About the Charter, http://www.encharter.org/index.php?id=7 (last visited Aug. 25, 2009).

184. See the "Members & Observers" section in the "About the Charter" information contained at the official website of the Energy Charter Treaty, http://www.encharter.org/index.php?id=7 (last visited Aug. 25, 2009).

ergy materials and products" to "energy-related equipment[ ]."[185] The negotiation of the ECT Transit Protocol began in 2000, but was ended by the Contracting Parties in December 2002 because only three issues remained unsettled at that time, for which there were differences only between the Russian and E.U. delegations.[186] The E.U.-driven ECT is an international agreement aimed to "create a freer and more competitive energy market among its Contracting Parties through the establishment of a negotiated discipline on the regulation of investment, transit and trade in the energy sector"; the predominant features of the ECT are "investment protection and facilitation of transit."[187]

With respect to trade, the ECT envisages that all its Contracting Parties will become WTO Members. Relevant ECT trade provisions are designed to be used in the interim period during which a few ECT Contracting Parties are in the process of their WTO accession negotiation. Thus, "with regard to the relationship between WTO Members *inter se*, the ECT trade regime is simply the WTO trade regime."[188] The "[t]rade relationship between ECT Contracting Parties one or more of which are not WTO Members is also governed by WTO rules—but this time, 'subject to some exceptions and modifications.' Among these exceptions and modifications, the [ECT's] balance between export and import restrictions, in comparison to the WTO rules, is pertinent."[189]

Article 1 provides the definition of "Energy Material and Products." Annex EM lists three categories of "Energy Material and Products": (1) nuclear energy; (2) coal, natural gas, petroleum and petroleum products, and electrical energy; and (3) other energy. "Economic Activity in the Energy Sector" is defined in Article 1, sub-paragraph 5 as "an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products except those included in Annex NI, or concerning the distribution of heat to multiple premises."[190] Article 4 reiterates the principle that relevant GATT rules are applicable within

185. *See* ENERGY CHARTER SECRETARIAT, THE ENERGY CHARTER TREATY: A READER'S GUIDE, 14–15, *available at* http://www.encharter.org/fileadmin/user_upload/document/ECT_Guide_ENG.pdf.

186. Andrei A. Konoplyanik, *Russia-EU Summit: The Energy Charter Treaty and the Issue of Energy Transit*, INT'L ENERGY L. & TAX'N REV. 30, 32 (2005); see also Doran Doeh, *Russia and the Energy Charter Treaty: Common Interests or Irreconcilable Differences*, INT'L ENERGY L. & TAX'N REV. 189, 190 (2006).

187. Desta et al., *supra* note 4, at 539.

188. *Id.* at 539–40.

189. *Id.* at 540.

190. ECT, *supra* note 183, art. 1.

the ECT regime.[191] Article 29, as replaced by Article 1 of the Trade Amendment, sets down interim provisions on trade-related matters with regard to those ECT Contracting Parties that are not yet WTO Members. Article 29.2(a) states:

> Trade in Energy Materials and Products and Energy-Related Equipments between Contracting Parties at least one of which is not a WTO Member shall be governed, subject to subparagraph (b) and to the exceptions and rules provided for in Annex W, by the provisions of the WTO Agreement, as applied and practised with regard to Energy Materials and Products and Energy-Related Equipment by Members of the WTO among themselves, as if all Contracting Parties were Members of the WTO.[192]

Take export control measures as an example. All regulations on export controls under the GATT/WTO—as examined in the previous section—are applicable to exportation of such products and equipment among the ECT Contracting Parties, unless otherwise provided.

In comparison to NAFTA which focuses on quantitative restrictions, taxes, and other price-based restrictions, the following discussion will demonstrate that Article 29 of the ECT, as replaced by Article 1 of the Trade Amendment, puts more emphasis on customs duty or charges of any kind imposed on, or in connection with, importation or exportation. Article 29.3 requires that, on the date of its signature or of its deposit of its instrument of accession, each signatory and each state, or regional economic integration organization acceding to the ECT, shall provide to the Secretariat a list of all import and export customs duties and charges of any kind on Energy Materials and Products and Energy-Related Equipment, and notify the Secretariat of any subsequent changes.[193]

Article 29.4 further provides that Contracting Parties shall endeavor not to increase any export or import customs duty or charge of any kind: (a) in the case of importation and if the Contracting Parties are WTO Members, above the level set for in the Schedules of tariff concession of that Contracting Parties; and, (b) in the case of exportation and in the case of importation with Contracting Parties that are not WTO Members, above the level most recently notified to the Secretariat.[194] In addition, Article 29.6 requires that, in respect to trade between Contracting

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191. Note that references to the GATT are all being replaced by the WTO in the Trade Amendment.

192. ECT, *supra* note 183, art. 29.2(a).

193. *Id.* art. 29.3(a).

194. *Id.* art. 29.4(a), (b).

Parties at least one of which is not a WTO Member, a Contracting Party shall not increase any export or import customs duty or charge of any kind above the lowest of the levels applied on the date of the decision by the Charter Conference and must list the particular item in the relevant Annex.[195] As has been analyzed, obligations not to impose duties and other charges higher than those prescribed in the Members' Schedules only apply to import under Article II.1(b) of the GATT 1994. In comparison, such obligation has been extended to export duties as well under the ECT, which provides a more comprehensive legal regime concerning export duties and charges.

With regard to exceptions, Article 24 of the ECT provides general and security exceptions similar to the approach, but not identical to the conditions, of Articles XX and XXI of the GATT.[196] Article 24.1, however, states that "[t]his Article shall not apply to Articles 12, 13 and 29."[197] As a result, the above-mentioned obligations concerning the imposition of customs duties and charges on, or in connection with, importation and exportation of Energy Materials and Products and Energy-Related Equipment as stipulated under Article 29, cannot be exempted by invoking Article 24. In other words, these obligations can only be exempted by complying with the GATT provisions on exceptions, such as Article XX and Article XXI.

In addition to these more comprehensive regulations concerning export duties and charges under the GATT/WTO, the ECT provides another set of rules which are crucial to energy security concerns but are insufficiently regulated under the GATT/WTO; these are its rules on transit. Despite the suspension of the negotiation on the Transit Protocol, Article 7 of the ECT has already provided the basic obligations on transit of energy materials and products, as the following analysis will demonstrate. It has been argued that the GATT 1994 provision on transit, Article V, stops short of addressing some fundamental issues that are pertinent to transit of energy and that the ECT went a step further.[198] Article 7.1 states:

> Each Contracting Party shall take the necessary measures to facilitate the Transit of Energy Materials and Products consistent with the principle of freedom of transits and without dis-

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195. *Id.* art. 29.6(a), (b).

196. ECT Article 24.2(b)(i) contains language similar to GATT 1994 Article XX(b): "necessary to protect human, animal or plant life or health." ECT Article 24.3(a)(ii) also contains language similar to GATT 1994 Article XXI:(b)(iii): "taken in time of war . . . or other emergency in international relations."

197. ECT, *supra* note 183, art. 24.1.

198. Laffont, *supra* note 27, at 240.

> tinction as to the origin, destination or ownership of such Energy Materials and Products or discrimination as to pricing on the basis of such distinction, and without imposing any unreasonable delays, restrictions or charges.[199]

Article 7.2 states that Contracting Parties "shall encourage relevant entities to cooperate" in four types of measures, including "measures to mitigate the effects of interruptions in the supply of Energy Materials and Products" and those "facilitating the interconnection of Energy Transport Facilities."[200]

In comparison, private entities are not regulated under Article V of the GATT 1994. Article 7.2 of the ECT, thus, made a great improvement in this aspect. Furthermore, Article 7.3 lays down the national treatment principle with regard to the transport of Energy Materials and Products and the use of Energy Transport Facilities. Another improvement is that, in the event of a dispute over any matter arising from transit, Article 7.6 requires that the Contracting Party through whose Area Energy Materials and Products transit:

> *[S]hall not . . . interrupt or reduce, permit any entity subject to its control* to interrupt or reduce, *or require any entity subject to its jurisdiction* to interrupt or reduce *the existing flow* of Energy Materials and Products *prior to the conclusion of the dispute resolution procedures set out in paragraph (7)*, except where this is specifically provided for in a contract or other agreement governing such Transit or permitted in accordance with the conciliator's decision.[201]

Several concerns and issues relating to transit, such as growing dependence on imported energy, specific guidelines, criteria, or rules for transit fees, have not been addressed in Article 7 and, hence, the need for the Contracting Parties of the ECT to begin negotiating a Transit Protocol.[202] However, compared to the inadequate regulation of transit under the GATT 1994, Article 7 of the ECT alone seems to provide a better protection for importing countries:

> When comparing those who have signed and ratified with those who have either not signed or not ratified, it is hard to escape the inference that the ECT is regarded favourably by countries which are primarily consumers, but that most pro-

199. ECT, *supra* note 183, art. 7.1.
200. ECT, *supra* note 183, arts. 7.2(c)–(d).
201. ECT, *supra* note 183, art. 7.6 (emphasis added).
202. *See* Laffont, *supra* note 27, at 241–42; *see also* Walde & Gunst, *supra* note 17, at 213.

> ducers [with few exceptions] have serious reservations about it.[203]

Take Russia, the most important energy-exporting country, as an example. Russia has signed the ECT, but has stated clearly that it would not ratify the current ECT at the G8 Summit in July 2006.[204] In this circumstance, Russia, in accordance with Article 45 of the ECT, only needs to apply the ECT "provisionally pending its entry into force . . . to the extent that such provisional application is not inconsistent with its constitution, laws or regulations." Russia has not delivered a declaration according to Article 45.2(a) stating that "it is not able to accept provisional application."[205] It also did not file a written notification according to Article 45.3(a) to the Depository of its intention not to be become a Contracting Party and thereby terminate its provisional application of this Treaty.[206] All these indicate that, although not yet a Contracting Party, the ECT is currently applicable to Russia on a provisional basis.

In summary, provisions on trade and transit for energy materials and goods, and energy-related equipments under the ECT provide more comprehensive regulations on export control and transit than those under the GATT/WTO. However, it also has to be noted that, instead of its own exception clauses, exceptions to export control regulations in the ECT are those under the GATT/WTO.

C. Regionalism Versus Multilateralism

The Energy Chapter, whose provisions were later on replicated in the more general chapter on trade in goods, was among the first to be negotiated during NAFTA negotiations.[207] It is thus "reasonable to suppose, then, that the detailed energy provisions of . . . 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 [forums] such as the WTO."[208] Meanwhile, facing the increasing dependence on

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203. Doeh, *supra* note 186, at 189.

204. Russia clearly stated that its biggest concern on the ECT is the Transit Protocol. *See id.* at 189–90.

205. ECT Article 45.2(a) states: "Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depository." ECT, *supra* note 183, art. 45.2(a).

206. ECT Article 42.3(a) states: "Any signatory may terminate its provisional application of this Treaty by written notification to the Depository of its intention not to become a Contracting Party to the Treaty." ECT, *supra* note 183, art. 42.3(a).

207. U.N. CONFERENCE ON TRADE AND DEVELOPMENT, *supra* note 18, at 63 (2000).

208. *Id.*

energy supply from Russia, the E.U. initiated and concluded the ECT with an aim of strengthening the link with its major energy supplying countries—in addition to speeding up Russia's WTO accession negotiation.[209] As illustrated in this section, both NAFTA and the ECT base their trade regulations on those under the GATT/WTO. However, NAFTA and the ECT provide more comprehensive and detailed provisions on export controls and transit to address energy security concerns of their parties—in particular, importing parties.

There are several differences between the GATT/WTO, on one hand, and NAFTA and the ECT, on the other hand. First, energy goods are not subject to special or different treatment under the GATT/WTO. NAFTA, however, has a whole chapter focusing on energy goods and the ECT regime focuses exclusively on energy goods. Second, with regard to export control via tariffs, the legal regime under the GATT/WTO seems to provide asymmetrical treatment between import duties and export duties in terms of treaty language under Article II:1(b) of the GATT 1994. The ECT, on the other hand, provides a more balanced framework in terms of requiring its Contracting Parties not to raise import *and* export duties and other charges without complying with relevant provisions under Article 29.4. Furthermore, the imposition of export duties does not need to comply with the national treatment principle under Article II of the GATT 1994, while the Energy Chapter under NAFTA—in particular Article 603—provides that the imposition of export duties needs to comply with both the most favored nation principle and the national treatment principle.

Third, with regard to export control via quantitative restrictions, the legality of maximum export price remains uncertain under the GATT/WTO while the Energy Chapter under NAFTA specifically prohibits such practice in Article 603.2. Fourth, with regard to exceptions to export control measures, the exception clauses under Article 605 of the NAFTA provide more stringent disciplines in the event of invoking such exceptions than Article XI and Article XX of the GATT. Lastly, with respect to transit, Article V of the GATT 1994 provides a fairly limited set of regulations and some scholars even argue that it is still debatable whether Article V applies to the transit of energy at all.[210] In addition, considering the prevailing practices in the energy industry—where pipelines are mostly constructed and managed by state-owned or monopolized enterprises—the inapplicability of Article V on private entities further illustrates its inadequacy in dealing with transit in energy trade.

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209. Russia applied for accession to the WTO in June 1993. ECT began its negotiations in 1992 and opened for signature in 1994.

210. Laffont, *supra* note 27, at 240.

The ECT, despite the suspension of its negotiation on the Transit Protocol, still provides a more complete set of regulations compared to Article V of the GATT.

As Part II of this article has previously pointed out, issues critical to energy trade, such as investment measures and competition policies, are not directly regulated under the current GATT/WTO framework. The inadequacy of the GATT 1994 provisions on export control measures has also been pointed out in Part III of this article. However, the discussion in this Part, so far, indicates that regional agreements such as NAFTA and the ECT provide a better legal framework to address their parties' energy security concerns—in particular, the security of supply, by prescribing more comprehensive regulations on export control measures and transit. Does this suggest that the GATT/WTO plays a diminishing role in the international trade in energy from the perspectives of its Members' energy security concerns?

First, the main purpose of the WTO is the liberalization of trade in goods in general, rather than in specific sectors. Sector-specific regulations—such as the Agreement on Agriculture and the Agreement on Textile and Clothing—do exist under the WTO but, rather than creating different sets of rules, their primary focus is to normalize trade relations in a specific group of goods that were previously subject to different rules. This normalization of trade relations was implemented so that specific goods under different rules could be "brought back" to the general framework of trade provisions under the WTO and common to trade in goods in all sectors. From another perspective, the legal framework under the WTO does not exclude any specific sector.

It is possible that different types of trade barriers exist in different sectors and for different goods. The main objective of the GATT 1947, as well as the WTO, is to provide a broad legal framework to eliminate as many types of trade barriers as possible.[211] As a result, legal obligations for WTO Members under the GATT/WTO should, in theory, apply to trade in goods and services in all sectors. The energy sector, therefore, should not be excluded from the GATT/WTO. From the energy security needs of WTO Members that depend on imported energy, however, the traditional market-access emphasis of the GATT/WTO does not seem to meet their need for security of supply. It cannot be denied that previous negotiation rounds in the GATT 1947, as well as the 2004 Doha Round in the WTO, have focused and are still focusing on eliminating trade barriers for "import" rather than "export."

This has resulted in an unbalanced regulatory framework in which export controls are treated less extensively than import controls.

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211. See the preamble to the WTO Agreement and the preamble to the GATT 1947.

From the supply security concerns of certain, if not the majority, of the WTO Members, it is not surprising that legal framework under the WTO is incapable of meeting such needs. Nevertheless, from the discussion of this article, export control via export duties can be subject to tariffs reduction negotiations and be incorporated in Members' Schedules in such a way as to guarantee sufficient certainty as provided under Article II:1(a). In particular, some of the major energy resource exporting countries, such as Russia and the four OPEC members that are not yet WTO Members, are currently in their accession negotiation phase. Negotiation on the reduction of export tariffs on energy resources might play a significant role from this perspective.

For the following reasons, however, the multilateral trade provisions under the GATT/WTO cannot fully address its Members' security concerns. First, the legality of production quota, adopted by OPEC countries, under the GATT/WTO remains uncertain. Second, considering the characteristics of energy resources and their strategic importance, exporting Members have better chances of invoking exceptions provided under the GATT/WTO—in particular, exceptions for Article XX and Article XXI. Third, transit provisions under Article V of the GATT 1994 do seem inadequate for certain energy goods, such as natural gas and electricity. Because of these reasons, some WTO Members chose to resort to regional agreements that can be more tailored to their energy security needs, as illustrated in the cases of NAFTA and the ECT. Thus, to a certain extent, regional agreements do replace the MTS of the WTO in addressing some Members' energy security concerns.

Indeed, regional agreements with fewer stakeholders offer more flexibility in terms of prescribing and revising their regulations, which seems to provide an attractive alternative for WTO Members that need stricter export controls regulations to ensure access to supply. Such Members can freely choose their partners in negotiating and concluding regional agreements. In addition, as regional agreements involve fewer countries, the trade-off that needs to be made in the process of further liberalization on a reciprocal basis could be much smaller, giving rise to reduced impact on the relevant domestic industries, and resulting in less domestic opposition in concluding such agreements.[212] However, the most important aspects of such a regional approach is whether the targeted exporting countries are willing to negotiate and conclude bilateral or regional agreements with importing countries and, if they are, will such agreements contain provisions more advantageous to import-

212. For example, importing countries could offer market access to petrochemicals or other manufacturing products to exporting countries in exchange for exporting countries' commitment of a steady supply of energy resources.

ing countries? As observed by Selivanova: "[E]nergy-endowed states appear to be apprehensive about opening their energy sector through international agreements."[213] From this perspective, the cases of NAFTA and the ECT are the exceptions rather than the norms.[214]

Among the 153 WTO Members—the majority of which are dependent on importing energy—how many of them enjoy power and hold resources as influential as those of the European Union and the United States to "convince" energy resource-rich countries to negotiate and conclude regional agreements that are tailored to the needs of importing parties? As Part IV.A has illustrated, even for the United States, negotiations under the Energy Chapter in NAFTA encountered great difficulties due to the historically unique role of the energy industry in Mexico. Part IV.B has also demonstrated that, for the European Union, the negotiation on the Transit Protocol under the ECT had to be suspended due to strong opposition from Russia, itself a powerful player.

From the analysis in Part II, energy security presents different policy concerns for countries with different characteristics and needs, which also brings out different dimensions and policy concerns in energy trade. In contrast to most of the regional agreements, the membership in the WTO is fairly large and issues addressed under the WTO cover a wide range of policies. Each country can, of course, opt for regional agreements in addressing its special energy security needs. However, as countries transform through different phases of development, their energy security needs and policy concerns in energy trade might also modify to adjust to such transformation. As a result, each country might need to consider as many energy security concerns as possible in its long-term planning.

With respect to the various types of policies pertinent to different countries' energy security concerns, as identified in Part II.A, the WTO seems to be the only global regime that covers almost all of these policies. Under such circumstances, the variety of policy concerns regulated under the WTO legal framework seem to be the only international platform which can provide a wide range of interests available to each Member so that trade-off, in particular in each negotiation round, can be more easily calculated to address contemporary and future policy needs. For example, as previously analyzed in Part II.B.1, countries with abundant energy resources and countries with advanced technologies have differ-

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213. Yulia Selivanova, *The WTO and Energy: WTO Rules and Agreements of Relevance to the Energy Sector*, ICTSD PROGRAMME ON TRADE AND ENVIRONMENT ISSUE PAPER NO. 1, 10 (2007), *available at* http://ictsd.net/downloads/2008/05/the20wto20and20energy.pdf.

214. Indeed, as noted by Selivanova, "[f]ree trade agreements rarely contain provisions specific to the energy sector." *Id.* at 9.

ent market access needs. Their different needs can both be satisfied under the WTO via tariff reduction and/or service negotiation, resulting in meeting different energy security concerns.

Furthermore, over-reliance on the regional approach might, in the long run, impede a country's capabilities to address evolving policy concerns. For example, when an energy importing country concludes a regional agreement with its main exporting partner with the intention of securing energy supply, it might steadily increase energy resources import from that particular country. This might reduce the level of diversification of energy supply and increase over-dependence on a single energy supply, endangering its energy security objective. In addition, another drawback of dealing with energy issues regionally is "the uncertainty for newcomers in the market and possible inconsistency of these rules with [those under the GATT/WTO]."[215] For those policies that have yet to be addressed, such as investment and competition policies and those provisions that have yet to be clarified or strengthened—e.g., export regulations, freedom of transit, energy service, and state-owned enterprises under the GATT/WTO—regional agreements do play a significant role in filling such a policy or legal vacuum.

Nonetheless, regional agreements involve a smaller group of countries, and, most importantly, are not a viable alternative to most WTO Members who do not hold strong enough bargaining power to engage in such an approach. Consequently, for WTO Members that depend on imported energy, the WTO legal framework might be the only available multilateral forum to address their energy security concerns. As a result, the role of the GATT/WTO in energy trade and energy security cannot, and will not, be replaced by regional agreements.

As analyzed in Part II and Part III, the GATT/WTO framework does exhibit its flaw in addressing Members' energy security needs. However, this should not be the only yardstick in evaluating the value and function of the WTO, as energy security is not the objective of this organization. The reform of the WTO and the evolution of its legal framework cannot be undertaken only with the aim of maintaining energy security concerns and security of energy supply. Nevertheless, energy security reflects a wide range of policy concerns and such policy contents contribute to the overall objective of trade liberalization. Furthermore, regulations on export control and freedom of transit have great impact, not only in energy trade, but also on trade in goods and services in general. More symmetrical regulations on import and export, as well as on providing greater freedom of transit, play an important part in the liberalization of trade in other sectors. Accordingly, despite its

215. *Id.* at 13.

importance, the regional approach should supplement, not substitute, the multilateral approach under the GATT/WTO in addressing Members' energy security concerns.

V. CONCLUSION

The article set out to answer the following question: Will the role of the MTS, established by the GATT/WTO, be increasingly marginalized and replaced by regional agreements with regard to energy trade and energy security concerns? After examining the concept of energy security and the different dimensions and policy-concerns of energy trade, Part II identified export control regulations—including export tariffs, quantitative restrictions on export, and certain exceptions to export control measures—as the most relevant legal rules under the GATT/WTO in terms of energy security concerns. Part III conducted a detailed analysis on such legal rules and concluded that the export control regulations under the GATT/WTO provide insufficient protection for WTO Members against export control measures on energy resources, mainly due to the wide range of exceptions to these control measures available under the GATT/WTO.

Part IV took up the issue of regional agreements, using NAFTA and ECT as two examples, to examine whether such agreements provide a more stable regime for WTO Members in terms of energy security concerns. Part IV concluded that, in comparison to the GATT/WTO, both regional agreements provide more adequate legal protection for their parties, in terms of export control and transit regulations, under their respective treaty. However, from the negotiation histories and current development under these two regional agreements, the inequality among its parties in terms of bargaining power stood out. In other words, not every importing country has the power and influence of the United States and the European Union to conclude a similar regional agreement that will secure their supply of key energy resources. Furthermore, trade liberalization embodied in the GATT/WTO plays an important role in energy trade.

Consequently, despite its insufficiency in providing legal protection and certainty to its Members for their energy security concerns, other trade rules under the GATT/WTO play a no less significant role in tailoring to the different needs of WTO Members' energy security and energy trade concerns. Such a role cannot be easily replaced by regional agreements with a narrower focus. Export control measures, identified and examined in this paper, are themselves subject to review and possible revision under the GATT/WTO due to the asymmetries between export and import inherent in the GATT regime. Now that their

importance in safeguarding WTO Members' energy security is firmly established, consensus should be easier to reach among Members for future negotiations on strengthening the discipline of export controls in the WTO.