Legal Options for a Sustainable Energy Trade Agreement

July 2012
ICTSD Global Platform on Climate Change, Trade and Sustainable Energy

Matthew Kennedy
University of International Business and Economics, Beijing

ICTSD
International Centre for Trade and Sustainable Development

A joint initiative with
Global Green Growth Institute
Peterson Institute for International Economics

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Published by

International Centre for Trade and Sustainable Development (ICTSD)
International Environment House 2
7 Chemin de Balexert, 1219 Geneva, Switzerland
Tel: +41 22 917 8492 Fax: +41 22 917 8093
E-mail: ictsd@ictsd.org Internet: www.ictsd.org

Publisher and Director: Ricardo Meléndez-Ortiz
Programme Manager: Ingrid Jegou
Programme Officer: Mahesh Sugathan

Acknowledgments

This paper is produced by the Global Platform on Climate Change, Trade and Sustainable Energy of the International Centre for Trade and Sustainable Development (ICTSD). The concept of the research has been informed by ICTSD policy dialogues during the past year, in particular a dialogue organized in Washington DC in November 2011 by the Peterson Institute for International Economics (PIIE) with support of the Global Green Growth Institute (GGGI) and ICTSD as well as a high-level Roundtable in Geneva organized in December 2011 on the occasion of the Eighth Ministerial Conference of the WTO. The author thanks Ricardo Meléndez-Ortiz, Ingrid Jegou, Mahesh Sugathan, Marie Wilke and Joachim Monkelbaan from ICTSD for their guidance and inputs during the production of the paper. The author is also grateful for the comments on an earlier draft received from Prof. Thomas Cottier, Prof. Joost Pauwelyn and Ambassador Manuel Teehankee.

ICTSD is grateful for the support of its core and thematic donors, including the UK Department for International Development (DFID); the Swedish International Development Cooperation Agency (SIDA); the Netherlands Directorate-General of Development Cooperation (DGIS); the Ministry of Foreign Affairs of Denmark(Danida); the Ministry for Foreign Affairs of Finland; the Ministry of Foreign Affairs of Norway; Australia's AusAID; the Inter American Development Bank (IADB); Oxfam Novib and the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ).

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Citation: Kennedy, Matthew; (2012); *Legal Options for a Sustainable Energy Trade Agreement;* International Centre for Trade and Sustainable Development, Geneva, Switzerland, www.ictsd.org

ISSN 2225-6679

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The Global Green Growth Institute (GGGI) is a new kind of international organization that has been established to accelerate “bottom up” (country- and business-led) progress on climate change and other environmental challenges within core economic policy and business strategies. The Institute provides an international platform for evidence based learning and policy innovation that helps to illuminate practical opportunities for progress on the twin imperatives of economic development and environmental sustainability, while deepening cooperation among developed and developing countries, the public and private sectors, and practitioners and scholars. Founded in June 2010 and established in Seoul, GGGI is committed to help developing and emerging countries pioneer a new “green growth” paradigm, and is scheduled to be converted into an international organization in October 2012.

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Abbreviations and Acronyms

ACTA	Anti-Counterfeiting Trade Agreement
AMS	Aggregate Measurement of Support
APEC	Asia-Pacific Economic Cooperation
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Community
ECT	Energy Charter Treaty
EU	European Union
FTA	Free Trade Agreement
G20	Group of Twenty
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GHG	Greenhouse gas
GPA	Government Procurement Agreement
HS	Harmonized System
ICTSD	International Centre for Trade and Sustainable Development
IDA	International Dairy Agreement
ITA	Information Technology Agreement
ITLOS	International Tribunal for the Law of the Sea
LDCs	Least-developed countries
MAI	Multilateral Agreement on Investment
MFN	Most-favoured-nation
NAFTA	North American Free Trade Agreement
PTA	Preferential Trade Agreement
SCM	Subsidies and Countervailing Measures

SETA	Sustainable Energy Trade Agreement
SPS	Sanitary and Phytosanitary
TBT	Technical Barriers to Trade
TCA	Agreement on Trade in Civil Aircraft
TRIMS	Trade-Related Investment Measures
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UNCLOS	United Nations Convention on the Law of the Sea
UNFCCC	United Nations Framework Convention on Climate Change
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

Foreword

Climate change is an unprecedented challenge facing humanity today. Given that fossil fuel-based energy use is the biggest contributor to anthropogenic greenhouse gas (GHG) emissions, a rapid scale up and deployment of renewable or sustainable energy sources could significantly reduce the emissions responsible for climate change. On the development side, developing countries are faced with the challenge of ensuring access to energy for millions of people and power rapid economic growth in an increasingly low-carbon manner. Most countries are also seeking ways to enhance their energy security by reducing their reliance on fossil-fuel imports. Scaling up sustainable energy through a switch to cleaner and low-carbon transport fuels and technologies as well as greater energy-efficiency measures could make a positive contribution toward achieving all of these goals.

Efforts to scale up sustainable energy require generation costs to be as low as possible. This is difficult at present, given the relatively high capital costs associated with renewable-energy investments, the non-consideration of environmental and health externalities in fossil-fuel pricing and the enormous levels of subsidies that fossil fuels still enjoy.

While incentives such as feed-in tariffs and tax breaks help, lowering the costs of equipment and services used to produce sustainable power could also play a critical role in enabling economies of scale and cost optimization for renewable-energy projects, thus facilitating the scale-up process. Addressing barriers to trade in sustainable-energy goods and services can also contribute to scale economies and cost-optimization. Trade in sustainable-energy goods can be hampered by tariffs, subsidies and diverse or conflicting technical standards as well as by lack of harmonization or mutual recognition efforts.

Domestic sustainable-energy policies could also be designed in a manner that restricts access to competitively priced goods and services for sustainable-energy producers. This is because policymakers, while striving to lower the costs of sustainable energy production, often seek to promote the domestic manufacturing of renewable-energy equipment and the provision of services. In addition, the sustainable-energy sector is also seen by many policymakers as a potential engine for job creation. However, balancing all of these objectives may be difficult, and some policies could trigger trade disputes. The World Trade Organization (WTO) is currently witnessing the first ever trade dispute over renewable-energy feed-in tariffs and local content measures between Canada and Japan. It is clear that the urgency of addressing climate change will require, among other policy responses, a clear and coherent governance regime for sustainable energy and related goods and services and one that is also supported by trade rules and robust markets. The current stalemate in the WTO Doha negotiations, particularly in efforts to liberalize environmental goods and services, is preventing action to address barriers to sustainable-energy goods and services. Even a successful conclusion of the Doha Round would still leave a number of trade-related rules pertaining to sustainable energy, such as subsidies, unclarified given the lack of a holistic perspective on energy in the Doha mandate. In such a scenario, it may be worth looking into the possibility of sustainable energy trade initiatives, including a Sustainable Energy Trade Agreement (SETA) as a stand-alone initiative that could address these barriers and enable a trade policy-supported energy governance regime to advance climate change mitigation efforts and increase sustainable-energy supply.

This agreement could be pursued initially as a plurilateral option, either within or outside the WTO framework and eventually be “multilateralized.” It could serve to catalyze trade in sustainable-energy goods and services while seeking to address the needs and concerns of participating developing countries, many of which may not be in a position to immediately undertake ambitious liberalization in sustainable-energy goods and services. A SETA could also help clarify and address existing

ambiguities in various trade rules and agreements as they pertain to sustainable energy and provide focalized governance through effective and operational provisions.

In order to identify viable options for a SETA, it is imperative to analyze the existing legal frameworks within which a SETA could be negotiated and the resulting legal challenges and opportunities. This paper looks at a number of options under which a SETA could be given legal shape within and outside the WTO and assesses the pros and cons of the various approaches. It touches on a number of important considerations, such as the negotiating procedures, issues of accession, relationship to existing WTO rules and obligations and dispute settlement. The author also puts forward arguments as to why an agreement within the WTO would be the first-best option.

This paper was conceived by the International Centre for Trade and Sustainable Development (ICTSD) and written by Matthew Kennedy of the University of International Business and Economics, Beijing. He was formerly a senior lawyer in the WTO Secretariat. The paper is produced as part of a joint initiative of ICTSD's Global Platform on Climate Change, Trade and Sustainable Energy, the Global Green Growth Institute (GGI) and the Peterson Institute for International Economics (PIIE). The concept of the research has been informed by ICTSD policy dialogues, in particular a dialogue organized in Washington DC in November 2011 by the PIIE with support of the Global Green Growth Institute (GGGI) and ICTSD; a a high-level Roundtable in Geneva organized on 16 December 2011 on the occasion of the Eighth Ministerial Conference of the WTO that was attended by a number of high-level representatives from WTO missions and capitals; and at a session organized at the Global Green Growth Summit 2012 in Seoul, Korea on 11 May 2012.

As a groundbreaking piece of research it has the potential of informing innovative policy responses on sustainable-energy trade initiatives and will be a valuable reference tool for policymakers as well as trade negotiators. We hope that you will find the paper to be a thought-provoking, stimulating and informative piece of reading material and that it proves useful for your work.

Ricardo Meléndez-Ortiz
Chief Executive, ICTSD

Executive Summary

This study presents legal options available to a group of interested governments to conclude an agreement among themselves on trade in sustainable-energy goods and services either within the existing WTO framework, or outside it. The study was commissioned by the International Centre for Trade and Sustainable Development (ICTSD), which drew up the outline and terms of reference.

In November 2011, the ICTSD Global Platform on Climate Change, Trade and Sustainable Energy produced a scoping paper entitled *Fostering Low Carbon Growth: The Case for a Sustainable Energy Trade Agreement.* The scoping paper noted that a transition to a low-carbon economy requires a greater switch to sustainable energy, as conventional fossil-fuel-based energy use is a major driver of greenhouse-gas emissions. It further noted that a transition would also entail the deployment of energy-efficiency measures in both conventional power generation and end-use sectors, such as buildings, industry and transport in addition to the deployment of cleaner, low-carbon transport fuels and technologies.

Sustainable energy, for the purposes of that paper and the present one includes solar, wind, small-scale hydro and biomass-related fuels, technologies and services and any other energy source that has the potential to mitigate greenhouse-gas emissions. Countries interested in facilitating diffusion and access to sustainable-energy goods and services would need to start addressing trade-related barriers. Different types of barriers are affected by rules and disciplines developed in the World Trade Organization (WTO), regional trade agreements, bilateral investment treaties and elsewhere. Trade in sustainable-energy goods and services is also affected by negotiations and rules in fora set up to address broader issues of climate change, such as the United Nations Framework Convention on Climate Change (UNFCCC), or issues of energy transit, such as the Energy Charter Treaty (ECT).

In theory, certain types of barriers to trade in sustainable-energy goods and services can be addressed through existing WTO rules or as part of the Doha Round. However, WTO rules do not currently address the energy sector in a systematic way. The Doha negotiations on environmental goods have been bogged down by differences between members over scope and coverage, as well as the modalities of liberalization, while the services negotiations have also made extremely slow progress, and the Round as a whole is presently stalled.

Outside the WTO, the UNFCCC negotiating framework faces challenges of its own and may not be the appropriate place to negotiate trade rules and to introduce operational provisions for addressing trade and market barriers to sustainable energy goods and services. The ECT covers transit and investment-related provisions on energy, but its membership does not include many countries, like China and India, and it does not presently offer a framework for trade-related concessions on sustainable-energy goods and services. Regional and bilateral trade agreements also have limited memberships.

Therefore, the ICTSD scoping paper considered a fresh approach that would cover the whole sustainable energy sector by addressing a variety of market and trade-related barriers, which it dubbed a Sustainable Energy Trade Agreement (SETA). A SETA could be a way to bring together countries interested in addressing climate change and longer-term energy security while maintaining open markets. The scope and form of the agreement would be matters for negotiation. Three possible legal forms were envisaged: (i) an optional WTO agreement similar to the Information Technology Agreement (ITA); (ii) an optional WTO agreement similar in form to the Government Procurement Agreement (GPA); and (iii) a stand-alone agreement outside the WTO, which might be incorporated in the WTO framework at a later date. Clarification would

be required regarding the relationship between the new agreement and existing WTO rules and agreements, including the dispute settlement mechanism. The present paper explores these legal options.

Implementation of SETA within the WTO framework:

New agreements can be added to the WTO framework, even though the WTO Agreement was originally agreed as a package deal. The single undertaking approach was adopted in the Uruguay Round, as reflected in the WTO Agreement, and later in the Doha Round, but that does not prevent the negotiation of a new agreement outside the Round among a group of interested Members. Section 2 considers the available bases for implementation of SETA within the WTO framework, either as an ITA-type agreement or a GPA-type agreement, in accordance with the current institutional rules and procedures. The choice between these two forms depends on what the new agreement would contain. An ITA-type agreement operates through modifications of Members' WTO goods and services schedules so it can include market access improvements, and even new sets of rules through incorporation of a so-called reference paper. However, it is limited in its subject matter to the scope of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the General Agreement on Trade in Services (GATS) and, most important, it may only yield rights, not diminish obligations. A GPA-type agreement would be added to Annex 4 of the WTO Agreement and would not be subject to the same substantive limitations as long as it was a trade agreement. However, it would face a procedural hurdle, as agreements can be added to Annex 4 only by a decision of the Ministerial Conference (or the General Council conducting its functions between sessions) taken 'exclusively by consensus." This means that any Member present at a meeting where the decision was proposed could, in theory, block it.

The benefits of SETA could accrue to all WTO Members, even those that were not parties to it. This is clearly the case for a new ITA-type agreement. However, GPA-type agreements are not automatically excluded from most-favoured-nation treatment (MFN) either. The WTO rule that plurilateral agreements do not create either obligations or rights for Members that have not accepted them is a restatement of the *pacta tertiis* rule of customary international law, not a derogation from MFN obligations. If the GPA is not applied on an MFN basis that is because its subject matter falls outside the scope of the WTO's existing MFN provisions, not because it is plurilateral. In contrast, SETA would be likely to cover at least some issues within the scope of the MFN obligations in GATT 1994, GATS and other covered agreements. Consequently, non-participating WTO Members would retain all their rights under those provisions unless they were waived. This important issue should be confirmed at such time as SETA is added to the WTO Agreement. This opens up possibilities for free riding, but only those Members with an actual or potential trade interest stand to benefit in practice.

The process of negotiation of SETA can be launched outside formal WTO meetings on an ad hoc basis or in existing fora. Transparency in the negotiating process is important to build trust with non-participants. If a group of interested Members considers that participation by other Members is required for an agreement to be viable, they could propose the launch of negotiations in the WTO, which would require a consensus decision of a WTO body. Negotiations on an ITA-type agreement could be conducted among those that intend to participate in the results. Negotiations on a new GPA-type agreement would be a novelty because the wider membership would eventually be called upon to consent to the addition of the results to the WTO framework. Non-participants could participate actively in the negotiations with observer status to ensure that their interests are protected. The negotiating group could organize its business as it saw fit, but it would be useful for participants to confirm that the negotiations are separate from those in the Doha Round and form part of a different balance of concessions.

The size of a group of interested Members required to implement SETA would depend on participants' respective assessments as to whose participation is necessary to ensure the viability of an agreement, in light of those obligations that are to be applied on an MFN basis and those that are to be applied on a reciprocal basis among the parties only. The critical mass could, for example, be assessed in terms of a collective percentage share of world trade in the relevant products, like the ITA. Accession to SETA after its entry into force could be subject to "terms to be agreed" in order to encourage Members to become original participants but when implementation was sufficiently wide the parties could agree to allow accession on the same terms as those for original parties, like the ITA. Assurances could be given that accession is and remains voluntary.

The relationship to existing WTO rules and disciplines is clearer in the case of an ITA-type agreement, as the commitments that it contains become part of the participating Members' goods and/or services schedules and, hence, integral parts of the GATT 1994 and the GATS. The Dispute Settlement Understanding (DSU), general exceptions and procedures for modifications of schedules all apply. However, the relationship between existing WTO rules and a new GPA-type agreement would require some consideration. As regards dispute settlement, the agreement could be added to the list of "covered agreements" under the DSU through a series of decisions; the rights of non-parties to the new agreement in disputes arising under it could be enhanced; special and additional dispute settlement rules could be added, in particular, the selection and role of technical experts on non-trade issues could be clarified; and the applicability of the DSU to any future amendments of the new agreement should be indicated. As regards substantive rules, the SETA would overlap with other WTO agreements due to its subject matter. New rules could clarify or add to the obligations of SETA parties, but some rules could also diminish their WTO obligations, for example, through a new category of non-actionable subsidies or the creation of a general exception-type provision. The addition of such provisions to the WTO framework would be subject to the consent of the wider WTO membership, and they would not affect the rights and obligations of non-parties, but their impact on the interpretation of the WTO Agreement should be addressed expressly in the text.

Implementation of SETA outside the WTO framework:

WTO Members and non-Members can implement a new agreement outside the WTO framework. This would be the only option under which SETA would be a GPA-type agreement, and the WTO Ministerial Conference would not need to consent to add it to the WTO Agreement. Implementation outside the WTO would be a second-best option, because the SETA would not benefit from the WTO institutional framework, in particular, its dispute settlement system. SETA would be unlikely to qualify on its own as a free-trade agreement; hence, benefits would have to be applied on an MFN basis in accordance with relevant WTO obligations. Conflicts may also arise with the substantive norms of the WTO. SETA could at least reduce uncertainty through express clarification of its relationship to relevant WTO agreements. Conflict could also arise with the jurisdiction of the DSU if the SETA had its own dispute settlement mechanism. A waiver for SETA-implementing measures would be a temporary solution, and a choice of forum clause (or so-called fork-in-the-road provision), such as those that exist in many free-trade agreements (FTAs), would be useful.

1. Introduction

This paper looks at the legal options for a group of interested countries to enter into a new international agreement dedicated to the interface between trade policy and climate change, which could be titled the Sustainable Energy Trade Agreement (SETA). Sustainable energy, for the purposes of this paper, includes solar, wind, small-scale hydro and biomass-related fuels, technologies and services and any other energy source that has the potential to mitigate greenhouse-gas (GHG) emissions. The primary objective of SETA would be to promote the scale-up and deployment of sustainable-energy sources through the use of trade policy measures in order to reduce the emissions responsible for global warming.

This paper is one of a series that builds on the findings of the scoping paper released by the ICTSD Global Platform on Climate Change, Trade and Sustainable Energy in November 2011, entitled *Fostering Low Carbon Growth – The Case for a Sustainable Energy Trade Agreement*.[1] The scoping paper examined the relative merits of SETA and the substantive rules that it might contain. As regards structure, it suggested that SETA could be modelled either on the plurilateral Agreement on Government Procurement (GPA) or the Information Technology Agreement (ITA), both of which are part of the World Trade Organization (WTO) framework. Alternatively, SETA could be a stand-alone agreement completely outside the WTO framework. As regards the scope of issues and market barriers to be covered, it suggested that SETA could be undertaken in a two-phased approach. Phase one would address clean energy supply, i.e. goods and services relevant to sustainable-energy generation in the areas of solar, wind, hydro and biomass as a starting point, although this could be extended to biofuels used for transportation, such as ethanol and biodiesel, and other technologies.[2] Phase two may address the wider scope of energy efficiency products and standards, particularly those identified by the Intergovernmental Panel on Climate Change for GHG mitigation (buildings and construction, transportation and manufacturing) and agriculture.

The scoping paper suggested alternative approaches to the negotiation of SETA. The agreement could initially focus on key trade-related issues as a cluster, comprising tariffs, non-tariff barriers, subsidies, procurement and services. Alternatively, it could proceed incrementally on an issue-by-issue agenda and, depending on the ambitions of the parties, it could also address issues related to domestic energy regulation, such as fossil fuel subsidies, investment and competition policy, as well as trade facilitation and transit issues related to sustainable energy. The scoping paper did not attempt to pre-determine the means of implementation of any eventual agreement or its scope and modalities. Those remain matters for Members and non-Member governments to decide.

SETA would not be part of the Doha Round, although its subject matter would overlap with the Doha negotiations, notably those on environmental goods and services. A group of interested WTO Members and non-Members might wish to pursue negotiations on SETA in parallel, in view of the lack of substantial progress in the multilateral negotiations and a tendency to converge on the lowest common denominator in negotiations within a very large and diverse membership. Negotiations among groups of interested parties are not new and can draw on experience with optional agreements within the General Agreement on Tariffs and Trade (GATT) and the WTO. If eventual negotiations lead to a successful conclusion, the parties could implement SETA within the WTO framework, or outside it. Different considerations would apply at each stage from the launch and conduct of negotiations, through their conclusion, into implementation and later on as regards accession.

This paper aims to advise governments and other relevant stakeholders on the legal options for SETA in the scenarios set out in the scoping paper. Specifically, this paper addresses the institutional and formal issues to be taken into consideration in deciding either to add SETA to the WTO framework or to establish it as

a stand-alone agreement. Section 2 begins with a consideration of how the negotiations for SETA could be launched, conducted and implemented *within* the WTO framework, paying special attention to how non-participants would be protected. It examines how SETA would relate to the WTO's existing institutions, notably the dispute settlement mechanism, and the decisions that would need to be taken to adapt them to each other. It also examines how SETA would relate to certain of the WTO's substantive rules, in particular where it not only added to obligations but also purported to diminish them, through a new class of non-actionable subsidies or a general exception-style approach. Section 3 considers how SETA could be established *outside* the WTO framework, and what action could be taken to avoid conflicts between SETA and the WTO in that scenario. Key points are repeated in shaded text at the end of each sub-section. A summary of conclusions and recommendations on ways forward appears at the end of the text.

Forthcoming papers in this ICTSD series will elaborate on the substantive issues and market barriers that SETA could cover. They include *Governing Clean Energy Subsidies: What, Why and How Legal?* by Arunabha Ghosh and Himani Gangania, and *The Trade Implications of Procurement Practices in Sustainable Energy Goods and Services* by David Luff.

2. Implementation of SETA Within the WTO Framework

Given the scope of issues and market barriers that SETA might cover, as envisaged in the scoping paper, the new agreement could be negotiated and concluded within the WTO. This would take advantage of the institutional framework that the WTO already provides for the conduct of trade relations among its Members and, potentially, allow SETA to be enforced through the WTO dispute settlement mechanism. This would not only avoid a duplication of institutions, but also help prevent conflicts of jurisdiction. This section considers the available legal bases for such an exercise and some important issues to take into consideration. The options presented are available under the WTO's current institutional rules and procedures, but reform of the institutional rules and procedures themselves can also be envisaged.[3]

2.1. Scope for SETA to be a New WTO Agreement

The WTO framework is not set in stone. New agreements can be added at any time - even though the WTO Agreement was originally agreed as a package deal. Article II:1 of the WTO Agreement defines the scope of the WTO in terms of the Annexes to that agreement, which can and do change over time. Three WTO agreements have already terminated: the 1994 International Dairy Agreement and the 1994 International Bovine Meat Agreement were both deleted in 1997,[4] and the Agreement on Textiles and Clothing terminated at the end of 2004.[5] The results of other negotiations have been incorporated into the existing WTO agreements, notably the ITA,[6] reviews of the Pharmaceutical Understanding,[7] a bilateral deal on tariffs on distilled spirits,[8] four General Agreement on Trade in Services (GATS) protocols on financial services, movement of natural persons and basic telecommunications[9] and a protocol to the Agreement on Trade in Civil Aircraft (TCA).[10] An amendment to the Trade-Related Aspects of the Intellectual Property Rights (TRIPS) Agreement has been adopted, although it has not entered into force.[11] The WTO has also approved 29 protocols with acceding Members. The WTO has yet to add a new formal agreement to its framework, although one (the Trade Facilitation Agreement) is under negotiation in the Doha Round.[12]

The single undertaking of the WTO does not prevent the addition of new agreements to the WTO framework, even without the successful conclusion of a Round of multilateral trade negotiations. The single undertaking was an approach adopted for the organization of two Rounds of multilateral trade negotiations, first the 1986 Punta del Este Declaration that launched the Uruguay Round[13] and later the 2001 Doha Declaration.[14] The single undertaking approach is reflected in the implementation of the results of the Uruguay Round insofar as Members accepted the WTO Agreement and remain bound by it as a package, without the option to select *à la carte* among the agreements in Annexes 1, 2 and 3.[15] The preamble to the WTO Agreement recites the parties' resolution to develop "an integrated, more viable and durable multilateral trading system" with respect to the results of negotiations *up to and including* the Uruguay Round.[16] The single undertaking approach was later adopted for the Doha Round by choice,[17] but that does not govern the organization of other negotiations. Indeed, Article X:9 of the WTO Agreement expressly provides a procedure for the addition to Annex 4 of new agreements (and the deletion of old ones) to which some Members are parties but others are not.[18]

The WTO framework is open to agreements entered into by less than all 155 Members. The GPA is an example of one form of agreement. The ITA (formally the 'Ministerial Declaration on Trade in Information Technology Products') is an example of a different form of negotiating results concluded among a subset of Members and implemented within the WTO framework.[19]

There is a degree of mistrust among some developing countries regarding the GPA-type of optional agreement. Plurilateral agreements (i.e. optional agreements in Annex 4 to the WTO Agreement) are perceived as a throwback to the Tokyo Round of trade negotiations of 1973-79.[20] The results of the Tokyo Round included nine agreements, or so-called codes to which only some contracting parties to the GATT subscribed. One of the achievements of the Uruguay Round was to revise most of those codes and integrate them into the WTO framework. Five multilateral WTO agreements were based on Tokyo Round Codes: the Agreement on Technical Barriers to Trade (TBT), the Anti-Dumping Agreement, the Customs Valuation Agreement, the Subsidies and Countervailing Measures (SCM) Agreement and the Agreement on Import Licensing Procedures. Four other WTO agreements were based on, or identical to, a Tokyo Round Code but remained plurilateral. Two of these, the 1994 GPA and the 1979 TCA, remain in Annex 4 to the WTO Agreement.

The ITA-type of optional agreement among subsets of WTO Members does not arouse the same suspicions. The ITA provided for improvements in market access that were negotiated and concluded among only certain Members but given effect by means of certifications of modifications to participating Members' goods schedules,[21] which are integral parts of Part I of GATT 1994.[22] The positive attitude toward this type of optional agreement lies in the fact that the market access improvements it provides accrue to all WTO Members. In reality, this may not be very different from the position of SETA, regardless of its form, because it may still be applied on a most-favoured-nation (MFN) basis for reasons of substance. In other words, some or all of the benefits of SETA may accrue to all WTO Members even if it is concluded as a GPA-type of optional agreement, for reasons discussed below.

A new optional agreement, such as SETA, could be concluded among a group of interested WTO Members and given effect according to either or both of these models, depending on what it contained. If SETA were added to Annex 4 of the WTO Agreement as a GPA-type agreement, the only substantive condition would be that it must be a trade agreement.[23] SETA would clearly satisfy that condition, at least at an initial stage.[24] (There is also an important procedural condition, discussed below). If SETA were given effect through certifications of modifications to participating Members' schedules as an ITA-type agreement, it could only provide for improvements in tariff concessions and improved commitments on non-tariff measures within the scope of GATT 1994 and/or specific commitments on liberalization of trade in services within the scope of GATS. The improvements could make reference to an agreed set of rules that participants incorporate in their respective Schedules by reference, along the lines of the Understanding on Commitments in Financial Services[25] and the reference paper on telecommunications services.[26] If these types of improvements were *all* that the new agreement contained, it would not be necessary to add SETA to Annex 4. However, schedules may only yield rights under GATT 1994 and the Agreement on Agriculture and cannot diminish obligations under those agreements without some express authorization in the text of those agreements. Therefore, a permanent derogation within the WTO framework would require a new agreement in Annex 4.[27] Other types of WTO instruments, such as an amendment, could also be considered.[28]

Either way, the WTO membership collectively retains control over which new agreements are added to the WTO framework. Agreements among subsets of Members can be added to Annex 4 only by means of a decision of the

Ministerial Conference (or the General Council conducting its functions between sessions) taken "exclusively by consensus."[29] This procedural condition could be a challenge to fulfill. Modifications of participating Members' goods or services schedules are certified only with the tacit consent of all Members to the proposed modification.[30]

A new optional agreement among a group of interested WTO Members and open to all would not necessarily be a backward step. Transitional periods and other provisions granting special and differential treatment already create different sets of rights and obligations among different groups of WTO Members. The difficulty in obtaining agreement among all Members in the context of the Doha Round compels fresh consideration of alternative approaches to rule-making in order for the WTO to remain relevant in light of contemporary developments.[31] In 2005, the Sutherland Report advised that possible plurilateral approaches to WTO negotiations should be re-examined – outside the context of the Doha Round. However, it outlined a series of problems to which attention should be paid, notably the rules under which any such negotiations take place.[32] In 2007, the Warwick Commission recommended that serious consideration be given to the re-introduction of the flexibility associated with what has come to be known as critical mass decision-making, as opposed to the single undertaking approach.[33] Most of the successful negotiations in the WTO framework since its establishment have, in fact, been optional, sectoral exercises.[34]

There are legitimate concerns regarding WTO agreements concluded among less than all WTO Members. These relate to the value and availability of the benefits of the agreement; the inclusiveness of the negotiating process; the potential for pressure to participate after an agreement has been concluded and potential conflicts between new agreements and the existing WTO framework. Each of these concerns is discussed below.

- *SETA could be added to the WTO framework as an optional agreement outside the context of the Doha Round.*

- *SETA could be added to Annex 4 to the WTO Agreement, like the GPA, but a decision of the Ministerial Conference (or General Council), adopted exclusively by consensus, would be required.*

- *SETA could be implemented through modifications to participating Members' schedules, like the ITA, insofar as it provided for improvements to tariff concessions, commitments on non-tariff barriers and commitments on liberalization of trade in services.*

2.2. Rights and Obligations Toward Non-participants

One of the most important issues regarding the conclusion of SETA as a new agreement within the WTO framework concerns the rights and obligations of participants towards WTO Members who do not participate in SETA. Multilateralization of benefits under critical mass agreements ensures that they do less damage to the integrated system that the WTO Agreement established in 1994 than might otherwise be the case.[35] The Warwick Commission recommended that the principle of non-discrimination should apply to all Members, regardless of whether they participate in critical mass agreements.[36] This could be a decisive issue in obtaining consent from the Ministerial Conference to add SETA to Annex 4 of the WTO Agreement, if it were given legal effect as a GPA-type agreement.[37]

All improvements in tariff and other concessions effected through modifications to participating Members' goods schedules will accrue – in theory – to the benefit of all WTO Members, through the application of the MFN obligation in Article I of GATT 1994. This is the position as regards the ITA and the Pharmaceuticals Understanding. Improvements in market access for services also apply on an MFN basis, subject to

any relevant exemptions that participating Members may have entered under Article II of GATS.[38] The application of improvements on an MFN basis is one of the attractions of this type of optional agreement as regards non-participating Members. However, in practice, the position is more nuanced, as only those Members with an actual or potential trade interest in the relevant goods and services can obtain a benefit.

The position may not be so different as regards agreements in Annex 4 of the WTO Agreement. Article II:3 of the WTO Agreement provides that these agreements "do not create either obligations or rights for Members that have not accepted them." This restates the basic rule of public international law that *pacta tertiis nec nocent nec prosunt*, which has been codified in Article 34 of the Vienna Convention on the Law of Treaties of 1969 as "[a] treaty does not create either obligations or rights for a third State without its consent."[39] However, the parties to agreements in Annex 4 still owe MFN obligations to all WTO Members under the multilateral WTO agreements.[40] To the extent that the subject matter of any agreement in Annex 4 falls within the scope of any of these MFN obligations, such as Article I:1 of GATT 1994 and Article II:1 of GATS, the benefits must normally be extended to all WTO Members, including non-parties to the agreement in Annex 4. These obligations are not created by the agreements in Annex 4; hence they are not addressed by Article II:3 of the WTO Agreement.

The GPA is an agreement in Annex 4 of the WTO Agreement, and it has no MFN effect, but that does not mean that SETA would have no MFN effect either if it were added to Annex 4. Article III of the GPA obliges the parties to grant non-discriminatory treatment only to other parties to that agreement but if, in practice, those advantages are not applied on a multilateral basis, it is because the subject of government procurement does not fall within the scope of Article I:1 of GATT 1994[41] or the other MFN obligations in the multilateral WTO agreements. That is an important difference from SETA, which is likely to cover issues that fall within the scope of existing MFN obligations, such as improvements in market access and eventually possibly product standards. The benefits of these obligations would normally accrue to all Members, including non-parties, in accordance with the WTO agreements, as do benefits under the ITA, even if SETA were implemented as a GPA-type agreement. On the other hand, obligations in other areas might fall outside the scope of existing MFN obligations, and the benefits would not accrue directly to non-parties.

There is an alternative view that the parties to plurilateral agreements do not have to apply them on an MFN basis. This view would have the merit of preventing free riding and was expressed at least as early as the first plurilateral concluded under the auspices of GATT (i.e. the Kennedy Round Anti-Dumping Code[42]). In 1967, the European Communities maintained that the parties were under no obligation to apply the provisions of that Code to non-signatories.[43] In 1968, the GATT Director-General was asked for a ruling on whether the parties had a legal obligation under Article I of GATT 1947 to apply the provisions of the Anti-Dumping Code in their trade with all GATT contracting parties. The Director-General replied that in his judgment they *did* have such an obligation, because (a) the text of Article I of GATT 1947 covered many of the matters dealt with in the Anti-Dumping Code; and (b) the MFN obligation under Article I of GATT was clearly unconditional.[44]

At the conclusion of the Tokyo Round in 1979, the results of the negotiations included several plurilateral agreements. The contracting parties to the GATT expressly addressed the issue of MFN treatment by adopting a decision reaffirming "their intention to ensure the unity and consistency of the GATT system" and expressly confirming that "existing rights and benefits under the GATT of contracting parties not being parties to [the plurilateral agreements among the results of the Round], including those derived from Article I, are not affected by these Agreements."[45] In other words, it confirmed that the benefits of the Tokyo Round plurilateral agreements were to accrue to all contracting parties to the GATT, even those that were not parties to the

plurilaterals, insofar as the subject matter of those agreements was covered by Article I of GATT 1947. However, this did not always occur in practice.[46]

When the WTO was established, no derogation from MFN treatment was granted with respect to the plurilateral agreements in Annex 4. Therefore, the parties are required to extend the benefits of those agreements to all WTO Members, to the extent that their subject matter falls within the scope of the WTO MFN obligations. There is an alternative view that the language of the second sentence of Article II:3 of the WTO Agreement (quoted above) grants such a derogation, but it is not obvious that that sentence does anything more than restate the *pacta tertiis* rule.[47] No decision or interpretation on this issue has been adopted in the WTO.

Any decision to add SETA to Annex 4 should address MFN treatment specifically, in the interest of certainty. If the Ministerial Conference adds SETA to Annex 4, it can confirm that SETA does not affect non-parties' rights under the multilateral WTO agreements, including the MFN obligations. The benefits of SETA obligations would then accrue to all Members, in principle, but only insofar as those obligations are covered by one of the WTO MFN provisions. In any event, free riding under a sectoral agreement such as SETA is not possible for all other Members in practice as some will have no relevant trade interest.[48] Therefore, a careful definition of the critical mass required for implementation of the new agreement can ensure that any free riding will not undermine attainment of the agreement's objective.

A further incentive for a group of non-parties to consent to the addition of the new agreement might be the inclusion of an optional MFN exception in the text in favour of least-developed countries (LDCs). The GPA already contains such a provision in the second sentence of Article V:12.

The alternative is to grant a waiver to exclude SETA from MFN treatment. If agreed, this would create an incentive to participate; but, the exclusion of non-parties from the benefits of SETA is likely to be perceived as promoting a "two-speed' WTO, which would probably reduce the prospects of obtaining the Ministerial Conference's consent to add it to Annex 4.

- *The benefits of SETA would normally accrue to all WTO Members, even if it was implemented as a GPA-type agreement, to the extent that it covered subjects within the scope of the MFN obligations in the multilateral WTO agreements. The Ministerial Conference would be well-advised to confirm this point in any decision to add SETA to Annex 4 of the WTO Agreement.*

2.3. SETA Negotiations Within the WTO

2.3.1. Preparatory stage

The procedure to add a new agreement to Annex 4 envisages that an agreement has *already* been concluded among certain Members (as parties to it) and does not address the prior processes of negotiation and conclusion, which can take place outside formal WTO meetings.[49] While, in principle, the parties are free to decide how to handle those questions, it should be borne in mind that the way in which the participants proceed can affect the attitude of Members that are not parties, whose consent will be required for the addition of any eventual agreement to Annex 4.

The 1980 certification procedures for modifications to Members' schedules, which have been used to give effect to the results of sectoral tariff negotiations, do not restrict the prior processes either.[50] Renegotiation procedures have not been considered necessary, because the negotiations only lead to improvements (i.e. reduction or elimination of tariffs), hence no compensation is owed. The certification procedures adopted by the Council for Trade in Services to give effect to new services commitments and improvements to existing services commitments do not stipulate who must participate in the negotiations either, although they do allow other Members to object to proposed changes.[51]

The ITA provides an illustration of one means to launch negotiations among a group of interested WTO Members (and an acceding Member). The initiative for the ITA came from a coalition of industry actors and was taken up by the governments of the old 'Quad' (Canada, the European Community (EC), Japan and the United States of America (US)). The initiative was endorsed at a bilateral EU-US summit in 1995 and in 1996 by Quad ministers, who instructed their negotiators to move forward. The US submitted a proposal for a multilateral ITA to the WTO Committee on Market Access[52] and later provided the WTO Council for Trade in Goods a summary of the agreement that had been developed among interested delegations. By that time, the ITA was envisaged as a plurilateral agreement. The United States offered to consult with any delegation that wished to know more about the specifics of the initiative.[53] Three of the old Quad members took up the issue in the Asia-Pacific Economic Cooperation (APEC) forum, because certain Asian countries were becoming important exporters in the IT sector. A breakthrough came in the APEC 1996 Leaders' Declaration, which called for the conclusion of ITA by the Singapore Ministerial Conference of the WTO in order to substantially eliminate tariffs by the year 2000.[54] The following month, at that session of the Ministerial Conference, Ministers of 13 WTO Members plus one acceding Member (comprising the old Quad, seven other APEC members and Norway, Switzerland and Turkey) made the joint declaration on trade in information technology products that is the ITA.[55] The text of the 1996 Declaration set out modalities for tariff reductions and product coverage, to be finalized and implemented later, and invited other Members and acceding Members to participate.[56] The Ministerial Conference took note of the ITA and welcomed the initiative.[57]

When a group of interested Members has reached an agreement on market access improvements and is willing to apply those improvements on an MFN basis, they can implement through the certification procedures without a WTO declaration or decision, provided they are willing to more forward without the participation of any other Members. For example, the Pharmaceutical Understanding was implemented in this way in 1994 among 12 parties, including the EC-12 as one party.[58]

A group of interested Members may reach an agreement on market access among themselves but not yet have secured what they consider to be sufficient participation for implementation to be viable and beneficial to their interests. For example, the participants in the ITA at the time of the 1996 Declaration accounted for "well over 80 percent" of world trade in information technology products, but this was less than what they considered to be the critical mass for implementation of their agreement.[59] However, when agreement is reached without the critical mass yet assembled, there is a risk that other Members will seek to reopen the terms of the agreement as a condition of their participation.

When a new GPA-type agreement foresees not only market access, but also new rules as well it is bound to be treated with skepticism if little is known about it. Transparency is an important means of building trust with non-parties, whose consent will eventually be required to add any agreement to Annex 4 of the WTO Agreement. The aborted Multilateral Agreement on Investment (MAI) illustrates the point. The MAI was negotiated among OECD member states from 1995 to 1998, but the negotiations were discontinued[60] in the face of fierce opposition from civil society after information was leaked regarding the proposed rules under discussion. The WTO established a working group on the relationship between trade and investment in 1996[61] but there was a belief that this would start a process towards a MAI in the WTO.[62] WTO negotiations were never launched, and the working group was disbanded in 2004.[63] In contrast, a General Council decision was taken in 2004 to launch multilateral WTO negotiations on trade facilitation in the context of the Doha Round. Of course, the difference between this new initiative and the MAI can be attributed to substance as well as to procedure, as sufficient Members believed that new rules were of potential benefit to them, at least in the context of a Round.[64] The point is that multilateral consent to the addition of SETA could also be forthcoming if the negotiating process is transparent from the outset and the

potential impact, including on non-parties, is communicated effectively.

A preparatory or exploratory group of Members could be formed ad hoc or based on a pre-existing arrangement. The old Quad would not be an appropriate group as it no longer has a pre-eminent role in the world trading system as it did during the Uruguay Round and shortly thereafter. A contemporary alternative might be the Group of Twenty (G20), which accounts for approximately 80 percent of world trade and two-thirds of the world's population.[65] The G20 includes developed countries, developing countries and transition economies from all major regions of the world, and its members include the top ten countries in terms of sustainable-energy capacity and investment.[66] There are indications that they include many, but not all, large traders in sustainable-energy-related equipment – for example, photovoltaic cells, modules and panels and wind power generating sets.[67] However, the G20 does not aim to be representative of the WTO membership and does not include any small economies or LDCs. G20 summits are only annual events now. APEC could also play a role, as it did in the negotiation of the ITA. APEC's membership overlaps with that of the G20, but it also includes certain other economies that appear to be significant traders in sustainable-energy-related equipment.[68]

If a preparatory process becomes identified too strongly with one particular group, it risks jeopardizing wider participation and the launch of WTO negotiations, or implementation of negotiating results within the WTO framework. Moreover, if the goal of a preparatory process conducted among a limited group of Members is not clearly focused and communicated to non-participants, there is a risk that the exercise will be perceived as an attempt to introduce a senior officials' consultative body or WTO steering group, as has been proposed in literature on WTO reform.[69]

- *Preparatory work and negotiations outside formal WTO meetings can be conducted among a group of interested WTO Members on an ad hoc basis or in an existing forum, with meetings in other fora playing a positive role, but transparency is important when the participation of other Members will eventually be sought, or where the wider WTO membership's consent to add an agreement to the WTO framework will be required.*

2.3.2. Launch of negotiations within the WTO

The SETA negotiating process can respect basic principles of transparency and inclusiveness even though the negotiating objective in the case of an optional agreement is not full participation by all WTO Members. A decision of a WTO body is required to launch negotiations in formal WTO meetings. For example, in 1994, ministerial decisions were adopted at the end of the Uruguay Round to establish a Negotiating Group on Movement of Natural Persons and a Negotiating Group on Basic Telecommunications, which led to three GATS protocols.[70] In 2004, the Trade Negotiations Committee agreed to establish the Negotiating Group on Trade Facilitation, at the direction of the General Council.[71] One exception concerns the WTO Committee of Participants on Expansion of Trade in Information Technology Products, commonly known as the ITA Committee, which was formed not to negotiate the ITA but to implement it, including the review of its product coverage (so-called ITA II). The ITA Committee was formed by a decision of the participants (two of whom were not even WTO Members yet), who then informed the Council on Trade in Goods of their decision in March 1997.[72] Meetings of the participants "under the auspices of the Council on Trade in Goods" had been foreseen in the ITA.[73] This exceptional procedure for the formation of a WTO body occurred in the early days of the WTO, and it seems unlikely that a similar procedure would be acceptable to the WTO membership today.

Non-participants as well as other Members should carefully review any decision to launch negotiations as it may be taken into account later in the interpretation of provisions in the WTO agreements – including existing ones. For example, the Appellate Body in *US – Shrimp* referred to the ministerial decision to establish the Committee on Trade and

Environment in its interpretation of the chapeau to Article XX of GATT 1994.[74]

Any decision to establish a WTO negotiating group would be taken by consensus among all WTO Members present at the meeting where such a decision was considered, in accordance with customary practice.[75] If the decision is taken by a subsidiary body of the General Council, consensus is the only option.[76] Although the General Council is empowered to take decisions by voting, it would be futile to launch negotiations over the objections of a substantial section of the membership if the proponents' goal is to add an eventual agreement to Annex 4 of the WTO Agreement, as that would require a decision taken exclusively by consensus. Naturally, consensus on launching negotiations does not imply that all Members should participate in the negotiations nor implement the results.

If consensus can be found to launch negotiations, the WTO could establish a negotiating group on sustainable energy (but with a title that distinguished it from bodies formed by the existing Trade Negotiations Committee). As a WTO negotiating group, it would report to a WTO Council or committee and receive WTO Secretariat support, which can, among other things, help ensure the openness and transparency of the process as well as generate a drafting history that could be taken into account in interpretation of the results. The Secretariat can also provide technical support, such as tariff data and statistical information, although it would probably provide this information to Members in any case. Another advantage of conducting negotiations in a WTO negotiating group, in theory, can be the opportunity for trade-offs with other sectors and issues during a Round of multilateral trade negotiations, but that advantage is illusory at present, given the current state of the Doha Round. If consensus cannot be found to establish a Negotiating Group on Sustainable Energy, negotiations can proceed in informal meetings of interested WTO Members with a view to requesting the incorporation of the eventual results in the WTO framework.

- *A consensus decision of a WTO body would be required to launch negotiations in formal WTO meetings.*

2.3.3. Participation in the negotiations

There is no legal requirement regarding the minimum number of Members that must participate in a WTO negotiating process. The successful negotiations on basic telecommunications were launched among 31 governments, including the then-12 EC member states, which had already announced their intention to participate, with their names set out in a list and no express reference to collective trade share.[77] The participants in the ITA at the time of the 1996 Ministerial Declaration noted that they accounted for 83 percent of world trade in information technology products, but by that stage, they had already agreed on product coverage and modalities for tariff elimination.[78]

The rules for negotiations should be clear in advance and appropriate to the WTO as an institution.[79] Negotiations on an ITA-type agreement can be conducted among those who intend to participate in the results. However, negotiations on an optional agreement to be added to Annex 4 of the WTO Agreement would be a novelty because the participants would negotiate among themselves in a group in the shadow of the wider membership. Therefore, this process would have to operate on two planes. Exclusion of non-participants from the negotiating process would only increase the likelihood that consent will not be given to add any such agreement among the participants to the WTO Agreement. The process needs the input of non-participants, including those who have no intention of acceding.

A WTO negotiating group would ordinarily be open to all WTO Members that wished to participate, on a voluntary basis, according to an opt-in procedure.[80] For example, the 1994 Ministerial Decision on Negotiations on Basic Telecommunications and the 1994 Ministerial Decision on Negotiations on Maritime Transport Services provided that negotiations would be "entered into on

a voluntary basis" and that the negotiating groups would be open to all governments that announced their intention to participate. A procedure was established in the decisions that required notifications of intention to be addressed to the WTO treaty depositary (i.e. the WTO Director-General).[81]

All Members should be clear as to what participation in the negotiating group entails. The voluntary nature of negotiations should imply that those who have chosen to participate have a right to opt out at any time. However, as a practical matter, there is a risk that some participants' input will not be properly taken into account if their eventual participation is not assured or if participation in the negotiations will give rise to expectations of participation in the results in any case. Moreover, some Members will participate in the group only with the intention to follow proceedings or to share their own perspectives on the issues under negotiation. This role is important to ensure that negotiators are aware of the effect that their proposals may have on the wider membership, especially if SETA includes new rules in areas already covered by existing WTO agreements and not only improved market access. Therefore, it might be better to agree at the outset of negotiations in the WTO on what participation (or opting in) means and set up an appropriate structure for the negotiating group.

A practical solution is for a negotiating group's rules of procedures to distinguish between participants and observers. Participants in the negotiations could be expected to participate in the results. Observers would be free not to participate in the results but would not participate in decision-making in the negotiating group.[82] Conditions of participation and observership, if any, could be laid down in the decision establishing the negotiating group or, in the case of observership, decided by the group. For example, only parties to the ITA are "participants" in the ITA Committee.[83] The Committee adopted a decision allowing all WTO Members, and governments with observer status in the Council for Trade in Goods, to follow its proceedings in an observer capacity.[84] Similarly, only parties to the GPA are members of the Committee on Government Procurement (GPA Committee)[85], but governments of WTO Members and actual or potential acceding Members may apply to observe its meetings if they fulfill certain transparency conditions in their procurement tenders[86] and are "interested in initiating accession negotiations" to the GPA.[87] In fact, over half the observers to the GPA Committee are not currently negotiating accession to the GPA.[88] The revised GPA will entitle non-parties to become observers by submitting a written notice to the GPA Committee.[89] During negotiations on the review of the GPA, it was agreed that observers were entitled to attend negotiations on the text in Committee meetings, but that they could attend bilateral negotiations on issues of coverage and elimination of discriminatory measures and practices only if they had submitted an offer with a view to participating in the revised Agreement.[90]

Informal methods are also important parts of the negotiating process.[91] Consultations within smaller groups of participants can be used to advance negotiations, but there may also be value in including observers even in these groups and consulting other Members representative of the wider membership. The goal is to avoid a situation where an agreement is concluded only to require renegotiation because consent to annex it is denied. The identity of the Chair can also be important. Chairs are usually drawn from the ranks of the participants' representatives, but the novel nature of negotiations on SETA might justify casting the net wider.[92] For example, the first Chair of the ITA Committee was an acknowledged expert on tariff negotiations and, at the time, a WTO Deputy Director-General.[93]

Decisions to launch negotiations on SETA can set out a date for the first meeting of the negotiating group to give impetus to the negotiations. They can also include requirements to report to a regular WTO body and require the negotiating group to issue a final report with a date for implementation. Several WTO bodies could have relevant responsibilities, given that SETA could cover

market access in goods, both agricultural and non-agricultural, as well as services, and possibly rules in different areas of trade in goods, such as technical barriers to trade, subsidies and procurement. Multiple reporting requirements are not helpful, but non-participants may wish to ask questions in different WTO committees. A practical solution would be for the SETA negotiating group to report directly to the General Council at least annually, with a request that the reports be included in the agenda of subsidiary bodies, or circulated in them, or both.

There is the possibility of assigning different aspects of SETA to separate negotiating groups to take account of their specialized roles, but this is not necessarily the best way forward. While it is likely that different government agencies would have responsibility for different aspects of SETA in many Members, separate processes will make it more difficult to achieve a coherent outcome on trade in sustainable-energy goods and services. Negotiations on issues relevant to market access for sustainable-energy goods and services have been scattered across various bodies in the Doha Round, such as the special session of the Committee on Trade and Environment, the negotiating group on non-agricultural market access and the special sessions of the Committee on Agriculture and the Council for Trade in Services, without results.

An alternative is to adopt a centralized approach. For example, negotiations relating to regional trade agreements take place in a single group, which in 2006 produced an "early harvest" result in the Doha Round. That decision is now applied on a provisional basis.[94]

A practical solution for SETA would be to establish a single negotiating group that can organize its business as it sees fit. For example, it could take up rules in the group as a whole, with focused sessions on particular issues, and delegate market access to bilateral meetings, similar to the processes of negotiations on WTO accessions and the revision of the GPA. A group could also delegate certain issues to "friends of the Chair" or "facilitators" from within the negotiating group, who can make progress through focused bilateral, small group and open-ended meetings, similar to the process in the negotiations on trade facilitation.

Negotiations on SETA would be separate from the Doha Round as an institutional matter, but each process could, nevertheless, influence the other, because the same parties may negotiate market access for the same products in two or more negotiating groups simultaneously. Proposals in one process might be taken into account inappropriately in another. Participants may be reluctant to make different, calibrated proposals on matters, such as product coverage and modalities of treatment, adopting a "wait and see" approach based on progress in one particular group. Therefore, it could be useful for participants to confirm that each negotiation is conducted in a separate context and forms part of a different balance of concessions.

- *Negotiations on an ITA-type agreement can be conducted among those who intend to participate in the results. Negotiations on a GPA-type agreement would benefit from the input of non-participants, whose consent will be required to add a new agreement to the WTO framework. Participant and observer status can distinguish between Members' different roles in the negotiations and expectations of eventual participation in the results.*

- *Negotiations could be conducted in a single group that organizes its business as it sees fit, such as dividing issues between the group as a whole and bilateral meetings or delegating particular issues to facilitators.*

2.3.4. Implementation by a critical mass

The size of a group of interested WTO Members required to *implement* SETA has legal implications but still depends only on participants' respective assessments as to what is the critical mass necessary in economic and political terms to ensure the viability of any eventual agreement, in light

of those obligations that are to be applied on an MFN basis and those that are to be applied on a reciprocal basis among the parties only. The definition of the critical mass in effect determines the point beyond which the participants will tolerate free riding. The critical mass for implementation of SETA could be assessed in light of the characteristics of the market for equipment and services for the generation of sustainable energy or those countries most responsible for CO2 emissions, or both, depending on what the agreement contained.

When the participants have assembled a critical mass during the negotiations, they may simply agree that entry into force of the results is subject to all the participants accepting by a target date. The GATS Protocols adopted this approach. If that condition was not fulfilled, a residual clause allowed those participants that had accepted on time to make a decision on entry into force.[95]

Alternatively, the participants in the negotiations may define the critical mass for implementation in terms of a percentage share of world trade in the relevant products. The ITA adopted this approach. The 1996 Declaration defined the critical mass for implementation as approximately 90 percent of trade in information technology products[96] but it was only in 1997, after several additional participants joined, that this criterion was met.[97] The definition of the critical mass in terms of a collective share of world trade was inspired by the GATT, which was not limited to products in a particular sector. Article XXVI:6 of GATT 1947, as amended at the 1954-55 Review Session, provided that the GATT would enter into force definitively after acceptance by parties accounting for 85 percent of the total external trade of the 34 contracting parties. The trade share of each contracting party, based on the most recent four-year average, was stipulated in advance in two alternative scenarios.[98] The provision was never implemented and application of the GATT 1947 remained provisional until it was terminated.

The method of calculation of the critical mass can raise technical problems where the product coverage excludes certain products, such as parts, defined more narrowly than the Harmonized System (HS) six-digit level ("ex-outs"), or products that must be covered wherever they are classified in the HS. In these situations, a calculation that covers all trade in the relevant HS subheadings (ignoring ex-outs) will overestimate the actual trade involved. A calculation that only takes into account the fully covered HS subheadings (ignoring subheadings with ex-outs) will underestimate the actual trade involved. The note by the WTO Secretariat on the calculation of the share of world trade in information technology products under the ITA does not specify how the calculation was carried out.[99] The only way to ensure an accurate calculation in a future negotiation is to ensure that product coverage is defined in terms of full HS subheadings.

A definition of the critical mass in terms of a collective share of world trade may not be sufficient to limit free riding in sectors where there are major producers with as yet unrealized export potential. In these circumstances, a critical mass could be defined in terms of a collective share of world production as well, or instead.

An alternative basis for a definition of the critical mass can be found in the Kyoto Protocol to the UNFCCC, concluded in 1997. That Protocol entered into force in accordance with a formula that comprised a minimum number of parties (55) plus a certain proportion of listed countries, expressed in terms of a collective share (55 percent) of those countries' emissions.[100] The relevance of this additional condition lay in the fact that the listed countries were the parties that assumed commitments to reduce GHG emissions under the protocol. The protocol entered into force just over seven years later in 2005.

A more flexible approach is to postpone a decision on implementation. This was the approach adopted for the entry into force

of the WTO Agreement. At the conclusion of the Uruguay Round, no decision was made on the number of parties that would be required for entry into force of the WTO Agreement. Rather, a target date was set of 1 January 1995, and a decision on the timing of the entry into force of the results of the Round was postponed under the Implementation Conference in December 1994[101], where the decision was taken based on the understanding that Members were committed to bringing the WTO into force on the target date and would be making every effort to conclude their domestic ratification processes to that end.[102] This approach was also used for the implementation of the results of the Kennedy Round.[103] However, such flexibility may be more appropriate for the results of a Round, which spans disparate industrial sectors, because it can be more difficult to define the participation necessary for the effective operation of the agreements reached and the adequacy of the benefits. A flexible approach is inherently less predictable and might not be as well suited to the case of a sectoral agreement like SETA.

The critical mass may be quite a small minority of WTO Members in some sectors. For example, the TCA has 31 parties, 20 of which are Europen Union (EU) member states.[104] The ITA had 25 participants, including the EU-15, at the time of its initial implementation,[105] and it now has 46 participants, including the EU-27, representing approximately 97 percent of world trade in information technology products.[106] On the other hand, the minimum price provisions of the International Dairy Agreement (IDA) were suspended in 1995 because the limited membership of nine, including the EC, and in particular the non-participation of some major dairy-exporting countries, made their operation untenable.[107]

The critical mass for either the launch of negotiations or the implementation of a new agreement may require a degree of diversity in participation. A critical mass expressed in strictly numerical terms will ordinarily involve some diversity if the number is large enough. For example, the ITA included several developing country participants at the time of implementation (India, Indonesia, Korea, Malaysia, Singapore, Thailand and Turkey). The definition of the critical mass could also include a target group of countries, but such a list would rankle many if it gave the impression that the new agreement was creating two classes in the WTO membership.[108] Participants will make their own individual assessments as to which other countries' participation is required in any case.[109] Finally, any critical mass for implementation should not include a contracting party who only accepts the agreement conditionally, lest it not fulfill the condition and free ride after entry into force.[110]

- *The critical mass for implementation of an eventual agreement can be defined as the participants see fit, for example, in terms of a percentage of world trade in the goods and services covered by the agreement.*

2.3.5. Accession to SETA after entry into force

Accession to SETA should remain open to all WTO Members after it has entered into force within the WTO framework, as this is consistent with the multilateral nature of the institution. An accession clause should be stated expressly in the agreement.[111]

Accession could be open on the same terms accepted by original parties, or on terms to be agreed through negotiations. Where the same terms apply to original and acceding parties, this may promote wider acceptance of SETA among the WTO membership in the long run. However, this reduces the incentive to participate early, which is essential to achieve the critical mass for implementation. Where terms of accession are agreed through negotiations, an acceding party will have little incentive to agree if it already obtains the benefits of the agreement on an MFN basis.

Both approaches can be combined by initially leaving open the possibility that accession will be on terms to be agreed but, after successful implementation of the agreement, allowing all Members to join on the same terms accepted by original parties. In the case of the ITA, the original participants decided in 1997 that

accession would be on terms to be agreed,[112] but in 1998 they reached an understanding that new participants would join on the same terms and conditions as the original participants. They only negotiate if they want to deviate from the terms of the ITA.[113]

A choice is not possible in some cases. Accession negotiations are inevitable as regards market access agreements, such as GATT 1994, GATS and the GPA, unless the product coverage and modalities are defined in advance in objective terms.

A decision of the Ministerial Conference, taken exclusively by consensus, is required to add to Annex 4 of the WTO Agreement any trade agreement among a subset of WTO Members, however many or few they may be. One of the concerns regarding such agreements is that non-parties are pressured to join. No current WTO Member is susceptible to pressure through WTO accession negotiations, but some may still be concerned that PTA negotiations outside the WTO or even future multilateral negotiations inside the WTO could link market access and other benefits to accession to an Annex 4 agreement. Therefore, WTO Members who do not wish to participate in SETA may be more willing to consent to its addition to the WTO framework if they are given some assurances that accession to it is voluntary and shall not be made a condition of the launch or conclusion of negotiations on other subjects. Such an assurance could be included in the WTO decision to add the agreement to Annex 4.

- *An accession clause should be included in the agreement. It may allow original parties to decide whether accession is on the same terms that applied to themselves or on more rigorous terms*.

2.4. Modification of Existing WTO Disciplines

The implementation of SETA as an ITA-type agreement through participants' WTO schedules would not require any modification of the existing WTO institutional framework, save the optional addition of a Committee to monitor implementation. The commitments for which it provided would become part of the participating Members' goods and/or services schedules and integral parts of Part I of GATT 1994 and of GATS, respectively. Other provisions of those agreements, and other WTO agreements, would apply to them in the same way that they apply to existing concessions and commitments in Members' schedules. These would include the DSU and the general exceptions and procedures for modifications of schedules. However, the scope for implementation by means of schedules is limited (as discussed above).

Conversely, the implementation of SETA as a GPA-type agreement added to Annex 4 of the WTO Agreement would not be subject to the same limits on scope, but clarification would be required as to the way in which the disciplines in the new agreement would relate to the WTO dispute settlement procedures and substantive WTO rules. These issues are considered in turn below.

2.4.1. Dispute settlement procedures

Availability of DSU procedures

The dispute settlement rules and procedures of the DSU can apply to disputes among parties to optional WTO agreements. For example, the dispute in *Korea – Procurement* arose under the GPA and was conducted under the DSU procedures, as adapted by the GPA, from 1999 to 2000.[114] The disputes in *EC – IT Products* concerned concessions made by the European Communities pursuant to the ITA and were conducted under the standard DSU procedures from 2008 to 2011.[115]

The availability of the WTO dispute settlement mechanism in the DSU is likely to be a large part of the attraction of negotiating SETA within the WTO framework for sponsors of the initiative because that would provide a means of ensuring that it is implemented faithfully.[116] The WTO's dispute settlement function is carried out more efficiently than its rule-making function. The WTO dispute settlement mechanism provides an avenue for independent review of implementation of

treaty obligations in a system of compulsory jurisdiction, backed by the possibility of trade sanctions. The potential for dispute settlement has an *ex ante* effect on Members' efforts to implement obligations and, when disputes arise, Dispute Settlement Body (DSB) recommendations are implemented in most cases, usually without recourse to sanctions.

During the negotiation of a new agreement (other than an ITA-type agreement), some participants may be reluctant to accept the applicability of the DSU. For example, the October 2011 draft consolidated negotiating text on the Trade Facilitation Agreement contains bracketed provisions on the applicability of the DSU in which various issues are as yet unresolved.[117] However, it should be borne in mind that the trade facilitation negotiations are multilateral and form part of the single undertaking of the Doha Round. Participants in a negotiation on an optional agreement, such as SETA, may be more willing to agree to the availability of dispute settlement, as they have the option not to accept any obligations under the agreement at all.

- *DSU procedures can apply to disputes among parties under SETA if it is implemented within the WTO. This will necessarily be the case if it is implemented as an ITA-type agreement through modifications of participants' goods and/or services schedules.*

Suitability of DSU procedures

The suitability of the DSU procedures for disputes under SETA could change over time. During an initial phase at least, SETA would closely relate to existing WTO agreements. This would necessarily be the case where it was implemented partly or wholly through modifications to participants' goods and services schedules. However, SETA may develop in later phases of negotiations to cover other issues, such as the wider scope of energy efficiency products and standards.[118] The potential inclusion of these issues – which can be made subject to the consent of the wider WTO membership – also affects the assessment of the suitability of DSU procedures.

The appropriateness of introducing standards into the GATT system on "new" issues also arose in relation to the inclusion of intellectual property in the Uruguay Round in 1986.[119] The objectives of the negotiations on that subject included the reduction of distortions and impediments to international trade and ensuring that measures and procedures to enforce intellectual property rights did not themselves become barriers to legitimate trade.[120] That did not prevent the elaboration of a set of rules and disciplines on intellectual property in the TRIPS Agreement that is more comprehensive than anything that had been agreed in the pre-existing intellectual property conventions. During the negotiations one participant proposed dividing responsibility between two panels, mandating a World Intellectual Property Organization (WIPO) panel first to assess compliance with intellectual property standards and a GATT panel to assess any "trade-related effects."[121] This proposal was not accepted, and the DSU applies to disputes under the TRIPS Agreement.[122] Admittedly, intellectual property is a branch of law, not of science, unlike many climate change issues.

The WTO dispute settlement mechanism already applies to disputes that concern standards on complex non-trade issues arising under its trade agreements. The TBT Agreement applies to technical standards and refers to scientific and technical information and fundamental climatic or geographical factors or fundamental technological problems in certain obligations.[123] The SPS Agreement also refers to scientific principles and evidence and sanitary standards.[124] The ordinary DSU rules and procedures apply to disputes under all of these agreements, together with special procedures on the formation of technical expert groups.[125]

The DSU is partially equipped to manage detailed technical issues. Delegations of

parties to panel proceedings may include persons other than trade officials.[126] Panels can and do on occasion include a person nominated for their specific expertise in a technical area, although rarely more than one. The Appellate Body is less likely to have expertise in a specialized area because its composition is limited to seven individuals.[127] The WTO Secretariat may lack experience in issues covered by an amended SETA, but that could be addressed through recruitment if such an agreement were concluded in the WTO. Expeditious arbitration, by mutual agreement of the parties, is also available as an alternative means of dispute settlement.[128]

Ordinary and special DSU procedures allow the possibility for panels to seek technical advice and establish expert review groups.[129] Panels are not obliged to consult experts if the evidence is adequate. The recent panel in *US – Tuna II (Mexico)* made its own assessment of detailed scientific evidence regarding the adverse effects on dolphins of certain fishing practices and risks to dolphins in different locations in a dispute under the TBT Agreement, without consulting further experts.[130] On the other hand, the recent panel in *US – Clove cigarettes* was unable to compare a series of surveys addressing smoking patterns and failed to rely on them in its assessment of consumers' tastes and habits in another dispute under the TBT Agreement.[131] Expert consultation typically occurs in disputes under the SPS Agreement regarding scientific issues and health risks.[132] Since 2005, disputes involving expert review have become very lengthy. Part of the problem concerns the expert review procedures themselves, notably in relation to the identification and selection of the experts and the preparation of the questions to pose to them. In *US/Canada – Continued Suspension* (a sequel to the dispute concerning beef produced with growth hormones), the Appellate Body found that two experts should not have been selected, so the procedure proved fruitless.[133] Expert evidence is also complex and ultimately it is the panel's task to make an objective assessment of the matter before it.

The WTO dispute settlement system has no experience resolving disputes that fundamentally concern a non-trade objective, such as climate change. Until now, non-trade issues have tended to define the limits of the trade issues, rather than the objective of the obligations at issue. The usual bodies in the WTO dispute settlement system are not equipped to make judgments on sustainability issues, such as net carbon savings, as opposed to assessments of trade policy instruments applied to achieve environmental goals. If the subject matter of SETA were extended at some later stage there might be concerns that a corresponding extension of the subject matter of jurisdiction under the DSU could lead to misguided decisions on important environmental issues and also destabilize the WTO dispute settlement system.

One possible means to address such concerns would be the establishment of a separate dispute settlement system under SETA with the specialized expertise required to make an assessment of parties' implementation. This would be a less than satisfactory outcome for the parties, as the subject matter of SETA would overlap significantly with other WTO agreements, fragmenting the dispute settlement system as occurred in the GATT, where a single matter could involve claims under both a plurilateral agreement and GATT 1947 and require a complaining party to choose which dispute settlement provisions to invoke.[134] Such a situation persists under the TCA, but its procedures are a legacy of the GATT and not ideal.[135] Today, parties and non-parties alike might consider that implementation of SETA with both a separate membership *and* a separate dispute settlement system would be incompatible with the integrated nature of the WTO framework.

An alternative solution is to divide responsibility between the usual bodies of the WTO dispute settlement system, i.e. the DSB, panels, the Appellate Body and arbitrators on the one hand, and groups of experts in sustainable energy on the other. That is basically the solution that the DSU already

offers. However, there is a need for clarity on issues such as expert selection procedures and the respective roles of the panel and the experts in a given case to ensure that expert review is efficient.[136] Recourse to an expert selection procedure could be either mandatory or at the discretion of the panel. These issues could be addressed in the additional dispute settlement rules applicable under SETA (discussed further below).

- *The integrated WTO dispute settlement system could be suitable for disputes arising under SETA that raise technical non-trade issues through recourse to clear expert procedures.*

Procedures to apply the DSU

If the DSU procedures are to apply to disputes under SETA as a GPA-type agreement, three procedures must be followed. These are (1) the participants negotiate a provision in the text of the new agreement that provides for the application of the DSU, subject to any special or additional rules and procedures; (2) the Ministerial Conference adopts a decision amending the list of "covered agreements" in Appendix 1 to the DSU[137]; and (3) the parties to SETA (in practice, the SETA Committee at one of its first meetings[138]) adopt a decision setting out the dispute settlement provisions of the new agreement and notify that decision to the DSB, in accordance with the last paragraph of Appendix 1 to the DSU.[139]

The applicable procedure for a DSU amendment is the same in the key respect as the one to add an agreement to Annex 4 of the WTO Agreement, that is to say, it requires a consensus decision of the Ministerial Conference. The willingness of non-parties to join a consensus may depend on the way in which the DSU procedures would apply to disputes under SETA and how SETA would affect the interpretation of other WTO agreements (discussed below). If consensus can be reached, the decision to amend the list of covered agreements in Appendix 1 to the DSU could be included in the decision to add SETA to the WTO Agreement.[140]

The amendment to the list of "covered agreements" does not dispense with the requirement for a decision of the parties to be notified to the DSB, due to the wording of the last sentence of Appendix 1. The requirement for the parties to adopt a decision is fairly redundant but it could serve a purpose in the case of the TCA.[141] The decision of the parties to a new agreement does not dispense with the requirement to amend Appendix 1 to the DSU either – this point did not arise in the case of the original Annex 4 agreements because they were already listed.

- *The DSU can apply to disputes under a new GPA-type agreement if the text of the new agreement so provides, the Ministerial Conference amends the list of covered agreements in the DSU by consensus, and the parties to the new agreement notify the dispute settlement provisions to the DSB.*

Administration of standard DSU rules and procedures

The text of SETA may state that the DSU rules and procedures apply to disputes under SETA. However, the DSU already provides that it is not administered in the usual way as regards optional agreements in Annex 4 to the WTO Agreement in two respects.

First, Article 2.1 of the DSU provides that the "parties" to SETA would be substituted for "Members" in the DSU procedures.[142] This would mean, for example, that the interests of Members that were not parties to SETA would not have to be taken into account during the panel process, and that such Members would have no third-party rights to be heard or to receive any submissions during a panel proceeding.[143] This rule has been applied in two disputes under the GPA, which illustrate its negative implications for non-parties to that agreement. In 1997, the complaints in *US – Massachusetts* concerned a secondary boycott with a human rights objective. Two Members with trade or systemic interests but not parties to the GPA were not allowed to participate.[144] (The dispute was later settled).[145] In 2000, the Panel report in Korea – Procurement included an examination of the

non-violation remedy, which raised a systemic issue of interpretation under the DSU.[146]

Second, Article 2.1 of the DSU also provides that only those Members that are parties to the optional agreement may participate in decisions or actions taken by the DSB with respect to those disputes.[147] This may make little difference in practice, as a consensus decision is not required to adopt key DSB decisions but only to block them. Non-parties to the GPA were allowed to speak at the time of establishment of the panel in *US – Massachusetts* and at the adoption of the Panel report in *Korea – Procurement*, although one party to the GPA expressly reserved its position in this regard on the latter occasion.[148]

There is no formal requirement that panelists in disputes under an optional agreement be citizens of parties to that agreement, although the parties may make such a request during the process of panel composition.[149]

SETA participants and other Members may wish to consider whether to allow non-parties to exercise third-party rights in disputes under SETA, and to confirm that non-parties may express their views in the DSB on reports and actions taken by the DSB with respect to those disputes. This could be achieved through an amendment of the rule in Article 2.1 of the DSU or the inclusion of a special rule in SETA that would take precedence.

- *If the DSU is made applicable to disputes under a GPA-type agreement, the DSU can be amended or a special rule can be devised to grant WTO Members that are not parties to the agreement certain rights to participate in disputes under it.*

Special and additional dispute settlement rules and procedures

The text of SETA may state that DSU rules and procedures apply subject to special or additional dispute settlement rules and procedures. For example, special rules and procedures can provide for different timeframes for proceedings[150], special expert review procedures[151], specific remedies[152], non-violation and situation complaints[153] and they can exclude cross-retaliation.[154] They could also vary the rules in Article 2.1 of the DSU that exclude non-parties from dispute settlement proceedings under optional Annex 4 agreements (discussed above).

There is no need to amend Appendix 2 to the DSU because it only lists the special rules and procedures in the multilateral agreements, not those in optional Annex 4 agreements. The wider WTO membership has the opportunity to review and approve special or additional procedures in the text of SETA before it is added to the WTO Agreement.

A novel situation could occur in which a dispute arises under both SETA and multilateral WTO agreements, each with different rules. There is an existing practice with respect to combinations of standard and special rules: shorter timeframes are ignored when more than one is applicable but special remedies remain available with respect to the relevant claims.[155] However, there is no practice regarding the different status of parties to SETA and other Members in such a dispute and it would be useful to clarify the position. Members could agree to exclude the rules in Article 2.1 of the DSU regarding plurilateral trade agreements, so that all Members may participate in the usual way whenever a dispute relates to a multilateral WTO agreement taken in combination with a plurilateral agreement.[156] The TCA contains a similar provision as regards the different dispute settlement systems within GATT, in Article 8.8, second sentence. Members could also allow or require panels in such disputes to issue separate reports on matters under SETA and matters under the multilateral WTO agreements. The DSU already contains such a provision as regards situation complaints in Article 26.2(b). These results could be achieved through an amendment of the rules in Article 2.1 of the DSU.

- *Special and additional dispute settlement rules and procedures can be devised to supplement the DSU on matters such as expert review.*

- *An ordinary DSU provision might require amendment where a dispute arises under both the new agreement and an existing multilateral agreement. The amendment could protect the rights of WTO Members that are not parties to the new agreement.*

Future amendments to the scope of jurisdiction

A potential concern of non-parties to SETA relates to the scope of future amendments of an optional Annex 4 agreement and, in particular, jurisdiction in disputes related to the amended versions. Sustainable-energy technology and markets are rapidly changing fields; hence SETA is likely to require revision in the future to keep pace with the development of new products and other changes. Indeed, the parties to the TCA updated and expanded its product coverage,[157] the parties to the GPA have agreed to revise its text and expand its coverage,[158] and the ITA also foresees expansion.[159]

Article X:10 of the WTO Agreement creates a loophole in that it provides that amendments to agreements in Annex 4 are governed by the provisions of those agreements, rather than the multilateral amendment procedures. The amendment procedures in optional agreements would normally exclude the participation of non-parties. For example, the 2001 protocol amending the annex to the TCA was agreed among the signatories to that agreement, without the involvement of the wider WTO membership.[160] The 2012 protocol amending the GPA was approved by the parties to the GPA and adopted by the GPA Committee.[161]

The only substantive condition for an agreement to be added to Annex 4 is that it is a "trade" agreement, which is not defined. That might by implication prevent future amendments transforming the added agreement into something else, such as an environmental agreement with trade provisions. Yet even a "trade" agreement can be interpreted broadly in light of the objectives set out in the preamble to the WTO Agreement which, within the realm of "the parties' relations in the field of trade and economic endeavour," refer to the classic issue of "expanding the production of and trade in goods and services" followed by the clauses "while allowing optimal use of the world's resources in accordance with the objective of sustainable development," and "seeking both to protect and preserve the environment."[162] This might give considerable latitude to amend SETA in a later phase of negotiation.

There is a risk that parties to an agreement among a subset of Members might introduce provisions to which substantial sections of the WTO membership object, and that the DSU might become applicable to these provisions without their consent. A practical solution to provide certainty would ensure that any decision that amends the list of covered agreements in the DSU in order to add an optional agreement also states expressly whether it covers future amendments of that agreement, or whether a further consensus decision of the Ministerial Conference is required. Transitional provisions could usefully be added as well.

- *When a decision is taken to add a new agreement to the list of covered agreements in the DSU, it should indicate whether future amendments of that agreement are also covered, in the interest of certainty.*

2.4.2. Substantive rules

Adding to, and diminishing, WTO rights and obligations

SETA would be a sectoral agreement, which could govern different types of trade policy instruments.[163] Its precise coverage would require definition.[164] SETA would overlap with other WTO agreements, because the WTO's rules already apply to trade in sustainable-energy goods and services. The position is different as regards government procurement, for which some of the multilateral agreements contain express carve-outs.[165] Therefore, the relationship between any rules negotiated in SETA and existing WTO substantive rules requires careful consideration. As an

illustration, one can consider the TCA, where uncertainty regarding its relationship to the SCM Agreement, particularly the question of which agreement takes precedence, is one of the reasons the parties to the TCA have never agreed to apply the DSU to disputes under that agreement.[166] Moreover, SETA would be added to the WTO Agreement at a later time than the other agreements, which might be a source of uncertainty as regards interpretation, if not clearly addressed in the text.

WTO sectoral agreements can create exceptions to other agreements, adapt disciplines in them and add new disciplines. For example, the Agreement on Agriculture provides for market access for agricultural products, establishes a special safeguard mechanism, creates a new discipline on numerical reductions in domestic support and excludes certain products in certain Members from the SCM Agreement disciplines on export subsidies.[167] Meanwhile, the Sanitary and Phytosanitary (SPS) MeasuresAgreement combines elements of GATT 1994 and elaborates rules for the application of Article XX(b) to the use of SPS measures.[168] Agreements can also extend the scope of existing obligations, such as the TRIMS Agreement (which is not a sectoral Agreement) that extends the application of Articles III and XI of GATT 1994 to investment measures related to trade in goods.[169] SETA could employ the same techniques but, as an optional rather than a multilateral agreement, certain additional considerations would apply.

New SETA rules are likely to clarify or *add* to the obligations of SETA parties. Any advantages that the SETA parties extend to each other that fall within the scope of MFN obligations in the multilateral WTO agreements would accrue to the benefit of all other WTO Members (as discussed above). Any obligations assumed by SETA parties would not be assumed by other WTO Members in view of the *pacta tertiis* rule, as expressed in Article II:3 of the WTO Agreement.

However, some SETA rules might purport to *diminish* obligations in the WTO agreements. For example, the creation of a new general exception-style provision would purport to entitle SETA parties to breach obligations, such as national treatment and the prohibition of quantitative restrictions, or at least to confirm liberal interpretations of existing obligations or exceptions. Implementation of SETA as an ITA-style agreement through modification of participants' schedules would not be an effective means to diminish obligations because scheduling concessions and commitments can only yield rights, absent some express authorization in the text of the agreements.[170] Therefore, a choice to implement SETA as a GPA-style agreement added to Annex 4 of the WTO Agreement may be motivated, at least partly, by the objective of diminishing certain of the parties' WTO obligations as between themselves.

The WTO Agreement allows an optional agreement added to Annex 4 to add to the parties' WTO obligations as well as to diminish them. Article X:9 provides for the possibility of two or more Members modifying their rights and obligations as between themselves within the WTO framework (i.e. entering into an *'inter se'* agreement). It recognizes the possibility of adding a trade agreement between two or more Members but does not state that the trade agreement must be consistent with the multilateral WTO agreements. Also, it does not state that the multilateral agreements in Annexes 1, 2 and 3 to the WTO Agreement prevail over the optional agreements in Annex 4. These issues are within the discretion and authority of the Ministerial Conference in considering whether or not to consent to the addition of the agreement to Annex 4. This provides non-parties with the means to prevent certain modifications of the parties' WTO obligations as between themselves within the WTO framework, but the WTO Agreement itself does not set any substantive conditions.[171] Even if the Ministerial Conference's consent is forthcoming, Article II:3 of the WTO Agreement ensures that any modifications of multilateral WTO rules in an Annex 4 agreement will be ineffective as regards non-parties.

The Vienna Convention on the Law of Treaties (1969), in Article 41, provides for agreements to modify a multilateral treaty between certain of the parties only.[172] In cases where the possibility of such a modification is provided for by the multilateral treaty, as in Article X:9 of the WTO Agreement, Article 41(1) of the Vienna Convention sets no substantive conditions. Article 41(2) sets out a procedural requirement that the parties "notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides." This would normally require the participants in the negotiations to notify non-participating parties to the multilateral treaty *before* they conclude their agreement between themselves. Article X:9 might contract out of this requirement because it envisages that the parties will have already concluded an agreement at the time they request that it be added to Annex 4 of the WTO Agreement. Naturally, nothing prevents the text of the agreement, including drafts, being communicated to non-participants in the negotiations earlier.

- *Parties to SETA can modify their WTO rights and obligations among themselves within the WTO framework, not only adding to them but also diminishing them, provided that the Ministerial Conference consents to add the agreement to Annex 4. The WTO rights of other Members not party to SETA would not be affected.*

Affecting the interpretation of WTO agreements

The addition of an optional agreement to Annex 4 could indirectly affect the rights of non-parties through the interpretation of the covered agreements, if the issue is not addressed in the text of the new agreement. Article II:3 of the WTO Agreement provides that optional agreements in Annex 4 of the WTO Agreement are part of the WTO Agreement for those Members that have accepted them. Therefore, a panel or the Appellate Body might make reference to the terms of the optional agreement as context in interpreting the terms of the multilateral trade agreements – at least in a dispute between the parties to the optional agreement, who are bound by both. This is more likely in the case of an agreement that is closely related to the subject matter of the multilateral agreements, such as SETA, than one that refers to a separate subject, such as the GPA. Consequently, the same provisions in the multilateral agreement will either have the same meaning in a dispute involving a non-party or non-parties to the optional agreement – in which case their rights *are* affected – or else the same provisions will have different meanings as between different WTO Members, which is a threat to the integrity of the WTO Agreement.

The risk of diverging interpretations that affect the rights of non-parties is greatest in cases of potential conflicts among different WTO agreements without a clause indicating an order of precedence. Conflicts are to be avoided between different WTO agreements, as they are integral parts of a single agreement.[173] One provision may be "read down" to avoid conflict with another. What constitutes a conflict is a matter of debate: it may arise not only where it is impossible for a Member to comply with both agreements simultaneously, but also where one agreement explicitly authorizes a measure that is prohibited by the other.[174]

Overlapping agreements ideally should contain precedence clauses that provide how substantive rules in different agreements interrelate. These may be conflict provisions in which an agreement provides that, to the extent of any conflict, it prevails over others (as in the WTO Agreement and the Agreement on Agriculture[175]) or that the others prevail over it (as in the case of GATT 1994).[176] However, conflict provisions only apply after the process of treaty interpretation has failed to reconcile competing rules, which means that the terms of one agreement can affect the meaning of the other even without a conflict. Saving provisions also create an order of precedence but provide that rights and obligations under the multilateral agreements are not affected by a new agreement. In these cases, the interpretation of the former does not change after the new agreement is concluded (as was the case with the IDA).[177] A saving provision can be tailored to

an optional agreement so that non-participants obtain the benefits of market access but are not affected by any new rules. For example, the 2001 TCA Amending Protocol stated that, apart from duty-free treatment, nothing in that Protocol or the amended TCA changed or affected a party's rights and obligations under any of the WTO agreements.[178] This might be a suitable solution for SETA as regards non-parties. The way in which these issues are handled may affect the wider membership's willingness to consent to amend the DSU to apply to disputes under SETA.

- *SETA should contain a precedence clause explaining how it relates to other WTO agreements. It could provide that non-parties' rights and obligations under the multilateral agreements are not affected by the new agreement.*

Subsidies disciplines

The negotiating objectives for SETA with respect to subsidies may need clarification as to whether the aim is to add to or diminish the disciplines of the SCM Agreement, or both.[179] This will impact the prospects for market access concessions, as new commitments not to challenge or countervail subsidy programs would act as a significant disincentive for tariff reductions.[180] Moreover, given that SETA would not be a multilateral agreement, any new rules that purported to diminish disciplines would be subject to certain limitations.

SETA could be designed to add to the WTO disciplines on subsidies. The SCM Agreement applies to trade in goods (although a subsidy may take the form of government provision of services) whereas GATS as yet provides no multilateral disciplines to avoid the distortive effects of subsidies on trade in services.[181] Subsidies for the generation of sustainable energy, as opposed to the production and supply of sustainable-energy equipment and services, are not covered in a systematic way by the existing SCM disciplines. SETA could address these matters, including appropriate classifications of energy and energy-related services.[182]

Depending on its coverage, SETA could add to the disciplines in the SCM Agreement. For example, it could expand or clarify the definition of a subsidy in Article 1 of the SCM Agreement as between the parties with respect to known subsidies in the sustainable-energy sector[183] and measures subsidies as the allocation of emissions permits, and it could clarify the assessment of when they confer a benefit. SETA could also expand the category of prohibited subsidies beyond domestic content or import substitution subsidies.[184] In this case, SETA would not need to create its own system of countermeasures but could extend the one already found in Part II of the SCM Agreement.

SETA might also be designed to diminish the SCM disciplines. One proposal is to revive the concept of non-actionable subsidies, which was the "green box" of the SCM Agreement, in contrast to prohibited (red) and actionable (amber).[185] Non-actionable status protected subsidies from challenges on the grounds that they caused adverse effects to the interests of another Member and from countervailing action, subject to exceptions.[186] For example, SETA could treat non-discriminatory feed-in tariffs as non-actionable subsidies.

Adverse effects may consist of "serious prejudice" to the interests of another Member, for example, through export displacement of a like product, or through significant price undercutting, significant price suppression, price depression or lost sales of a like product in the same market or through an increase in world market share of the subsidizing Member following a consistent trend, on certain conditions.[187] For example, in 1998 in *Indonesia – Autos*, duty and sales tax exemptions under Indonesia's national car Programme were found to have caused serious prejudice to like imports of EC vehicles through significant price undercutting.[188] In 2010-2011 in *EC – Airbus*, launch aid, certain equity infusions and provision of certain infrastructure by the EC, France, Germany, Spain and the United Kingdom were found to have caused serious prejudice to the interests of the US through displacement of exports by Boeing and significant lost sales

in the same market.[189] Adverse effects may also arise in other circumstances.[190] Non-actionable status could prevent parties from bringing similar challenges to the WTO with respect to subsidies for sustainable-energy equipment.

Countervailing action is available where subsidized imports cause injury to a Member's domestic industry. Non-actionable status could, for example, prevent importing parties from imposing countervailing duties or even initiating countervailing investigations with respect to subsidies for sustainable-energy equipment.

The original classes of non-actionable subsidies were set out in Article 8.2 of the SCM Agreement, but it expired in 1999. There has been no consensus to extend or revive that provision.[191] The design of any new category of non-actionable subsidies is a matter for negotiation. The final text of Article 8.2 and its warren of footnotes do not focus on sustainable energy and are heavily qualified so that they probably would be unsuitable to serve as an initial draft for SETA negotiations. Non-actionable status could have a positive *ex ante* effect by encouraging parties to adopt or maintain measures promoting sustainable energy – the goal is not simply to allow a Member to escape sanction at the end of a lengthy and costly WTO proceeding or to avoid imposition of definitive duties at the end of a countervailing investigation or to have duties revoked after judicial review. If the qualifying criteria were simple enough and, say, did not require detailed analysis of effects, they would probably generate fewer disputes regarding the consistency of measures.[192]

A key to the original category of non-actionable subsidies was a clause stating expressly that the provisions of Part III of the SCM Agreement (on actionable subsidies) and Part V (on countervailing measures) "shall not be invoked" regarding measures considered non-actionable in accordance with its provisions.[193] If the new category is to grant similar immunity, SETA must specifically state so, because the provision in the SCM Agreement has expired and will not attach to a new category created in another agreement in any case. It can also provide that it prevails over other provisions of the WTO multilateral agreements, although the original category of non-actionable subsidies did not.

There are limits to non-actionable status if it is only recognized in an optional agreement in Annex 4 to the WTO Agreement. For one thing, non-parties that are WTO Members would remain free to take countervailing action. This would not necessarily prevent the SETA provisions being effective as the domestic industry in a non-party must still satisfy the standing requirements for a countervailing investigation and a case must still satisfy the conditions for a countervailing duty, including the existence of a subsidy, a benefit and injury. Even where these conditions are all fulfilled, countervailing duties are only applied on a bilateral basis.

A more serious problem is that non-parties that are WTO Members would remain free to challenge actionable subsidies in the WTO. If a non-party Member can demonstrate adverse effects to its interests[194], it could obtain a DSB recommendation that the SETA party remove the adverse effects or withdraw the subsidy.[195] Withdrawal is not bilateral, while removal of the adverse effects with respect to non-parties only could be impractical.

Non-actionability as regards the SCM Agreement cannot alter the status of measures under the Agreement on Agriculture. Certain measures, such as biofuel production-related payments, will still be subject to domestic support commitments unless they qualify for an exemption in the latter Agreement, such as the green box criteria in Annex 2. Any attempt to exclude them from those commitments would be ineffective for reasons similar to those regarding prohibited subsidies. However, the prospects for obtaining a WTO remedy would depend on many other factors making up the Member's current total aggregate measure of support (AMS). In any case, there are no product-specific caps for domestic support under the Agreement on Agriculture.

- *SETA could add to or clarify the disciplines on subsidies in the SCM Agreement. It might also diminish those disciplines by*

creating a new category of non-actionable subsidies, but this would be less effective when handled in an optional agreement.

General exception-style approach

The general exceptions found in Article XX of GATT 1994 and Article XIV of GATS could provide a model for SETA. Article XX(b) of GATT 1994, in particular, sets out a general exception for health measures. In 2007, the Appellate Body in *Brazil – Retreaded Tyres* explicitly mentioned measures adopted in order to attenuate global warming and climate change in its interpretation of that provision.[196] This suggests that Article XX(b) of GATT 1994 could ground an authoritative interpretation under Article IX:2 of the WTO Agreement or provide the basis for an agreement elaborating rules for its application to measures to promote sustainable energy.[197] Article XIV(b) of GATS contains an almost identically worded health exception as regards trade in services. Article XX(g) of GATT 1994 sets out a general exception for measures relating to the conservation of exhaustible natural resources, which can also apply to environmental measures.

The general exceptions are subject to significant limitations. By their own terms, they create exceptions to obligations in the same respective agreements in which they are found. It is not clear whether and how SETA would purport to create a general exception to other agreements in Annex 1A of the WTO Agreement, notably the TBT Agreement and the SCM Agreement.[198] Further, every general exception in GATT 1994 and GATS contains conditions regarding the content of the measures to which they apply, and all general exceptions are subject to conditions regarding the manner in which measures are applied, which may exclude certain measures that the parties to SETA may wish to allow.

However, the existing general exceptions are relevant to a *multilateral* approach to sustainable energy within the WTO because the general exceptions are found in agreements in Annex 1 to the WTO Agreement. (They are also relevant to implementation of SETA outside the WTO). If SETA were added to Annex 4 of the WTO Agreement as a GPA-type agreement, there would be no need for it to conform to the requirements of the general exceptions. It could in any case prevail over the parties' obligations under the agreements in Annex 1 to the WTO Agreement – including not only GATT 1994 but also the SCM Agreement. The limitation of this approach is that it cannot bind non-parties. They retain their rights under the multilateral WTO agreements, which could undermine derogations from certain obligations, as described in the previous section on subsidies disciplines.

A general exception-style provision could form part of SETA's sectoral approach. SETA could be inspired by the structure and concepts in the general exceptions, setting out classes of policy objectives and qualifying criteria for each, with rules on the method of implementation such as non-discrimination. The general exception could cover environmental measures, broadly defined.[199] It could also interpret and extend the TBT Agreement.[200] Clear references to the existing WTO agreements would have the advantage of clarifying the new agreement's relationship to them. This approach could subsume the new category of non-actionable subsidies by providing not only that the general exception justifies certain environmental measures under the WTO multilateral trade agreements, but also that other SETA parties shall not invoke certain provisions of the SCM Agreement.

The disputes that have arisen regarding the relationship between general exceptions and commitments in China's protocol of accession[201] would not arise if SETA were implemented following the GPA model. General exceptions in the multilateral trade agreements in Annex 1 of the WTO Agreement do not apply to agreements in Annex 4, unless incorporated by the latter.

- *SETA could be inspired by the structure and concepts of the WTO general exceptions but, as an optional agreement in Annex 4 of the WTO Agreement, it would not be necessary to conform to the requirements of a general exception as between the parties.*

2.5. Outlook

There is scope for SETA to be an optional agreement within the WTO framework. One model is an ITA-type agreement to be implemented through modifications to participating Members' goods and services schedules. These could also include disciplines on non-tariff measures agreed among the participants and incorporated in their schedules by reference. Another model is a GPA-type agreement that could be added to Annex 4 of the WTO Agreement, exclusively with the consent of the wider WTO membership. This type of agreement could vary the parties' WTO rights and obligations up or down.

On either approach, the existing WTO rights of non-participants are guaranteed through the MFN obligations in the multilateral WTO agreements. A GPA-type agreement can cover subjects that fall outside the scope of those obligations, but SETA would overlap much more with the existing agreements.

Preparatory work on negotiations can be initiated among a group of interested Members on an ad hoc basis or in existing groupings, such as the G20 and APEC. The issue can then be raised in the WTO when suitable, which will be earlier rather than later in cases where the interested parties will need the participation of other Members.

A WTO committee for the conduct of negotiations on a GPA-type agreement can be formed by decision of a WTO body. Participants negotiate among themselves but in the shadow of the wider WTO membership, which must consent before the agreement can be added to the WTO framework. Participation should be voluntary and open to all Members, but Members' different roles can be reflected in their status as either participant or observer.

The critical mass required for implementation represents the scale of participation that is required to render an agreement viable, which depends on its product coverage, the nature of the obligations that it contains and which of them are applied on an MFN basis. If a critical mass has been assembled prior to conclusion of the agreement, no threshold is required other than acceptance by all participants in the negotiations.

DSU procedures are available to enforce SETA if it is implemented within the WTO. If SETA is a GPA-style agreement, this will require dispute settlement provisions in the text of SETA, a consensus decision of the Ministerial Conference to amend the list of agreements covered by the DSU and a decision of the SETA Committee notified to the DSU.

Standard DSU rules and procedures can apply to disputes under SETA but if it is implemented as a GPA-style agreement special rules can be adopted to protect non-parties' interests, including granting the right to participate in dispute settlement procedures under the new agreement. Special rules and procedures – particularly expert review procedures – can also be adopted to take account of any scientific or technical issues that may arise under SETA. The expert review procedures should be more detailed than those that currently exist.

Depending on the level of ambition, SETA can adopt a sectoral approach, like the Agreement on Agriculture, and combine different disciplines in a single agreement. It can add to, and diminish, the rights and obligations of parties under the existing WTO agreements but the rights of non-parties are saved by Article II:3 of the WTO Agreement. This would reduce the effectiveness of any new category of non-actionable subsidies in certain respects, but it would not prevent the creation of a general exception-style provision for sustainable energy among the parties.

3. Implementation of SETA Outside the WTO Framework

SETA can be implemented outside the WTO. In this scenario, the participants would have to find or establish another institutional framework including, if they wished, a dispute settlement mechanism. Although SETA would not require multilateral approval in the WTO, it would still need to comply with certain WTO disciplines. Care would also be required to prevent conflicts with the WTO in terms of both jurisdiction and substantive norms. This section considers the relevant WTO disciplines and other international law, including options for dispute settlement.

Transparency in the process of negotiation of a trade agreement is still important, even when there is no requirement to obtain approval from non-participants in the WTO. For example, the Anti-Counterfeiting Trade Agreement (ACTA)[202] was negotiated and concluded in 2011 among a group of interested WTO Members outside the WTO framework. The participants did not publish a draft text until the final year of negotiations in 2010, which attracted criticism from parts of civil society.

3.1. Relevant WTO Disciplines

3.1.1. Preferential trade agreements

The WTO agreements expressly envisage the possibility that two or more WTO Members may enter into certain types of trade agreements among themselves (i.e. *inter se* agreements). Article XXIV of GATT 1994 and Article V of GATS provide that they do not prevent the conclusion of certain types of preferential trade agreements (PTAs) while the Enabling Clause, which is incorporated in GATT 1994[203], expressly provides that Members may enter into certain types of PTAs.[204] The term PTA is preferable to 'regional trade agreement', because an increasing number of these agreements are being negotiated between countries on different continents. The majority of PTAs are free-trade agreements but there are also partial scope agreements and customs unions.

The principal attraction of a PTA for the parties is that it may qualify for an exception to the MFN obligations in GATT 1994 and GATS. If it does, the benefits granted under the PTA need not be extended to any non-parties, which can increase the incentive to participate. There is no requirement that the parties to a PTA obtain the approval of the wider WTO membership, although there are certain transparency obligations. Instead, each PTA exception sets out separate conditions that must be met for an agreement to qualify. The salient conditions in the three relevant PTA exceptions are set out below.

Article XXIV of GATT 1994 is applicable to free trade areas as regards trade in goods and customs unions. There is no requirement that the parties to a free-trade area or customs union be in the same geographical region or at the same or different levels of development. Among the qualifying criteria for both is a condition that the duties and other restrictive regulations of commerce are eliminated on "substantially all the trade" between the parties in products originating in their territories.[205] While there is no precise definition of this condition, it is clear that SETA would not qualify if it were limited to sustainable-energy goods in the trade between any two parties.

Similarly, Article V of GATS is applicable to economic integration agreements. Among other things, these agreements must have "substantial sectoral coverage," which is understood in terms of number of sectors,

volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the *a priori* exclusion of any mode of supply.[206] It is clear that SETA would not qualify if it were limited to sustainable-energy services, even though those services are scattered across different sectors, due to the volume of trade affected.

SETA could qualify under Article XXIV of GATT 1994 and Article V of GATS if it were negotiated as part of comprehensive free-trade agreements, either existing ones or others to be negotiated in the future. The modalities for such negotiations would necessarily require substantial coverage of trade in goods or substantial sectoral coverage in trade in services (to the extent that SETA covers services). Where the broader agreement satisfied the conditions in Article XXIV of GATT 1994 and Article V of GATS, the advantages granted under it, including those for sustainable-energy goods and services, would be excepted from MFN treatment, and not accrue to non-parties.

The Enabling Clause is applicable to PTAs for the mutual reduction or elimination of tariffs among developing country Members on products imported from one another.[207] SETA would not qualify under the Enabling Clause if it included developed countries, unless those parties granted non-reciprocal preferences to the developing country Members in accordance with the Generalized System of Preferences.[208]

SETA, as a stand-alone agreement, is unlikely to satisfy the conditions of any of the PTA exceptions. However, that is not essential for SETA to be viable outside the WTO framework. Failure to satisfy the conditions of a PTA exception does not invalidate an agreement. It only means that commitments on improved market access and certain other trade advantages must be extended to all WTO Members in accordance with MFN treatment. That would not render an agreement unviable if the critical mass for implementation were defined widely enough to reduce the risks of free riding (discussed in Section 2.3 above). Further, failure to satisfy the conditions of a PTA exception would not affect the extension of benefits under any SETA rules on subjects that are not covered by the MFN obligations in the WTO agreements.

- *SETA is unlikely to qualify on its own as a free trade agreement, regional trade agreement or other PTA that would benefit from an exception to MFN treatment. This would not necessarily render the agreement unviable, depending on the extent of participation in SETA.*

3.1.2. Other non-WTO agreements

An advantage of implementing SETA through an agreement outside the WTO framework (other than a PTA) is that non-WTO Members can join. Non-WTO Members will be a smaller group after the impending accession of the Russian Federation, but they still include two countries of the top 25 emitters of GHG in electricity and heat (Iran and Kazakhstan)[209] and two large destinations of greenfield investment in the manufacturing of environmental technology products (Algeria and Libya).[210] However, even if SETA is implemented within the WTO, the participants can include acceding members (as the ITA did) pending their accession, and non-Members could also apply SETA on a de facto basis.

Two or more Members could agree to conclude SETA on a stand-alone basis or in an existing non-WTO framework. With respect to trade in sustainable energy, two relevant intergovernmental frameworks already exist in the UNFCCC and the Energy Charter. If the new agreement modified the parties' WTO obligations as between themselves, this would be an *inter se* modification but, unlike those discussed above, it would not be implemented within the WTO framework. Nevertheless, even outside the WTO framework, SETA's modifications of WTO obligations could still be valid as between the parties.

The WTO Agreement does not prohibit the conclusion of a trade agreement among two or more of its Members outside the WTO, even where the trade agreement does not

qualify as a PTA. While Article X:9 of the WTO Agreement sets out a procedure to add trade agreements to Annex 4, it does not oblige the parties to an agreement to request that it be added, and it does not prohibit such an agreement where the parties do make a request but the Ministerial Conference does not consent to it. Also, the other amendment procedures in Article X do not purport to exclude the operation of customary rules of public international law regarding *inter se* modifications.[211]

The Vienna Convention on the Law of Treaties (1969), in Article 41, provides that "[t]wo or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone." This basic rule is considered well-established.[212] Article 41 adds conditions to the rule, which appeared innovatory when the International Law Commission took up its study of the matter, but States have not subsequently called them into question.[213] Two substantive conditions in Article 41(1)(b) apply where a multilateral treaty neither provides for nor prohibits its modification by an agreement between certain of the parties only. The conditions are that (i) the modification in question does not affect the enjoyment by other parties (to the multilateral treaty) of their rights under that treaty or the performance of their obligations, and (ii) the modification in question does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the multilateral treaty as a whole.

As regards condition (i), SETA would only create obligations for its parties. Non-parties that were WTO Members would continue to enjoy their rights under the WTO Agreement, including MFN treatment, to the extent applicable. Non-parties' rights are in any case limited by the general exceptions in GATT 1994 and GATS, which could justify certain SETA implementing measures. If SETA does not purport to modify the WTO Agreement *inter se*, the saving provision could confirm that it does not affect the WTO rights and obligations of any WTO Member.[214] In other cases, it would be useful to include a saving provision in the SETA text confirming that it does not affect the WTO rights and obligations of non-parties. A more specific clause could also reiterate the text of particular WTO provisions, depending on the circumstances. For example, if SETA created a new category of non-actionable subsidies, the text could confirm that no Member should cause, through the use of any subsidy, adverse effects to the interests of other WTO Members not party to SETA.

As regards condition (ii), it is difficult to discern a non-derogable provision in the WTO Agreement.[215] SETA would in any case be designed to promote the attainment of the WTO's objectives, as set out in its preamble, regarding expansion of "production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development."[216] It would contribute to these objectives by the same means found in the WTO Agreement, i.e. through reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment.[217] Therefore, SETA should not run afoul of this condition.

Article 41(2) of the Vienna Convention (1969) also sets out a procedural requirement that the parties "notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides." It can be noted that this provides for notification *before* the parties conclude their agreement between themselves.[218]

- *Parties to SETA can modify their WTO rights and obligations among themselves outside the WTO framework, not only adding to them but also diminishing them. The WTO rights of other Members not party to SETA would not be affected.*

- *The parties to SETA should notify other WTO Members of their intention to conclude the agreement and of the modification to the WTO agreements for which it provides.*

3.2. WTO Institutional and Dispute Settlement Provisions

The conclusion of SETA would create a specialized system of rules tailored to address the issues unique to production of and trade in sustainable-energy goods and services. Its implementation outside the WTO framework would grant the SETA system a degree of autonomy but its subject matter would still overlap with the WTO. This could lead to conflicts of substantive norms and of jurisdiction, which are considered in turn below.

3.2.1. Conflicts of substantive norms

Potential conflicts of norms between international agreements can lead to uncertainty regarding their compatibility, which require the parties to make efforts to ensure their mutual supportiveness. SETA's relationship with the WTO agreements might not be straightforward where it contained new disciplines, which could lead to proposals to amend it or the WTO agreements or both. For example, there is a long-running discussion in multiple fora, including the WTO, regarding the relationship between Article 27.3(b) of the TRIPS Agreement, which governs the patentability of plants and animals, and the Convention on Biological Diversity. This has led to proposals to amend the TRIPS Agreement to enhance the mutual supportiveness of the two.[219]

SETA could reduce uncertainty through express clarification of its relationship to relevant WTO agreements. For example, it could make reference to particular WTO agreements or provisions in its preamble and consistently use terminology and definitions found in the WTO agreements to the extent appropriate. This could also assist national administrations and courts in implementation of the agreement.[2220]

Actual conflicts of substantive norms may arise in different scenarios (as discussed previously. These could also arise between the WTO agreements and SETA if it is implemented outside the WTO framework. SETA could contain a conflict clause providing that it prevailed to the extent of any inconsistency. However, WTO law would be applicable in any proceeding initiated in the WTO dispute settlement system.

The implementation of SETA outside the WTO framework would not entirely insulate the WTO agreements from its impact. It is clear that the WTO dispute settlement system has a limited mandate, which is to determine conformity with the "covered agreements" as listed in Appendix 1 to the DSU. It is also clear that Article 3.2 of the DSU directs dispute settlement panels and the Appellate Body to apply the customary rules of interpretation of public international law. In 1996 the Appellate Body in *US – Gasoline* considered that this direction reflected a measure of recognition that the GATT was "not to be read in clinical isolation from public international law."[221] The exact role in the WTO of external rules of public international law has become a subject of much debate. A suggestion in 2003 by the Appellate Body in *US – Byrd Amendment* that a WTO panel might in an appropriate case find that a Member had not complied with a rule of customary international law – even one as fundamental as good faith – sparked controversy.[222]

The general rule of treaty interpretation itself leads to debate as to which instruments and rules of international law are relevant to the interpretative exercise in a given case.[223] For example, in 1998 the Appellate Body in *US – Shrimp* referred to certain multilateral environmental agreements and declarations adopted outside the WTO framework to support its interpretation of the term "natural resources" in Article XX(g) of GATT 1994 because those instruments reflected contemporary concerns of the community of nations about the protection and conservation of the environment.[224] In 2011, the Appellate Body in *US – Anti-dumping and countervailing duties (China)* made extensive reference to the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts (the ILC Articles)[225] regarding the meaning of "public bodies" in Article 1.1(a)(1) of the SCM Agreement without

resolving definitively the extent to which Article 5 of the ILC Articles reflects customary international law.[226]

3.2.2. Conflicts of jurisdiction

The implementation of a SETA dispute settlement system outside the WTO framework could also lead to conflicts of jurisdiction with the DSU, unless SETA contained a clear jurisdiction clause.[227] Three examples that have arisen in practice illustrate the type of conflicts that can arise between a PTA or multilateral environmental agreement dispute settlement system, on the one hand, and the DSU on the other hand.

Simultaneous proceedings might be initiated in the two dispute settlement systems, straining parties' resource and creating a risk of conflicting decisions. For example, in 2000 the EC initiated a dispute in the WTO in *Chile – Swordfish* regarding measures that prevented EC fishing vessels operating in the South East Pacific from unloading their swordfish in Chilean ports for warehousing or transshipment, alleging breaches of Articles V and XI of the GATT 1994 on freedom of transit and quantitative restrictions.[228] Meanwhile, Chile initiated a dispute before the International Tribunal for the Law of the Sea (ITLOS), asserting that the EC had not complied with its obligations under the UN Convention on the Law of the Sea to ensure conservation of swordfish in the fishing activities of its vessels in the South-eastern Pacific Ocean.[229] A WTO panel was established (but not composed) and a special chamber of the ITLOS was constituted. Fortunately, before either proceeding advanced further, the parties came to a provisional arrangement on bilateral cooperation on the swordfish stocks in the South East Pacific. In 2008, they agreed on a more structured understanding. The proceedings in ITLOS were discontinued at the request of the parties in 2009, and the parties agreed unconditionally not to exercise any procedural rights concerning the dispute under the DSU in 2010.[230] The point to note is that the conflict of jurisdiction was avoided by the parties' mutual agreement, not by application of the rules of either dispute settlement system.

A ruling in one dispute settlement system may not take account of issues arising under the law of the other system. For example, in the late 1990s Mexico initiated dispute settlement procedures under the North American Free-Trade Agreement (NAFTA) regarding US quota restrictions on imports of Mexican sugar, but a NAFTA arbitral panel was not established at its request. In 1998, Mexico also imposed anti-dumping duties on US high-fructose corn syrup (also a sweetener) that were condemned in WTO dispute settlement proceedings[231] and later in a NAFTA panel proceeding. From 2002, Mexico imposed discriminatory taxes on drinks sweetened with high-fructose corn syrup, most of which were produced in the United States. In 2004, the United States initiated a dispute in the WTO regarding the taxes and other requirements in *Mexico – Soft Drinks* on the basis of Article III:2 and III:4 of GATT 1994. The WTO panel and Appellate Body upheld the US claims under WTO law and found that they could not take the NAFTA issues into account (discussed below).[232] In 2006, after 12 years, the two sides reached a negotiated agreement to settle the broader dispute, including implementation of the WTO ruling.

Both dispute settlement systems may rule, leading to incoherent jurisprudence. For example, there were successive proceedings in MERCOSUR and the WTO regarding a Brazilian ban on imports of retreaded tyres, originally imposed in 2000. In response to a 2002 ruling of a MERCOSUR arbitral tribunal, Brazil exempted imports from MERCOSUR countries but imports from other countries remained subject to the ban. In 2005, the European Community initiated a WTO dispute alleging that the measure was a quantitative restriction inconsistent with Article XI:1 of GATT 1994. Brazil sought to justify the ban on the basis of the general exception for health measures in Article XX(b) of GATT 1994, among other things, due to the facts that mosquitoes that transmit dengue, yellow fever and malaria use waste tyres as breeding grounds and tyre fires produce toxic emissions. The difficulty with this argument was that the same problems were presented by tyres from MERCOSUR countries that were exempt from the ban. The

WTO Panel considered that the MERCOSUR ruling provided a reasonable basis for the MERCOSUR exemption, the implication being that the resulting discrimination was not arbitrary. However, the Appellate Body ruled that the measure did *not* satisfy the general exception for health measures because the MERCOSUR exemption bore no relationship to the public health objective pursued by the measure. The Appellate Body expressly noted that the discrimination associated with the MERCOSUR exemption did not necessarily result from a conflict between provisions under MERCOSUR and the GATT 1994, because Brazil had not raised the public health exception available under MERCOSUR. It also suggested that the respondent might be able to justify its measure under the PTA exception in Article XXIV:8(b) of GATT 1994 as a further means of reconciling the two systems.[233]

In cases of conflict of jurisdiction, the WTO dispute settlement system may well prevail. The DSU provides for exclusive WTO jurisdiction where Members seek redress in disputes arising under the WTO covered agreements. Article 23 of the DSU, titled "Strengthening of the Multilateral System" (in which the key word is multilateral) establishes the WTO dispute settlement system as the exclusive forum for the resolution of such disputes and requires adherence to the rules of the DSU. It also prohibits certain unilateral action.[234] The DSU also provides for compulsory jurisdiction in cases where a Member initiates a dispute under its procedures. A recalcitrant respondent can delay but not block the establishment of a panel, the composition of a panel, the adoption of panel and Appellate Body reports and the authorization of retaliation.[235] The DSU may also oblige the WTO itself to accept jurisdiction where a Member initiates a dispute under its procedures. Article 3.3 of the DSU entitles a Member to initiate a dispute and this, read together with Article 23 and the mandate and functions of panels, has been interpreted as preventing panels from declining jurisdiction. In *Mexico – Soft Drinks* the respondent, Mexico, asked a WTO panel to decline to exercise jurisdiction in favour of a NAFTA panel. The WTO panel did not consider that it had a choice to decline jurisdiction, and the Appellate Body agreed.[236]

The DSU probably excludes countermeasures affecting WTO obligations taken in response to a breach of a non-WTO agreement such as SETA.[237] The issue has never been decided by a WTO body and commentators have expressed differing views as regards countermeasures considered lawful under non-WTO norms of international law.[238] However, it seems implausible that the WTO would allow countermeasures as redress for a non-WTO violation when it has so narrowly confined its power to authorize suspension of obligations in response to a violation of its own rules.[239] Were SETA to establish a dispute settlement mechanism endowed with powers to authorize trade sanctions, any suspension of WTO obligations pursuant to such authorization would most probably conflict with DSU rules and procedures. The mechanism could only effectively authorize suspension of SETA obligations that lie outside the WTO framework. Cross-retaliation would not be possible.

Even if the WTO system prevails in a situation of competing and parallel procedures, this could still be damaging for both dispute settlement systems. If the WTO's exercise of jurisdiction hinders the fulfillment of the object and purpose of the non-WTO agreement, this may in the long run affect the legitimacy of the DSU.

There exists the (as yet unrealized) possibility that a legal impediment could preclude a WTO panel from ruling on the merits of a claim before it in a case of competing jurisdiction. The Appellate Body highlighted in its report in *Mexico – Soft Drinks* that it did not express a view as to whether such a legal impediment could exist in different circumstances. It evoked the possibility of two proceedings, one in another forum and one in the WTO, with identical subject matter and identical parties' positions, a legal basis to raise the claims made in the other dispute in the WTO as well, a prior decision in the other dispute and invocation of a choice of forum, or so-called fork-in-the-road provision.[240] A WTO panel might one day rule a claim inadmissible in these circumstances.

Potential conflicts between SETA and the WTO can be anticipated to some extent through various techniques, either in the WTO framework or in the text of SETA, or both. The options of a waiver, a peace clause and a fork-in-the-road provision are considered below.

3.2.3. Waiver

One option to reconcile any substantive provisions in SETA that were inconsistent with the WTO agreements would be to request a waiver. A waiver does not presume a hierarchy among international agreements.[241] In practical terms, a request for a waiver is indicative only of a potential conflict between two systems and the existence of a functioning dispute settlement mechanism in one of them. Through a waiver, the WTO yields to the other system. A waiver could cover any SETA implementing measures, but it would be subject to important limitations.

The WTO agreements set out a waiver procedure that includes a series of requirements that begin with the submission of a request stating the existence of exceptional circumstances justifying the waiver decision. A request for a waiver from obligations under GATT 1994 must describe the measures the requesting Members proposes to take, the specific policy objectives that they seek to pursue and the reasons that prevent them from achieving those policy objectives by measures consistent with GATT 1994. A waiver is granted subject to conditions that must include a termination date.[242] WTO waiver decisions are taken by consensus, in accordance with decision-making procedures agreed by the WTO General Council in 1995.[243]

One model for SETA could be the 2003 waiver granted for measures implementing the Kimberley Process Certification Scheme for Rough Diamonds (the Kimberley process), which regulates the import and export of rough diamonds.[244] Eleven of the participants[245] submitted a request to the WTO for a waiver with respect to measures necessary to prohibit the export and import of rough diamonds to and from non-participants, many of whom are WTO Members. They cited the exceptional circumstances presented by the trade in conflict diamonds that fuels armed conflict, which has a devastating impact in affected countries. They also recalled that the United Nations Security Council had adopted a resolution supporting the Kimberley process.[246] The WTO General Council granted the requesting Members a waiver until 2006 from specific WTO obligations subject to the condition that the participants' measures were consistent with the Kimberley scheme together with other conditions regarding transparency. The waiver was later extended until the end of 2012.[247] As of 2009, 75 WTO Members participate in the Kimberley process; this includes all major rough diamond producing, exporting and importing countries in the world.[248]

This model has inspired a proposal to establish a mechanism within the UNFCCC to govern climate change subsidies. Subsidies notified and subject to the discipline of this mechanism could benefit from a WTO waiver from certain disciplines of the SCM Agreement.[249]

SETA could fulfill certain of the requirements for a waiver. The unprecedented challenge to humanity presented by climate change can constitute "exceptional circumstances" for the purposes of Article IX:3 of the WTO Agreement. A request for a waiver should carefully list every specific WTO obligation with which SETA might be inconsistent, as other obligations will not be covered simply by implication. The parties to SETA could agree to transparency conditions, and those who benefit from the waiver can be listed, leaving open the possibility for parties acceding to SETA later also to benefit from the waiver on notification to the WTO, as in the Kimberley process waiver. The waiver could be granted whether SETA was a stand-alone agreement or incorporated in another agreement, such as the UNFCCC, the Energy Charter, a PTA or a web of bilateral investment treaties.

However, there are limitations to what waivers can achieve. In 1997, the Appellate Body noted in *EC – Bananas III* that waivers have an exceptional nature, are subject to strict disciplines and should be interpreted with great care. In 2008, the Appellate Body in *EC – Bananas III (Article 21.5 – US)* reiterated those findings and emphasized that the

purpose of waivers is "not to modify existing provisions in the agreements, let alone create new law or add to or amend the obligations under a covered agreement or Schedule."[250] SETA may clearly be intended to modify existing provisions in the WTO agreements on a permanent basis, something that a waiver cannot accomplish. In contrast, the Kimberley process waiver was granted and extended for the sake of legal certainty[251] and may not in fact be necessary under WTO rules at all due to the general exceptions in Article XX of GATT 1994. The waiver does not even apply to most Kimberley participants, which indicates that the lack of WTO disputes regarding Kimberley-implementing measures is partly, if not wholly, due to other reasons.

Another major hurdle is that the wider WTO membership must normally consent to a waiver and to any extensions.[252] While the Kimberley process waiver was granted and renewed, it addresses a different policy objective from sustainable energy and covers a different product. Non-parties may block consensus on a SETA waiver. Although the waiver procedures provide for a decision by voting by a three-fourths majority, that is not applied in practice,[253] and some Members, who may be parties to SETA, would probably be unwilling to resort to a voting procedure for systemic reasons.

There is a risk that even a request for a waiver can be used against a Member in WTO dispute settlement, as in the Appellate Body report on *EC - Tariff Preferences*.[254] Therefore, if a waiver is only sought for the sake of legal certainty, the request and any decision should state so expressly and provide that both are without prejudice to the WTO consistency of the SETA-implementing measures.

3.2.4. Peace clause

One option that has been suggested is a "peace clause" under which WTO Members agree that certain measures will be shielded from complaints under the DSU.[255] This option would also be subject to important limitations.

The original WTO peace clause, which was crucial to the conclusion of the Uruguay Round, basically provided that subsidies that conformed to the new disciplines of the Agreement on Agriculture would be exempt from certain types of actions under the SCM Agreement and GATT 1994 until the end of 2003.[256] Alternatively, a peace clause could simply commit Members to exercise due restraint in having recourse to the DSU regarding certain types of measures. Such a clause does not provide legal certainty but may be sufficient for Members to reach an agreement, particularly if it is temporary. A peace clause could be tied, for instance, to a timetable for further negotiations.

SETA could also include a peace clause if it purported to authorize measures that were WTO-inconsistent. This would occur if it diminished WTO obligations among the parties (as discussed previously). A SETA peace clause could provide that subsidies that conformed to SETA would be exempt from actions or countervailing measures under the SCM Agreement. Such a clause is worthwhile only if one or more Members consider that their measures may be vulnerable to challenge, which would not be the case if SETA only clarified and added to WTO obligations without diminishing them.

Although the Uruguay Round peace clause was negotiated bilaterally between the EC and the US to end the litigation surrounding EC agricultural policies,[257] the deal was incorporated in the text of a multilateral agreement (Article 13 of the Agreement on Agriculture, with multiple cross-references from the SCM Agreement) and binding on all Members. If SETA is implemented outside the WTO, a SETA peace clause would not be incorporated in the WTO agreement and would not be binding on non-parties, in accordance with the *pacta tertiis* rule. Therefore, it would not prevent non-parties challenging the measures under the DSU, should they have grounds for action. Indeed, such a clause would not even prevent recourse to the DSU by the parties themselves, although there exists the possibility that a WTO panel might rule such a claim inadmissible in certain circumstances (discussed above).

In practice, SETA might be sufficiently effective to prevent disputes under the DSU where the

critical mass of parties includes all the likely eventual complainants. It can be recalled that, despite the proliferation of free-trade agreements throughout the world, no WTO Member has ever challenged an agreement under the DSU for failure to comply with the "substantially all the trade" requirement in Article XXIV of GATT 1994, due at least partly to most Members' mutual interest in justifying their own respective agreements under that Article.

However, the degree of comfort provided by the participation of the critical mass depends on the market for the relevant product and the nature of the relevant WTO obligations (as discussed previously in relation to the SCM Agreement). The longer an agreement remains in effect, the more likely trade flows will change and challenges will arise from unexpected quarters. For example, the Uruguay Round peace clause was negotiated bilaterally between the US and the EC, but when it was eventually litigated in 2002 it was Brazil that brought an action, challenging US subsidies in *US – Upland Cotton.*

A WTO moratorium can, in effect, suspend recourse to the DSU regarding certain measures for a period of time, by all WTO Members. For example, a moratorium on the initiation of non-violation and situation complaints under the TRIPS Agreement was agreed at the Doha Ministerial Conference in 2001 in a Ministerial Decision and has been renewed at successive Ministerial Conferences by declaration or decision, most recently in 2011.[258] The moratorium is temporary each time, but free of conditions. Irrespective of the legal status of the moratoria granted in the declarations and decisions, the fact is that no such complaints have been filed.

A moratorium would not be suited to SETA-implementing measures because it would have to be subject to conditions. The minimum condition would be that the implementing measures were consistent with SETA.[259] It should also be clear whether that condition encompasses not only measures that implement SETA obligations, but also voluntary measures that exercise SETA rights. As soon as conditions apply, it is not feasible to prevent the initiation of disputes under the DSU. Members would be free to resort to the DSU to claim that another Member's measures did not comply with the relevant conditions – as Brazil did, successfully, in *US – Upland Cotton*. In that sense, the decision would not be a moratorium but would simply purport to add the terms of SETA as conditions to WTO obligations without modifying the WTO agreements. In any event, a Ministerial Declaration or decision (or a General Council decision) is adopted by consensus in accordance with customary practice, which could be extremely difficult to reach for a decision authorizing a WTO-inconsistent agreement, particularly if the WTO membership had already declined to implement it within the WTO framework.

3.2.5. "Fork-in-the-road" provision

A "fork in the road" provides that a complainant's first choice of forum to resolve a dispute is irrevocable where an international agreement offers a choice of dispute settlement systems or procedures.[260] It is designed to anticipate the risks that the same matter may become the subject of multiple proceedings in different fora and that those proceedings may lead to different results. Once a complainant initiates a dispute settlement procedure in one forum, the fork-in-the-road provision excludes recourse to the other forum regarding the same dispute between the same parties. For example, many PTAs incorporate the WTO agreements and offer an irrevocable choice between the WTO's dispute settlement procedures and the PTA's dispute settlement procedures.[261]

SETA would contain substantive norms on many WTO subjects and might therefore incorporate WTO agreements. In that scenario, it would be important to include a fork-in-the-road provision to anticipate conflicts of jurisdiction where SETA is implemented outside the WTO framework. The WTO has not yet pronounced on the effectiveness of such a provision, but it is one circumstance among others that could potentially create a legal impediment that would preclude a WTO panel from ruling on a claim (discussed above). Even if the provision is not legally effective, its deterrent effect might be sufficient for it to achieve its objective.

3.2.6. Comity

Consideration of mutual respect and comity between judicial institutions can allow one tribunal to cede jurisdiction to another in the same issue. For example, in the MOX plant case between Ireland and the United Kingdom (both EU member states), a United Nations Convention on the Law of the Sea (UNCLOS) arbitral tribunal that had *prima facie* jurisdiction nevertheless suspended further proceedings to avoid a situation in which it and the European Court of Justice could both render final and binding decisions. The tribunal considered that "a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the Parties," although it remained seised of jurisdiction.[262]

A SETA panel or tribunal operating in a separate dispute settlement system could potentially suspend its proceedings in favour of a WTO panel in order to avoid a conflict. However, it seems unlikely that a WTO panel would cede jurisdiction or refrain from ruling on a claim for reasons of comity alone, particularly in view of the terms of the DSU as interpreted by the Appellate Body in *Mexico – Soft Drinks* (discussed above).

- *SETA could lead to conflicts of substantive norms with the WTO. It should contain rules explaining how its provisions relate to the WTO agreements.*
- *A SETA dispute settlement system outside the WTO could lead to conflicts of jurisdiction with the DSU.*
- *A WTO waiver could avoid conflicts but would be inappropriate to achieve a permanent amendment of the WTO agreements.*
- *A fork-in-the-road choice of forum clause in SETA would be useful.*

3.3. Outlook

If SETA is more than a market access agreement and the WTO Ministerial Conference does not consent to add it to the WTO Agreement, participants may choose to implement it outside the WTO framework. As a stand-alone agreement it would be unlikely to satisfy all of the conditions in any of the PTA exceptions, but that would not prohibit its conclusion.

Conflicts of substantive norms with the WTO agreements may arise, which create challenges for those that are party to both, to ensure that they are mutually supporting. If SETA creates its own dispute settlement mechanism, conflicts of jurisdiction with the DSU may also arise. These can involve multiple procedures in different fora, applying different rules and leading to different results. The WTO system may well prevail in such a conflict, which could hinder the fulfillment of SETA's object and purpose but might also reflect poorly on the WTO.

A waiver is possible on a temporary basis to shield SETA-implementing measures from conflicts with the WTO and the DSU, but this is not a suitable vehicle to create a permanent exception from WTO obligations. A peace clause could achieve the same purpose, but it will not be binding on non-participants unless it is included in a multilateral agreement. A fork-in-the-road provision would avoid procedures in multiple fora in many cases as it would require a party to make a single choice between dispute settlement systems. There is the possibility that a WTO panel might rule a claim inadmissible in a dispute under the DSU between SETA participants on the basis of such a provision in appropriate circumstances.

Summary of Conclusions and Recommendations

SETA can promote the scale-up and deployment of sustainable-energy sources through the use of trade policy measures in order to reduce the emissions responsible for global warming. The scope of the Doha Round is fixed and in any case the lack of progress in that exercise compels fresh thinking about ways to negotiate new agreements. The best way to proceed depends on further work on the substance of a new agreement but certain options can be identified now.

SETA could be negotiated, concluded and implemented among a group of interested WTO Members (and even non-Members) separately from the Doha Round. SETA can be implemented either within the WTO framework or, on the other hand, outside it as a stand-alone agreement or within another existing framework. Interested Members can begin preparatory work in other fora or in informal meetings at the WTO, but transparency is important to build confidence in the process, particularly since other Members' participation or consent may eventually be required.

SETA could be a "critical mass' agreement concluded among a group of countries large enough to render its implementation viable, which would be less than the total WTO membership. The definition of the "critical mass" would depend on the coverage of the new agreement, the nature of its obligations and which of them were to be applied on an MFN basis, but a sufficient collective share of world trade in the products covered would seem to be essential for any market access agreement. Irrespective of the form of the agreement, the benefits of improved market access would still accrue to WTO Members that did not join, in accordance with their rights to MFN treatment. Free riding could be reduced by defining the critical mass widely enough to include all Members with significant volumes of trade in the relevant products.

SETA could be a vehicle for market access improvements in an ITA-type agreement, which could cover not only tariff concessions, but also agreed rules on non-tariff measures and services commitments through incorporation of a reference paper. However, certain types of rules, namely those outside the scope of GATT 1994 and GATS, and any rules that diminished the parties' WTO obligations between themselves, would require a GPA-type agreement. The major hurdle to implementation of such an agreement within the WTO framework is that the Ministerial Conference (or General Council between sessions) must agree to it by consensus. No agreement has been added through that procedure since the establishment of the WTO. Consent might nevertheless be forthcoming if (a) the negotiating process is transparent and takes into account the views of non-parties as observers; and (b) the new agreement protects the interests of non-parties, including their rights to MFN treatment.

The application of the DSU to disputes under SETA is likely to be an incentive for parties to implement SETA within the WTO framework. However, this would also require the Ministerial Conference to agree that the DSU should be applicable, by consensus. That consent might be obtained if the interests of non-parties are specifically addressed in the way that the dispute settlement rules and procedures are applied to the new agreement and the way in which non-parties' rights and obligations under the existing substantive rules are preserved.

If the Ministerial Conference did not consent to add SETA to the WTO framework, the parties could implement it outside. This would be a second-best outcome, as the agreement could not benefit from the WTO's institutional structure, in particular, its dispute settlement system. It is unlikely that SETA would qualify

for a PTA exception; hence, the benefits would still accrue to all WTO Members in accordance with MFN obligations. This would not necessarily render the agreement unviable, depending on how many parties there were and who they were. Conflicts of norms and jurisdiction with the WTO would have to be avoided through the negotiation of appropriate rules and, ideally, an effective choice of forum clause.

Endnotes

1. ICTSD (2011), *Fostering Low Carbon Growth – The Case for a Sustainable Energy Trade Agreement*, International Centre for Trade and Sustainable Development, Geneva, Switzerland, www.ictsd.ch, pp.62-64.

2. For the full set that ICTSD has used see Paul Lako, (2008), 'Mapping Climate Mitigation Technologies and Associated Goods within the Renewable Energy Supply Sector', ICTSD Programme on Trade and Environment, International Centre for Trade and Sustainable Energy, Geneva, Switzerland; Izaak Wind, 'HS Codes and the Renewable Energy Sector', ICTSD Programme on Trade and Environment, International Centre for Trade and Sustainable Development, Geneva, Switzerland. See also EPO-UNEP-ICTSD joint 2010 report on Clean Energy Technologies available at www.epo.org/news-issues/issues/clean-energy/study.html

3. See, for example, Debra Steger (ed.) *Redesigning the World Trade Organization for the Twenty-First Century* (Wilfrid Laurier University Press, 2010); Thomas Cottier and Manfred Elsig, *Governing the World Trade Organization: Past, Present and Beyond Doha*, (Cambridge University Press, 2011),

4. General Council Decision on Deletion of the International Dairy Agreement from Annex 4 of the WTO Agreement, WT/L/251, 10 December 1997; General Council Decision on Deletion of the International Bovine Meat Agreement from Annex 4 of the WTO Agreement, WT/L/252, 10 December 1997.

5. Agreement on Textiles and Clothing, Article 9.

6. Ministerial Declaration on Trade in Information Technology Products, 13 December 1996, WT/MIN(96)/16 ('ITA').

7. Reviews of the product coverage of GATT document L/7430, 'Trade in Pharmaceutical Products – Record of discussion) at note 58 below), certified in WT/Let/251, 259, 270, 272, 361, 382, 405, 416, 442, 461 and 610.

8. WT/Let/178 and 182.

9. Second Protocol to GATS, S/L/11, text adopted by the Council for Trade in Services (CTS), S/L/13, 21 July 1995; Third Protocol to GATS, S/L/12, text adopted by the CTS, S/L/10, 21 July 1995; Fourth Protocol to GATS, S/L/20, text adopted by the CTS, S/L/19, 30 April 1996; Fifth Protocol to GATS, S/L/45, 3 December 1997, text adopted by the Committee on Trade in Financial Services, S/L/44, 14 November 1997.

10. Protocol (2001) Amending the Annex to the Agreement on Civil Aircraft, done at Geneva on 6 June 2001 (TCA/4), and amended by Decision of the Committee on Trade in Civil Aircraft of 21 November 2001 extending the date for acceptance (TCA/7).

11. Protocol Amending the TRIPS Agreement, done at Geneva on 6 December 2005, annexed to a WTO General Council Decision of the same date (WT/L/641).

12. TN/TF/W/165/Rev.1, 2 March 2010. Many other modifications and rectifications of concessions and commitments in individual Members' schedules have been certified.

13. Ministerial Declaration on the Uruguay Round, GATT document MIN/DEC, adopted 20 September 1986, BISD 33S/19, para.B(ii).

14. Doha Ministerial Declaration, WT/MIN(01)/DEC/1, adopted 14 November 2001, para 47.

15. WTO Agreement, Articles II, XI, XII, XIII, XIV and XV, discussed in Appellate Body report in *Brazil – Coconut*, WT/DS22/AB/R, at p.12.

16. WTO Agreement, preamble, 4th recital.

17. See note 14 above.

18. See further Matthew Kennedy, 'Two Single Undertakings: Can the WTO implement the results of a Round?' (2011) *J Int Economic Law* 14:77-120.

19. For the purposes of this paper, there is no need to consider in what sense the Ministerial Declaration setting out the ITA is an agreement or an instrument related to the WTO Agreement. See the Panel report in *EC-IT Products*, WT/DS377/R, paras 7.375-7.384.

20. The use of the word 'Code' to describe these agreements adds to that perception.

21. Decision of the CONTRACTING PARTIES of 26 March 1980, Procedures for Modification and Rectification of Schedules of Tariff Concessions, L/4962, BISD 27S/25, incorporated by Article 1(b)(iv) of GATT 1994.

22. GATT 1994, Article II:7.

23. WTO Agreement, Article X:9.

24. See ICTSD scoping paper, at note 1 above, p.63.

25. Understanding on Commitments in Financial Services annexed to the Final Act Embodying the Results of the Uruguay Round.

26. The Reference Paper of 24 April 1996 contains a set of pro-competitive regulatory principles applicable to the telecommunications sector that certain Members incorporated in their services schedules. It is available at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm

27. See GATT panel report in *US – Sugar*, adopted 22 June 1989, BISD 36S/331, para.5.7; Appellate Body report in *EC – Bananas III*, WT/DS27/AB/R, paras 154; Appellate Body report in *EC – Sugar*, WT/DS283/AB/R, para. 220.

28. See Robert Howse, *Climate Mitigation Subsidies and the WTO Legal Framework: A Policy Analysis*, International Institute for Sustainable Development, May 2010, who considers an authoritative interpretation of a WTO provision, revival of non-actionability or a waiver, at pp.17-24.

29. WTO Agreement, Article X:9.

30. 1980 Certification procedures at note 30 above; Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments adopted by the Council for Trade in Services on 14 April 2000, (S/L/84).

31. Stuart Harbinson, 'The Doha Round: "Death-Defying Agenda" or "Don't Do It Again"?', European Centre for International Political Economy, Working Paper No. 10/2009, p.20; James Bacchus, 'A Way Forward for the WTO', essay for the Trade and Development Symposium, Perspectives on the Multilateral Trading System, ICTSD and Swiss Federal Department of Economic Affairs, December 2011. As regards the merits of optional agreements, see Patrick

Low, 'WTO Decision-Making for the Future', background paper prepared for the Inaugural Conference of Thinking Ahead on International Trade (TAIT), Geneva, 17—18 September 2009.

32. Peter Sutherland et al., *Addressing Institutional Challenges in the New Millenium*, Report by the Consultative Board to the former Director-General Supachai Panitchpakdi, WTO: Geneva, 2005, paras 291-300.

33. Pierre S. Pettigrew et al., *The Multilateral Trade Regime: Which Way Forward?*, The Report of the First Warwick Commission, University of Warwick: Coventry, 2007, pp.30-32. See also Manfred Elsig, 'WTO Decision-Making: Can We Get a Little Help from the Secretariat and the Critical Mass?' in Steger, note 3 above, at pp.67-90.

34. The Protocol Amending the TRIPS Agreement is a notable exception.

35. Miguel Rodríguez, 'Towards Plurilateral Plus Agreements' in *Trade and Development Symposium – Perspectives on the Multilateral Trading System*, ICTSD and Swiss Federal Department of Economic Affairs, December 2011.

36. Warwick Commission, note 33 above.

37. Ismail and Vickers, note 91 above, at p.472.

38. For example, certain Members maintained broad MFN exemptions based on reciprocity, or limited MFN exemptions, as regards financial services after the conclusion of the Second GATS Protocol, and to a lesser extent after the Fifth GATS Protocol.

39. It has been stated that this 'general rule is so well established that there is no need to cite extensive authority for it': see R. Jennings and A. Watts (eds.), *Oppenheim's International Law,* London, Longman, (9th ed, 1992) at p.1260.

40. Hunter Nottage and Thomas Sebastian, 'Giving Legal Effect to the Results of WTO Trade Negotiations: An analysis of the methods of changing WTO law', (2006) *J Int Economic Law* 9:989-1016 at 1101.

41. Note that the scope of Article I:1 of GATT 1994 includes 'all matters referred to in paragraphs 2 and 4 of Article III' whereas government procurement is carved out of Article III by paragraph 8(a).

42. 1967 Agreement on Implementation of Article VI, which entered into force on 1 July 1968.

43. See first meeting of Committee on Anti-Dumping Practices of 15 November 1968, GATT document COM.AD/1, para. 11.

44. Note by the GATT Director-General dated 29 November 1968, GATT document L/3149.

45. Decision on 'Action by the CONTRACTING PARTIES on the Multilateral Trade Negotiations' of 28 November 1979, GATT document L/4905, BISD 26S/201, paras 1-3.

46. The United States was party to the GATT Subsidies Code but did not apply the requirement of injury to a domestic industry under its countervailing duty law on an MFN basis: compare 19 USC §1671(a) and (b) with 19 USC §1303 (1988), discussed in Andreas F. Lowenfeld, 'Remedies along with Rights: Institutional Reform in the new GATT', *AJIL* 88:477-488 [1994] at 478, fn 2, and see the US statement in the meeting of the GATT Committee on Subsidies and Countervailing Measures on 8 May 1980, GATT doc. SCM/M/3, para.11.

47. See, for example, Claus-Dieter Ehlermann and Lothar Ehring, 'Decision-Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade?', (2005) *J Int Economic Law* 8:51-75 at 56, fn15.

48. Some Members' trade share would always be too small for them ever to form part of a 'critical mass'. The small countries could enjoy the benefits of such agreements but recurrent use of critical-mass decision-making could lead to their disenfranchisement and disengagement: see Amrita Narlikar, 'Adapting to new power balances: institutional reform in the WTO' in Cottier et al, note 3 above, pp.111-128 at 122.

49. WTO Agreement, Article X:9. The procedure might also imply that an agreement has entered into force insofar as it refers to 'parties' to a trade agreement rather than to 'contracting parties', but this need not prevent the Ministerial Conference approving the addition of an agreement that had not yet entered into force.

50. See 1980 Procedures for Modification and Rectification of Schedules at note 30 above.

51. See Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments (S/L/84, 14 April 2000).

52. 'Information Technology Agreement', Communication from the United States dated 4 October 1996, G/MA/W/8.

53. See minutes of the Council for Trade in Goods meeting of 1 November 1996, G/C/M/15, para.2.1.

54. APEC Leaders' Declaration made at Subic, the Philippines on 25 November 1996, para.13 available at: http://www.apec.org/Meeting-Papers/Leaders-Declarations/1996/1996_aelm.aspx

55. Seven other WTO Members, including five APEC members, India and the Czech Republic indicated at that time that they were considering joining the ITA, see Barbara Fliess and Pierre Sauvé, *'Of Chips, Floppy Disks and Great Timing: Assessing the Information Technology Agreement',* Institut Français des Relations Internationales ('IFRI') and the Tokyo Club Foundation of Global Studies, 1997, p. 13.

56. WT/MIN(96)/16 of 13 December 1996.

57. Singapore Ministerial Declaration, WT/MIN(96)/DEC, adopted on 13 December 1996, para.18. The Declaration also welcomed the expansion of the Pharmaceutical Understanding, at note 58 below.

58. 'Trade in Pharmaceutical Products - Record of Discussion' dated 25 March 1994, GATT document L/7430.

59. ITA, at note 56 above, 1st recital and Annex, para.4.

60. 'Draft Multilateral Agreement on Investment negotiating text' available at http://www.oecd.org/document/35/0,3343,en_2649_33783766_1894819_1_1_1_1,00.html

61. Singapore Ministerial Declaration of 13 December 1996, WT/MIN(96)/DEC, para.20.

62. 'WTO Should Not Take Up Trade and Investment - Joint NGO Statement on the Investment issue in WTO', para.10, available at http://www.twnside.org.sg/title/take-cn.htm (last accessed 12 January 2012).

63. General Council Decision of 1 August 2004, WT/L/579, para.1(g), second indent. Two other WTO working groups were also established in 1996 without the same 'baggage' but were likewise disbanded in 2004 without the launch of negotiations in any forum: one group worked on trade and competition policy and the other on transparency in government procurement.

64. General Council Decision of 1 August 2004, WT/L/579, para.1(g), first paragraph and Annex D. The negotiating group produced a draft text for an agreement in 2010 but its conclusion and implementation are linked to the single undertaking of the Doha Round: see Annex D, para.10.

65. See the G20 website at http://www.g20.org/. This is not to be confused with the G20 group of developing countries in the WTO agriculture negotiations.

66. See ICTSD scoping paper, at note 24 above, p.10, Tables 1 and 3, sourced from Pew Charitable Trusts, 2010.

67. Source: COMTRADE using World Integrated Trade Solution software, in Rene Vossenaar, (2010), Climate-related Single-use Environmental Goods, ICTSD Issue Paper No. 13, International Centre for Trade and Sustainable Development, Geneva, Switzerland, Table A4, pp.43-47.

68. *Ibid.*

69. Ignacio Garcia Bercero, 'Functioning of the WTO System: Elements for Possible Institutional Reform', 6 *International Trade Law and Regulation* (2000) 103-115, at 108; John H. Jackson, 'The WTO Constitution and Proposed Reforms: Seven Mantras Revisited', (2001) *J Int Economic Law* 4:67-78 at 75; Sutherland Report, note 32 above, pp.70-71.

70. Decision on Negotiations on Movement of Natural Persons, para.2; Decision on Negotiations on Basic Telecommunications, para.3, both annexed to the Final Act of the Uruguay Round.

71. See minutes of Trade Negotiations Committee meeting of 12 October 2004, TN/C/M/14, paras 1-4.

72. Implementation of the Ministerial Declaration on Trade in Information Technology Products, communication dated 26 March 1997, G/L/160 (para.3) considered by the Council for Trade in Goods at its meeting on 14 April 1997, G/C/M/19, paras 2.1-2.8. Estonia and Chinese Taipei were still in the process of acceding to the WTO.

73. ITA, at note 56 above, Annex, para.4.

74. Appellate Body report in *US – Shrimp*, WT/DS58/AB/R, para.154.

75. WTO Agreement, Article IX:1, first sentence, and subsequent practice.

76. See, for example, the Rules of Procedure for meetings of the Council for Trade in Goods, Rule 33, WT/L/79.

77. Ministerial Decision on Negotiations on Basic Telecommunications, para.4. The 1994 Ministerial Decision on Negotiations on Maritime Transport Services adopted the same approach, with 33 governments, including the then-12 EC member states: Decision on Negotiations on Maritime Transport Services, para.3.

78. ITA, preamble, 1st recital. See Anwarul Hoda, *Tariff Negotiations and Renegotiations under the GATT and the WTO: Procedures and Practices*, (Cambridge University Press, 2001).

79. Sutherland Report, at note 32 above, para.298.

80. The only exceptions in GATT or the WTO were the negotiations that led to the Agreement on Agriculture and the Agreement on Textiles and Clothing, which were both sectoral agreements negotiated in the multilateral framework of the Uruguay Round.

81. Decision on Negotiations on Basic Telecommunications, paras 1 and 4; Decision on Negotiations on Maritime Transport Services, paras 1 and 3.

82. Harbinson, at note above, p.15.

83. Implementation document at note 72 above, para. 4, but see Rules of Procedure for meetings of the Committee of participants on the expansion of trade in information technology products, approved by the Committee on 30 October 1997, G/IT/3, para (i).

84. Decision on Participation of Observers in the Committee of participants on the expansion of trade in information technology products, attached to ITA Committee Rules of Procedure, atnote 83 above, para.1.

85. 1994 Agreement on Government Procurement, Article XXI:1.

86. 1994 Agreement on Government Procurement, Article XVII:2.

87. Decisions on Procedural Matters under the Agreement on Government Procurement (1994) of 27 February 1996, GPA/1, Annex 1: Decision on Participation of Observers in the Committee on Government Procurement.

88. An updated list of observers in the WTO Committee on Government Procurement is available at http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm

89. Protocol Amending the Agreement on Government Procurement, Annex, Article XXI:4, appended to the Decision of 30 March 2012 of the Parties to the WTO Agreement on Government Procurement on the Outcomes of the Negotiations under Article XXIV:7, GPA/113.

90. Decision of the Committee on Government Procurement of 16 July 2004, 'Modalities for the Negotiations on Extension of Coverage and Elimination of Discriminatory Measures and Practices', GPA/79.

91. Faizel Ismail and Brendan Vickers, 'Fairer Decision-Making in the WTO Negotiations' in Carolyn Deere Birkbeck, *Making Global Trade Governance Work for Development*, University of Oxford, Global Economic Governance Progam, 461-485 at 477.

92. See further John Odell, 'Chairing a WTO negotiation', *J Int Economic Law* (2005) 8(2): 425—48.

93. Anwarul Hoda, author of *Tariff Negotiations and Renegotiations under the GATT and the WTO: Procedures and Practices*, Cambridge: Cambridge University Press, 2001.

94. Transparency Mechanism for Regional Trade Agreements, General Council Decision of 14 December 2006, WT/L/671, which was negotiated in the Negotiating Group on Rules.

95. See, for example, Fourth GATS Protocol, at note 9 above, paras 2 and 3.

96. ITA, Annex, para.4.

97. Implementation of the Ministerial Declaration on Trade in Information Technology Products - Informal Meeting of 26 March 1997 - Note by the Secretariat - Revision, G/L/159/Rev.1.

98. GATT 1947, Annex H. The two scenarios depended on whether the threshold for entry into force was met before or after the accession of Japan.

99. See note 97 above.

100. Protocol to the United Nations Framework Convention on Climate Change done at Kyoto on 11 December 1997, Article 25. The formula was not less than 55 Parties to the UNFCCC, incorporating Parties included in Annex I to the UNFCCC which accounted in total for at least 55 % of the total carbon dioxide emissions for 1990 of the Parties included in Annex I.

101. WTO Agreement, Article XIV:1.

102. Minutes of the meeting of the Preparatory Committee for the WTO held on 8 December 1994, PC/M/10, paras 4-5; Notification of entry into force and notification of acceptances, WT/Let/1, 27 January 1995.

103. Geneva (1967) Protocol to the GATT, 30 June 1967, 620 UNTS 294, para.6.

104. The parties to the TCA comprise the old Quad; 20 EU member States in their own right; Albania; Egypt; Georgia; Macau, China; Norway; Switzerland; and Chinese Taipei.

105. See Implementation document, G/L/160, preamble.

106. Number of participants as of 12 May 2011, see Status of Implementation, Note by the Secretariat, G/IT/1/Rev.45, para.1.

107. Twelve parties signed the IDA, but not all ratified.

108. Sutherland Report, at note 32 above, para.298.

109. For example, in the United States, 19 USC 3511(b) authorized the President to accept the Uruguay Round agreements when he determined that a sufficient number of foreign countries were accepting the obligations of those agreements to ensure the effective operation of, and adequate benefits for the United States under, those agreements.

110. Brazil accepted the Second, Fourth and Fifth GATS Protocols and the IDA 'subject to ratification' but did not later ratify them: see WTO *Status of Legal Instruments* 2008, pp. 107, 114, 119 and 134 and 2009 Trade Policy Review of Brazil, Report by the Secretariat, WT/TPR/S/212/Rev.1, para.5.

111. The accession clause should not include a limited period for acceptance. The WTO Agreement, Article X:5 and X:7, refers to an acceptance period specified by the Ministerial Conference for amendments to the multilateral agreements, not an agreement added to Annex 4 under Article X:9.

112. Implementation document, note 72 above, para.5.

113. See minutes of the ITA Committee meeting of 30 October 1997, G/IT/M/2, section 4.

114. WT/DS163, complaint by the United States. The panel report was adopted without appeal and no further action was required.

115. WT/DS375, WT/DS376 and WT/DS377, complaints by the United States, Japan and Chinese Taipei, respectively. Implementation of the DSB recommendation was notified by the respondent in May 2011.

116. See Bacchus at note 31 above, p.4.

117. Negotiating Group on Trade Facilitation, Draft Consolidated Negotiating Text, 7 October 2011, TN/TF/W/165/Rev.11, see under 'cross-cutting issues' at the end of Section I. There is also a provision on a grace period for disputes against developing countries regarding certain commitments: see Section II, Article 7.

118. See ICTSD scoping paper at note 24 above, p.63.

119. Ministerial Declaration on the Uruguay Round, GATT document MIN.DEC, adopted 20 September 1986, BISD 33S/19, Section D, under the sub-heading 'Trade-related aspects of intellectual property rights, including trade in counterfeit goods'.

120. TRIPS Agreement, preamble, 1st recital.

121. Communication from Chile, 22 January 1990, MTN.GNG/NG11/W/61, Section B.

122. TRIPS Agreement, Article 64.

123. TBT Agreement, Article 2.2 and 2.4.

124. SPS Agreement, Articles 2.2 and 3.3.

125. SPS Agreement, Article 11.2, and TBT Agreement, Article 14.2 and 14.3 and Annex 2, as listed in Appendix 2 to the DSU.

126. The respondent's Minister of Environment, Ms. Marina Silva, made the initial statement to the panel in *Brazil – Retreaded Tyres* (WT/DS332).

127. DSU, Article 17.1.

128. DSU, Article 25.

129. DSU, Article 13.2; provisions at note 125 above; see also the Customs Valuation Agreement, Article 19.4, as regards consultations with a Technical Committee, all listed in DSU Appendix 4.

130. Panel report in *US – Tuna II (Mexico),* WT/DS381/R , paras 7.491-7.506, 7.517-7.531, 7.546-7.564. This report is currently on appeal.

131. *US – Clove cigarettes*, Panel report, WT/DS406/R, paras 7.209-7.210. This approach was disapproved on appeal, see WT/DS406/AB/R, paras 150-151.

132. Consider, for example, *EC – Biotech ('GMOs')*, WT/DS291; *Australia – Apples*, WT/DS367 but also *EC – Asbestos*, WT/DS135 which was not a SPS dispute but did consider health risks.

133. Appellate Body report in *US – Continued Suspension*, WT/DS320/AB/R, paras 433–484, 736(b).

134. See the discussion in the Appellate Body report in Brazil – Coconut, WT/DS22/AB/R, Section IV:B.

135. The TCA was concluded in 1979 and still refers to the old GATT dispute settlement procedures: see Agreement on Trade in Civil Aircraft, Article 8.8, although no WTO disputes have actually cited the TCA. GATT dispute settlement procedures are also applicable in some respects to situation complaints under Article 26.2 of the DSU and, optionally, to complaints brought by a developing country Member against a developed country Member under Article 3.12 of the DS

136. See Matthew Kennedy, 'Why are WTO Panels Taking Longer? And What Can Be Done About it?', *Journal of World Trade*, 45 (2011) 221-253 at 248-250.

137. DSU, Article 1.1; WTO Agreement, Article X:8.

138. The Committee on Government Procurement only notified the DSB of its special or additional dispute settlement procedures, see letter from Chairman of the Committee on Government Procurement to the Chairman of the DSB dated 6 July 1996 (GPA/5), approved by the Committee at its meeting of 4 June 1996 (GPA/M/2, Item I).

139. DSU, Appendix 1, last sentence.

140. WTO Agreement, Article X:8 and X:9 and Article IV:2.

141. The TCA contains a dispute settlement provision from GATT days that the parties considered updating to refer to the DSU. A draft Protocol concerning technical rectifications needed to bring the Aircraft Agreement into the WTO framework was sent to TCA parties in 1999 but not adopted: see the minutes of the Aircraft Committee meeting in July 1999 (TCA/M/8, paras 3-9) and meetings thereafter until 2007.

142. DSU, Article 2.1, 3rd sentence.

143. DSU, Article 10, read in light of Article 2.1, 3rd sentence.

144. See minutes of DSB meeting of 21 October 1998, WT/DSB/M/49, Item 2.

145. See *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287 (D. Mass., 1998); and lapse of authority for establishment of the panel, WTO documents WT/DS88/6 and WT/DS95/6.

146. See minutes of DSB meeting of 19 June 2000, WT/DSB/M/84, paras 64-72.

147. DSU, Article 2.1, 4th sentence.

148. See note 146 above.

149. All panelists in *US – Massachusetts* (WT/DS88 and WT/DS95) and *Korea – Procurement* (WT/DS163) were from parties to the GPA.

150. GPA, Article XXII:6; SCM Agreement, Articles 4 and 7.

151. SPS Agreement, Article 11.2; TBT Agreement, Article 14.2-14.4; Customs Valuation Agreement, Article 19.4.

152. SCM Agreement, Articles 4 and 7.

153. GATS, Article XXIII; TRIPS Agreement, Article 64.2 and 64.3.

154. GPA, Article XXII:7 which contracts out of DSU, Article 22.2. Note also DSU, Article 22.3(g)(i).

155. See for example the reports in *US – Upland Cotton* (WT/DS267), which included claims under Parts II and III of the SCM Agreement and the Agreement on Agriculture subject to special and standard rules and procedures, respectively.

156. See DSU, Article 2.1, last sentence.

157. TCA/4 at note 10 above.

158. GPA/113 at note 89 above.

159. ITA, Annex, para. 3.

160. Protocol (2001) Amending the Annex to the Agreement on Trade in Civil Aircraft, TCA/4.

161. Decision of 30 March 2012 of the Parties to the WTO Agreement on Government Procurement at note 89 above, adopting inter alia the Decision of 30 March 2012 of the Committee on Government Procurement, GPA/112.

162. WTO Agreement, preamble, 1st recital. The Appellate Body referred to this recital in *US – Shrimp* (WT/DS58/AB/R), para. 129. See further the references in fn 107 to that report: G. Handl, 'Sustainable Development: General Rules versus Specific Obligations' in *Sustainable Development and International Law*, (ed. W. Lang, 1995), p.35; World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987), p.43, regarding the scope of the concept of sustainable development.

163. See Thomas Cottier et al., 'Energy in WTO Law and Policy' in Thomas Cottier and Panagiotis Delimatsis (eds.), *The Prospects of International Trade Regulation: From Fragmentation to Coherence,* (Cambridge University Press, 2011), pp. 211-244.

164. See note 2 above. For experience regarding definitional issues in the Doha Round environmental goods and services negotiations, see Thomas Cottier and Donah Baracol-Pinhão, 'Environmental goods and services: The Environmental Area Initiative approach and climate change' in Thomas Cottier *et al* (eds.) *International Trade Regulation and the Mitigation of Climate Change,* (Cambridge University Press, 2009) pp. 395-419.

165. GATT 1994, Article III:8(a); TBT Agreement, Article 1.4; GATS, Article XIII.

166. See note 141 above.

167. Agreement on Agriculture, Articles 4, 5, 6, 8 and 9; SCM Agreement, Article 3.1.

168. Agreement on the Application of Sanitary and Phytosanitary Measures, preamble, eighth recital.

169. Agreement on Trade-Related Investment Measures, Articles 2 and 3.

170. See note 27 above.

171. The Vienna Convention on the Law of Treaties (1969), Article 41, adds certain conditions in cases where the multilateral treaty neither provides for nor prohibits *inter se* modifications. This is discussed in relation to modifications of WTO agreements effected among two or more Members in a non-WTO agreement in Section 3a)0) below.

172. The status of the rules in Article 41 of the Vienna Convention is discussed in Section 3.a) ii below.

173. WTO Agreement, Article II:2 and 3; and the principle of effective treaty interpretation, see Appellate Body report in *Korea – Dairy*, WT/DS98/AB/R, at para.81 (referring to Annexes 1, 2 and 3).

174. See Erich Vranes, 'The Definition of Norm Conflict in International Law and Legal Theory' (2006) *EJIL* 17(2) 395-418

175. WTO Agreement, Article XVI:3; Agreement on Agriculture, Article 21.1.

176. General interpretative note to Annex 1A to the WTO Agreement regarding GATT 1994 and the other agreements in that annex.

177. IDA, Article VIII :6. ACTA, which was concluded outside the WTO framework, provides that nothing shall derogate from any obligation between the parties under existing agreements, including the TRIPS Agreement: see Article 1.

178. *Ibid.*, para.6.

179. See Luca Rubini, 'Ain't Wastin' Time No More: Subsidies for Renewable Energy, the SCM Agreement, Policy Space, and Law Reform', *J Int Economic Law* (2012) 15(2) 525-579.

180. See Veena Jha, (2009) 'Trade Flows, Barriers and Market Drivers in Renewable Energy Supply Goods: The Need to Level the Playing Field', ICTSD Trade and Environment Issue Paper No. 10, Geneva: ICTSD, p.39, and Kyle Bagwell & Robert Staiger, 'Will international rules on subsidies disrupt the world trading system?' *The American Economic Review*, (2006) 96(3), 877–895.

181. GATS, Article XV. See Pietro Poretti, 'Waiting for Godot: Subsidy Disciplines in Services Trade' in Marion Panizzon *et al* (eds.) *GATS and the Regulation of International Trade in Services*, (Cambridge University Press, 2008) at pp.466-489.

182. See Cottier, note 163 above, at p.222-223.

183. See, for example, the typology of subsidies in certain WTO Members in Arunabha Ghosh and Himani Gangania, (2012, forthcoming), *Governing Clean Energy Subsidies: What, Why and How Legal?* ICTSD Global Platform on Climate Change, Trade and Sustainable Energy; International Centre for Trade and Sustainable Development, Geneva, Switzerland, www.ictsd.org

184. SCM Agreement, Article 3.1(b). They are also inconsistent with GATT 1994, Article III:4.

185. Howse, at note 28 above, p.20.

186. SCM Agreement, Article 9.1; Article 10, fn 35.

187. SCM Agreement, Articles 5(c) and 6.3.

188. Panel report in *Indonesia – Autos,* WT/DS54/R.

189. Panel report in *EC and certain member states – Large civil aircraft*, WT/DS316/R, and Appellate Body report, WT/DS316/AB/R.

190. Adverse effects may consist of injury to a domestic industry caused by the subsidized imports or through nullification or impairment of benefits accruing under GATT 1994, most typically where the improved market access expected to flow from a tariff concession is undercut by subsidization: SCM Agreement, Article 5(a) and (b).

191. See, for example, the Doha Ministerial Decision of 14 November 2001 on Implementation-Related Issues and Concerns, WT/MIN(01)/17, para.10.2.

192. Some disagreements are inevitable but simplified procedures can be agreed to determine which subsidies do in fact qualify. Article 8.3 to 8.5 of the SCM Agreement contained notification and arbitration procedures and the SCM Committee adopted formats for notifications and updates

and procedures for arbitration, which could serve as a model for the SETA Committee: see Format for notifications: PC/IPL/11; G/SCM/14; format for updates of notifications: G/SCM/13, procedures for arbitration: G/SCM/19. No Member ever availed itself of these notifications or procedures.

193. See footnote 35 of the SCM Agreement, second sentence. The subsequent sentences backtracked in certain respects.

194. SCM Agreement, Articles 5(c) and 7.2.

195. SCM Agreement, Article 7.8.

196. Appellate Body report on *Brazil – Retreaded Tyres*, (WT/DS332/AB/R) at para.151.

197. See Howse at note 28 above, pp.17-19.

198. As regards the relationship between the general exceptions in Article XX of GATT 1994 and subsidies covered by the SCM Agreement, see Luca Rubini, The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective (Oxford University Press, 2009), p.195; and note 179 above.

199. Andrew Green, 'Trade rules and climate change subsidies' (2006) *World Trade Review,* 5(3), 377–414 at 409, cited in Howse at note 28 above, p.17.

200. See Gary Hufbauer, Steve Charnovitz and Jisun Kim, *Global Warming and the World Trading System,* 2009, Washington DC: Peterson Institute for International Economics, p.71/

201. See Appellate Body reports in *China – Audiovisual services, WT/DS363/AB/R, paras 205-233, and China – Raw Materials*, WT/DS394/AB/R, paras 278-307.

202. Text of the Anti-Counterfeiting Trade Agreement ('ACTA') dated 3 December 2010 available at http://www.dfat.gov.au/trade/acta/Final-ACTA-text-following-legal-verification.pdf (last accessed 12 January 2012).

203. GATT 1994, Article 1(b)(iv) of the incorporation text.

204. Decision of the CONTRACTING PARTIES to GATT of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries', GATT document L/4903.

205. GATT 1994, Article XXIV:8(b).

206. GATS, Article V:1(a) and footnote 1.

207. Enabling Clause, paragraph 2(c), read together with GATT 1994, Explanatory note 2(a) in the incorporation text.

208. Enabling Clause, paragraph 2(a).

209. ICTSD scoping paper at note 24 above, Figure 4, p.5.

210. *Ibid.*, p.11

211. An analogy might be seen in *US – Clove cigarettes* in which the Appellate Body found that the procedure for authoritative interpretations in Article XI:2 of the WTO Agreement did not exclude the customary rules of interpretation to which Article 3.2 of the DSU refers: WT/DS406/AB/R, paras 257-259.

212. 1928 Havana Convention on Treaties, Article 19, para.1; *Oscar Chinn case*, PCIJ (1934) Series A/B no. 63, 80ff, see the separate opinions of Judges van Eysinga and Schücking; Christian Feist, *Kündigung,Rücktritt und Suspendierung von multilateralen Verträgen* (Kiel: Duncker & Humblot, 2001) at p.197, cited in Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties,* (Martinus Nijhoff, 2009), at pp.531, 538.

213. Villiger, *loc. cit.* See also Anthony Aust, *Modern Treaty Law and Practice*, (Cambridge University Press, 2000) at p.222. Article X:9 of the WTO Agreement appears to contract out of the procedural condition in cases where the parties request that their agreement be annexed to the WTO Agreement.

214. ACTA, *ibid*., contains such a provision.

215. See Joost Pauwelyn: 'The Role of Public International Law in the WTO: How far can we go?' *AJIL* 95:535-577 [2001] at 547-550; *Conflict of Norms in Public International Law: How WTO law relates to other rules of public international law* (New York: Cambridge University Press, 2003) p. 320; and 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' *EJIL* 14 (2003) 907-951 at 914-915.

216. WTO Agreement, preamble, 1st recital.

217. WTO Agreement, preamble, 3rd recital.

218. As regards notification of agreements that the parties request be added to Annex 4 of the WTO Agreement, see Section 2d)ii)1 above.

219. See Communication from Brazil, China, Colombia, Ecuador, India, Indonesia, Peru, Thailand, the ACP Group and the African Group dated 15 April 2011, setting out a draft Decision, TN/C/W/59.

220. See Pieter Jan Kuijper, (2010), *Conflicting Rules and Clashing Courts: The Case of Multilateral Environmental Agreements, Free Trade Agreements and the WTO,* Issue paper no. 10, ICTSD Programme on Dispute Settlement and Legal Aspects of International Trade, Geneva: ICTSD, pp.19-20.

221. Appellate Body report, *US - Gasoline*, WT/DS2/AB/R, p.17.

222. See statement of the United States on adoption of the reports in *US – Continued Dumping and Subsidy Offset Act of 2000 ('Byrd Amendment')* in the minutes of DSB meeting of 27 January 2003, WT/DSB/M/142, para.57.

223. Vienna Convention on the Law of Treaties (1969), Article 31.

224. Appellate Body report, *US – Shrimp,* WT/DS58/AB/R, para.129.

225. See *US – Anti-dumping and countervailing duties (China)*, WT/DS379/AB/R, paras 35-41, regarding Articles 4, 5 and 8 of the ILC Articles. The Appellate Body had referred to Article 51 of the ILC Draft Articles (as they then were) in *US – Cotton Yarn*, WT/DS192/AB/R, para. 120 and fn 90; and *US – Line pipe*, WT/DS202/AB/R, para.279.

226. WT/DS379/AB/R, paras 304-316. Article 5 of the ILC Articles sets out a rule of attribution regarding the conduct of persons or entities exercising elements of governmental authority.

227. See Kuijper at note 220 above, pp.25-38.

228. *Chile - Measures Affecting the Transit and Importation of Swordfish*, WT/DS193.

229. Case concerning Conservation and Sustainable Exploitation of Swordfish Stocks in the South-eastern Pacific Ocean (Chile/European Union) ITLOS Case No.7.

230. WT/DS193/4.

231. WT/DS132/R and RW

232. Appellate Body report in *Mexico – Soft Drinks*, WT/DS308/AB/R, paras 44-54.

233. Appellate Body report in *Brazil – Retreaded Tyres*, WT/DS332/AB/R, paras 217-234 and fn 245.

234. Appellate Body reports in *US – Certain EC Products*, WT/DS165/AB/R, para.111; and *US - Continued Suspension*, WT/DS320/AB/R, para. 371.

235. DSU, Articles 6.1, 8.7, 16.4, 17.14 and 22.6.

236. See note 232 above.

237. The WTO agreements only recognize authorization to suspend concessions granted by the DSB, or under the United Nations Charter for the maintenance of international peace and security: see GATT, Article XXI(c), GATS, Article XIV*bis*(c) and TRIPS, Article 73(c).

238. Pauwelyn, *Conflict of Norms*, note 215 above, at p.232; contrast A. Bianchi and L. Gradoni (2008), *Developing Countries, Countermeasures and WTO Law: Reinterpreting the DSU against the background of International Law*, ICTSD Project on Dispute Settlement, Series Issue Paper No.5; and Kuijper at note 220 above at p.26.

239. DSU, Article 3.2.

240. Appellate Body report in *Mexico – Soft Drinks*, WT/DS308/AB/R, para. 54, discussed in Joost Pauwelyn and Luiz Eduardo Salles, 'Forum Shopping Before International Tribunals: (Real) Concerns, (Im)possible Solutions', 44 *Cornell Int'l LJ* (2009) 77-118 at 90.

241. Joost Pauwelyn, 'WTO Compassion or Superiority Complex?: What to Make of the WTO Waiver for "Conflict Diamonds"', 24 *Michigan Journal Of International Law* (2003) 1177-1207; Kuijper at note 220 above p.12.

242. WTO Agreement, Article IX:3 and IX:4; Understanding in Respect of Waivers of Obligations under GATT 1994, paragraph 1.

243. WT/L/93. Consensus is the only option in certain cases concerning transition periods and staged implementation: see WTO Agreement, Article IX:3, footnote 4.

244. WTO General Council Decision of 15 May 2003 on Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds (WT/L/518).

245. Australia, Brazil, Canada, Israel, Japan, Korea, Philippines, Sierra Leone, Thailand, United Arab Emirates and the United States. Eight other participants are listed in the 2006 extension.

246. S/RES/1459(2003).

247. General Council Decision of 15 December 2006 on Kimberley Process Certification Scheme for Rough Diamonds (WT/L/676).

248. See http://www.kimberleyprocess.com/structure/participants_world_map_en.html (visited 27 January 2012).

249. Howse, at note 28 above, page 24.

250. Appellate Body report in *EC – Bananas III (Article 21.5 – US)*, WT/DS27/AB/RW/R, paras 381-382, citing the Appellate Body report in *EC – Bananas III*, WT/DS27/AB/R, paras 185.

251. WT/L/518, 4th recital, WT/L/676 5th recital.

252. The TRIPS and Public Health waiver (General Council Decision of 30 August 2003 on Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, WT/L/540 and Corr.1) exceptionally expressed the termination date in terms of a condition subsequent.

253. WTO Agreement, Article IX:3(a), and the decision-making procedures at note 243 above.

254. Appellate Body report in *EC – Tariff preferences*, WT/DS246/AB/R, para.186.

255. See Hufbauer, Charnovitz and Kim, at note 200 above, p.103.

256. Agreement on Agriculture, Article 13.

257. Under the peace clause, US renounced further litigation regarding EC agricultural policies after the GATT Panel reports on *EEC – Oilseeds I* (BISD 37S/86) and *EEC – Oilseeds II* (BISD39S/91).

258. Doha Ministerial Decision on Implementation-Related Concerns, WT/MIN(01)/17, para.11.1; Hong Kong Ministerial Declaration, WT/MIN(05)/DEC, para.45; Ministerial Conference Decisions of 2 December 2009 and 17 December 2011 on 'TRIPS Non-Violation and Situation Complaints' (WT/L/783, WT/L/842).

259. See, for example, Decision of 8 December 1994 of the Preparatory Committee for the WTO and the CONTRACTING PARTIES to GATT on 'Transitional Co-Existence of the GATT 1947 and the WTO Agreement' (PC/12, GATT document L/7583), para.2, and corresponding decision regarding the Anti-Dumping Code (PC/13, GATT document L/7584), para.2.

260. Bilateral investment treaties often give the investor an irrevocable choice between different arbitration procedures: C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration: Substantive Principles,* Oxford: Oxford University Press, 2007, para.4.75.

261. For example, North American Free Trade Agreement, Article 2005; Olivos Protocol for the Settlement of Disputes in MERCOSUR, Article 1; Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-Operation Between the Association of Southeast Asian Nations and the People's Republic of China, Article 2(6).

262. Arbitral Tribunal Constituted Pursuant to Article 287, and Article 1 of Article VII, of the United Nations Convention on the Law of the Sea for the Dispute Concerning the MOX Plant, International Movements of Radioactive Materials and the Protection of the Marine Environment of the Irish Sea, the MOX Plant case, *Ireland v United Kingdom*, Order No. 3 'Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures' dated 24 June 2003, paras 14-30.

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