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Disciplining Energy Trade in the WTO

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There has long been a misperception that there are no multilateral trade rules that discipline trade in energy across borders. However, while the rules that apply are dispersed over a number of WTO trade agreements, there certainly exist disciplines that serve as the basis for determining whether such trade activities conform to multilateral trade regulations. This is mainly due to the characteristics of energy resources and products that differentiate them from other types of goods, based on which the main form of restrictive measures on energy trade are export restrictions, rather than import restrictions which have been the focus of trade regulations that typically apply to traded goods and services. More recently, however, with the increasing importance of global climate change initiatives, energy-related policy measures involve more direct forms of subsidies and tax incentives under the aim to support clean energy policy objectives at the national level.

In general, energy-related policy measures involve measures that promote easier access to fossil fuel energy or the development of technology for renewable energy generation. While the former measures would be solely aimed at securing the supply of energy, latter measures are aimed at both a more stable supply of energy and the reduction of emissions that are responsible for climate change. Thus, from an environmental perspective, the former type of measures can be deemed as being environmentally harmful, while the latter as more environment-friendly. More recently, governments around the world have been making efforts to promote their renewable energy industries as a means to implement the commitments made at the UN Framework Convention on Climate Change under which participating countries have promised to reduce their greenhouse gas emissions to targeted levels.

Reportedly, the most common policy tool that is used to promote such ‘green’ policy objectives through the development of renewable energy resources is ‘feed-in tariff (FIT)’ programs, under which investors are basically provided the incentive to adopt renewable energy sources such as through guarantee of electricity purchase prices, long-term contracts, and generally a return on their investments. Due to the inherent nature of the renewable energy generation industry, government support is inevitably required to cover the high costs of investment and low guarantee of return, which are the causes of the ‘missing money’ problem. On the other hand, many FIT programs incorporate ‘local content requirement (LCR)’ provisions which usually require the investor or producer to use green energy product inputs that are manufactured or provided by local producers. Such practice is based on the government’s intention to use green industrial policies to achieve other policy objectives, such as economic growth and employment.

In a recent WTO dispute case, the FIT program introduced by the Ontario provincial government in Canada was challenged as a WTO-inconsistent measure, in particular with the WTO rules on subsidies. However, due to the local content provision in Ontario’s FIT program, the dispute case did not deal with the FIT program per se as a subsidy measure, but rather the LCR element of the program that was in clear violation of the GATT/WTO rules. Although the rulings in the case did not produce direct evaluation of the ‘green’ subsidy measure, the dispute case holds significance since it was the first time the issue of whether ‘green’ subsidies are allowed under the WTO framework was brought to the fore. However, it remains to be seen if future WTO dispute settlement rulings will continue to be ‘friendly’ to Member countries’ green energy policy initiatives. In particular, will the WTO still evaluate national subsidization policies for green energy industries that do not contain LCR provisions as not pertaining to subsidies?

While there may be various subject areas covered by the WTO Agreements that are related to the discipline on energy trade, particularly sustainable energy resources, the current WTO rules on subsidies do not seem to be able to provide the sufficient legal framework for evaluating the legitimacy of Member countries’ green energy policies. Such a legal framework would require consideration of the unique characteristics of the renewable energy industry, which currently under the WTO rules cannot be rigorously examined. Under the current system, it is unclear whether national governments are allowed to pursue their green energy initiatives without concerns about violation of the WTO rules. This may be reason for the need for separate, consolidated rules on energy trade which would provide the proper basis for screening out legitimate green energy policy measures from those with trade-restrictive intentions.

At present, in order to provide more stable and predictable rules for disciplining trade in energy sources, there have been movements to establish a ‘Sustainable Energy Trade Agreement (SETA)’ as a form of plurilateral trade agreement among signatories interested in the initiative. The agreement has recently gained momentum as the U.S. president announced the Climate Action Plan in a major policy announcement to tackle climate change, which effectively brings together the issues of climate change and energy trade. If established, the SETA will provide rules on energy trade including tariff cuts on environmental goods and regulations on non-tariff barriers such as subsidies, LCR, and technical regulations or voluntary standards that apply to environmental products and services. While there are a lot of considerations to be made prior to formulating the agreement, including the institutional framework and scope of coverage, it seems imperative that there should be consistent rules in place for trade in energy that effectively discipline renewable energy trade and investment. Korea, among other major global players, is reportedly an active supporter of the initiative, and should continue to be so in order to stand at the forefront in the global effort to combat climate change in a way that is not inconsistent with world trade rules. KIEP