

**Cross-Cutting Issues in the UNFCCC:
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Cross-Cutting Issues**

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I. Introduction

National climate policies can include a variety of measures. Among the measures envisaged or already adopted are product standard setting, product labeling, fuel efficiency standards, subsidies, government procurement and so-called border carbon adjustments. As these national policies are aimed at influencing the economic behavior of industries, manufacturers and consumers, they might fall into the scope of the rules of international trade embodied in the law of the World Trade Organization (WTO).

The WTO agreements do not deal with specific trade policies, but its rules might come into play as soon as national policies influence the economic behavior of economic actors like manufacturers, industry sectors or consumers in a way that affects trade flows. Therefore, some ‘trade disciplines’ might also overlap with climate policies.

The significance of the WTO rules lies in the fact that the WTO system provides for its own mechanism to settle disputes related to rights and obligations under the WTO agreements. If a WTO Member state believes that a measure of another WTO Member state, including climate measures, is inconsistent with one or more of the WTO disciplines, the Member can challenge that measure in an institutionalized dispute settlement system that produces legally binding rulings.

It is, however, important to recall that as long as a measure is not challenged there will not be a ruling on its WTO-compatibility. Some WTO-inconsistent measures might simply be not harmful enough to the interests of another Member to be challenged. Other Members might weigh carefully whether they would like to challenge a democratically adopted environmental or health measure or pursue other options that are less harmful to political and diplomatic relations.

Moreover, WTO rules leave space for arguing in favor of national climate measures and provide for exceptions to pursue other societal values than trade. The jurisprudence of the WTO panels and Appellate Body indicate that WTO rules allow for policy space for national decision-makers to adopt environmental measures, provided certain guidelines

¹ This paper is based on a longer Trade and Climate Q&A to be published later in 2009 by Friends of the Earth and CIEL.

are observed. Thus, climate measures have a good chance to be found to be WTO-consistent.

In addition to concerns about whether climate policies may be trade consistent, there has also been some discussion that trade measures, such as raising tariffs, or certain kinds of border carbon measures, may be used to ensure compliance. This may involve the use of unilateral measures that may implicate WTO rules. Some suggestions have also been made that trade measures be included within the new Copenhagen outcome as a means of ensuring compliance.

In the following section, certain types of national climate measures and their relation to the law of the WTO will be discussed. However, the issue of the inclusion of trade measures in the compliance mechanism will not be discussed as that has broader legal implication than can be discussed in this paper.

II. Standards and Labeling and the WTO

Product standards and product labelling can ensure or at least induce a transition to the use of more energy efficient products and more climate-friendly methods of harvesting, producing and distributing products.

In the field of energy efficiency states have already made widespread use of these policy instruments. Both product labelling and mandatory energy efficiency standards can effectively reduce energy consumption and related greenhouse gas (GHG) emissions and energy costs for households. Labelling schemes may take various forms, from endorsement labels that endorse a preferable characteristic of a product to information labels that display specific information about a product, generally in comparison to the characteristics of competing products. Moreover, labelling schemes can be either voluntary or mandatory and be sponsored by private sector parties or governments.

The adoption of “mandatory minimum standards” can provide an even more powerful tool for governments to achieve large GHG emissions savings. Under a mandatory minimum standard, products not meeting the required performance levels may not be sold anymore. Hence, consumers will automatically replace inefficient products with more efficient ones.

While standards and labelling have been more frequently used in relation to energy saving policies, governments can also develop minimum standards and labelling schemes for production methods and processing of products. There exist approaches to calculate the product’s carbon footprint consisting of the total amount of GHG (not just gaseous CO₂) emitted over the full life cycle of a product or service. The life-cycle analysis (“LCA”) of a product’s GHG emissions, from its production or processing, to its transportation, to its intended use, and ending with its disposal as waste, quantifies the carbon footprint of a given product. The carbon footprint based on a LCA can be the reference point for labelling schemes or mandatory minimum standards. However, note

that the methodologies for LCA have been criticized for being weak because they necessarily include numerous controversial assumptions and the wide range of factors that need to be taken into account render the process complex and prone to manipulation.

The magnitude of the trade effects caused by labels and standards depends on their design. At one end of the spectrum we see mandatory minimum requirements that effectively ban those products from the market which do not comply with the relevant standard(s). At the other end of the spectrum are voluntary endorsement labels, which are not compelling in a legal sense. Still, wide-spread use of certain voluntary schemes can have an effect similar to a minimum standard, because retailers and consumers may inhibit the successful commercialization of non-labelled products.

Both standards and labelling schemes require the producer to adapt its product to the minimum standard or the standard reflected in the respective label. Such adaptation may cause particular problems for small producers and producers from developing countries, especially with the proliferation of various standards, testing procedures, certification and accreditation schemes. The impact on small and developing country producers is felt strongest with regard to labelling schemes that relate to methods of production. Developing country producers may find themselves unable to adapt their production methods, either for financial reasons or due to the lack of available technologies.

Recognizing these potential trade effects, WTO law also applies to national standards and labelling schemes. The two most relevant WTO Agreements on standards and labels are the Agreement on Technical Barriers to Trade (TBT Agreement), which deals specifically with standards and labelling schemes and the General Agreement on Tariffs and Trade (GATT), which covers trade in goods. However, the application of one agreement does not necessarily exclude the application of the other. The TBT Agreement covers mandatory labelling schemes and minimum standards that relate to the end-use performance of a product, such as its energy efficiency level, and, in its “Code of Conduct” Annex, voluntary labelling schemes relating to the end-use of products. Whether standards and labels relating to production methods and processes used for a certain product, especially those that cannot be detected in the final product, are covered by the TBT Agreement is a matter of debate, but it is likely that these measures will be considered under the rules of the GATT. The GATT might apply to mandatory schemes, but voluntary schemes are unlikely to be covered.

Both the TBT Agreement and the GATT require WTO Members to observe the so-called non-discrimination principles. These bedrock principles of WTO law prohibit treating products from other WTO Members less favourably than “like” domestic products (“national treatment principle”) and treating products from some WTO Members less favourably than “like” products of other WTO Members (“most favoured nation principle”). The crux of these non-discrimination principles is therefore that WTO Members may not distinguish in a discriminatory fashion between “like” products. If two products are found to be “like”, they have to be accorded equal treatment. If two products are not “like”, a state is free to treat them differently. A narrow determination of “likeness” thus leaves more policy space to governments. The term “like” products is not

defined in the relevant WTO Agreements and in fact it is likely to be applied differently in the different agreements and contexts.

In the context of the TBT Agreement the "like product" concept has not been interpreted so far. It is likely that distinguishing between energy efficient and non-efficient products will not raise concerns with regard to the non-discrimination principles since nothing in the TBT Agreement disallows labelling or standards - measures that are precisely applied to distinguish one category of products from another. It is inherent to the agreement that products can be distinguished based on their products characteristics, such as energy efficiency. What is clearly not allowed under the TBT Agreement is to categorize equally energy-efficient products differently. Theoretically, the design of the labelling scheme or the minimum standard can become an issue under the necessity test of the TBT Agreement which requires WTO Members not to apply measures that are 'more trade-restrictive than necessary to fulfil a legitimate objective'. It is, however, unlikely that challenges in this respect would be successful. The TBT Agreement explicitly lists environmental protection as a legitimate objective. In light of the current global concern with regard to climate change, the objective would be considered important. On the basis of recent international studies WTO Members could argue successfully that their standards or labelling schemes make a 'material contribution' to climate change mitigation and that the respective level of protection cannot be achieved through less compelling measures.

In the context of the GATT the question of whether energy efficient and non-efficient products are "like" may indeed arise. Based on past WTO jurisprudence, there are four criteria which, when taken together, instruct the determination of the "likeness" of two products:

- (1) the products' end-uses in a given market;
- (2) consumers' tastes and habits;
- (3) the products' properties, nature and qualities; and
- (4) the products' tariff classifications.

Under these four criteria, the argument can be made that WTO panels could conclude that energy efficient products are not "like" their inefficient counterparts. Energy efficiency is an important factor influencing consumers' tastes and habits. Moreover, energy efficiency can be regarded as a key determining factor for a product's "properties" and "qualities" under criterion three, above. Since the list of determining factors is not closed, a dispute settlement panel may, in light of the global concern on global warming, even consider energy efficiency as an additional criterion.

The question of whether products manufactured by different production methods or processes are to be considered "like" under WTO law is a longstanding unresolved debate. Although the Appellate Body has made clear that measures based on processes and production methods can be WTO consistent, it has up to now avoided the "likeness" question. In the *US – Shrimp* case, the Appellate Body held a measure based on how the shrimp was harvested (a process-based measure) as an illegal ban, but ultimately found

that the measure qualified as an exemption under WTO law, allowing for the protection of natural resources. This ruling made clear that environmental measures distinguishing products on the basis of their processes or production method can be WTO-compliant under the general exceptions clause, if they are enacted in good faith and in conjunction with, or after, coordination and/or cooperation efforts with affected exporting states. The Appellate Body also clarified that such measures should be applied in a sufficiently flexible manner to permit compliance and should be transparent and procedurally fair. Therefore, to maximize the likelihood of adopting WTO-compliant product labelling schemes and minimum standards for production methods, WTO Members should avoid rigid and unbending standards. Rather, for example, WTO Members ought to permit production methods that are of comparable effectiveness.

Therefore, standards and labels relating to performance criteria of the final product, like energy efficiency levels, are likely to be found in compliance with the key provisions of either the TBT Agreement or the GATT and measures relating to the manner, in which products are produced and natural resources are extracted, grown or harvested, stand a good chance to comply with the general exceptions clause of the GATT.

Nevertheless, governments should bear in mind that harmonization of product-related standards can prevent a great deal of trade distortion. Therefore, international harmonization of energy efficiency measurement, for example the related testing, certification and accreditation of purported efficiencies, could both facilitate trade and benefit the environment. While harmonization should not impede the possibility of some states to adopt ambitious environmental standards, industrialized countries must realize that standards and labels, particularly those relating to processes and production methods, can be particularly burdensome for developing country exporters who risk losing market access.

Current WTO practice on notification of standards and labelling could be improved to better target the needs of developing countries, for instance through consulting procedures that aim at alerting developing country members if their exports are threatened by a standard or labelling initiative. Where financial or technological assistance is necessary to ensure continued market access of developing countries under a standard or labelling initiative, it should be provided by industrialized countries according to their obligations under the WTO and the UNFCCC.

III. Border Carbon Adjustments

The term “border carbon adjustments” refers to a range of possible measures, aimed at adjusting for the costs of climate policies incurred by domestic industries as compared to costs incurred by foreign producers in countries with weak(er) climate policies. They have also been mooted as possible unilateral measures that states may take to address non-compliance with emissions reductions obligations, or to deal with free-riders on the UNFCCC system. Since these measures are applied at the border on imported or exported products, they are essentially a trade policy tool. Border adjustments are conceivable both

as a national measure and as part of the international framework addressing climate change.

To date, border carbon adjustments have been discussed in conjunction with either domestic carbon tax or cap-and-trade schemes. If they are applied in conjunction with a carbon tax and the adjustment itself takes the form of a tax-like charge, border carbon adjustments can also be referred to as “border tax adjustments”.

Three main considerations have been put forward to justify the adoption of border carbon adjustments: preserving the competitiveness of domestic industries, “carbon leakage”, and “leverage” or “compliance” to induce the adoption of stringent climate regulation in other countries. Competitiveness concerns are typically voiced by carbon intensive industries, such as cement, chemicals, energy production, aluminium and steel, claiming that the competitiveness of their products both domestically and abroad is affected because foreign market participants were not subjected to any comparable climate policies and, thus, do not incur similar costs. In the context of border carbon adjustments “carbon leakage” describes concerns that imposing high costs on domestic producers may cause production of carbon-intensive industries to shift to countries lacking regulation to control GHG emissions. Apart from worries that climate policies would be undermined since GHG intensive production processes would be maintained elsewhere, national policy debates on border carbon adjustments are connected with concerns about negative effects on domestic employment situations. “Leakage” of emissions is closely associated with “leakage of jobs.” As a “leveraging tool” to induce other countries to implement comprehensive climate policies, border carbon adjustments are thought to address effectively the free-rider problem in an international climate regime and to ensure that non-compliance is kept to a minimum.

However, with regard to competitiveness and leakage concerns, it is too easy an assumption that costs of climate policies automatically translate into competitiveness impacts for domestic producers. In assessing competitiveness concerns, a wide array of factors needs to be taken into account. Some studies show that competitiveness impacts are not large enough to be alarming and that as a consequence, the loss of jobs is not expected to be significant. Moreover, concerns about current competitiveness impacts turn a blind eye to the fact that strong environmental regulation forces an industry to adapt in a way that later makes it much more competitive in the market since other firms that did not face these regulations are unable to keep up over time. Given the long-term challenge of climate change, this idea is particularly pertinent. Nevertheless, competitiveness concerns loom large in the climate policy discussions of most developed countries. Border carbon adjustments or other measures addressing these concerns, such as the allocation of free allowances to affected industry sectors, have wide currency among policy makers.

Whether a given border carbon measure is or is not WTO-compatible will depend on exact structure, design and application. Therefore, only some general implications of WTO law for border carbon adjustments can be highlighted.

WTO law permits under GATT Art. II:2(a) and Art. III:2 the use of border tax adjustments that are imposed *equally* upon both domestic and imported goods. The rationale is that if a country taxes a domestic product (e.g. domestic cigarettes), the country may also tax the same imported products (e.g. imported cigarettes) at the same rate. However, it should be noted that direct taxes (meaning taxes levied on producers), in contrast to indirect taxes (meaning taxes levied on final products or parts incorporated therein), are generally considered not to be eligible for border tax adjustments. Therefore, it is argued that taxes imposed on the producer only during the production stage of the product could not be adjusted by a border measure. Still, one may contend that energy or carbon taxes could be considered as indirect taxes because they are levied on inputs used during the production and, hence, apply “indirectly” to the product. If charges based on the carbon released during the production of a good are considered an indirect tax, WTO rules would allow the charges to be adjusted at the border. While the prices paid by producers for allowances under a cap-and-trade program are not “taxes” in the strict sense of the word, it can be convincingly argued that they constitute charges comparable to a tax and could, thus, be covered by the WTO framework for border tax adjustments.

Border carbon adjustments, including border tax adjustments, must generally comply with national treatment and the most favoured nation principle. To comply with the non-discrimination requirement under the national treatment obligation, WTO Members need to ensure that they are treating domestic and foreign products, such as steel, similarly, meaning that the border carbon adjustment affects domestic and foreign producers to the same degree. Adjustment schemes for cap-and-trade programs could comply with this condition by creating the same market conditions for purchasing allowances for foreign and domestic steel producers - for example, by applying the same tax rates or, under a cap-and-trade scheme, allocating the same amount of free allowances to foreign and domestic steel producers.

However, the tax rates or the number of allowances that need to be applied for a given imported product would depend on the production method used for the product in the exporting Member. Assessing and verifying production methods can pose high administrative burdens on the country applying the border carbon adjustment and leaves much room for discriminatory application and implementation, which could subject the border carbon adjustment measure to a WTO challenge.

Similarly, the most favoured nation principle requires WTO Members not to discriminate between the “like” products of different Member states. In the US, for instance, steel from producers in China would need to be subjected to the same conditions as steel from producers in the EU or Canada. Subjecting only producers from certain countries to border carbon adjustments would therefore be a violation.

If a border carbon adjustment measure is found to violate either the most favoured nation or the national treatment principle, the measure may nonetheless qualify as a legitimate exception to the principles of WTO law. In the context of border carbon adjustments, the exception for measures “*relating to the conservation of natural resources*” may present a safe harbour, provided that the measure is “*not applied in a manner which would*

constitute a means of arbitrary or unjustifiable discrimination ..., or a disguised restriction on international trade". Based on past decisions, it is likely that the Appellate Body would require a flexible application of the border carbon adjustment regime. For example, the Member applying a border carbon adjustment could not simply expect other members to adopt the same climate policy as its own. Rather, it would need to accept it as sufficient if similar levels of mitigation were achieved in a given sector. Moreover, a Member state would need to make a good faith effort to attain the same results via the multilateral process before resorting to border carbon adjustments. Thus, with respect to using such measures to encourage compliance in other states, significant attempts would need to be made to seek a multilateral approach on acceptable trade measures. If border carbon adjustments were allowed or foreseen in an international agreement on climate change, measures taken in consistence with that international agreement are likely to be considered compliant with Art. XX GATT.

Hence, one could argue that border carbon adjustments can be designed and applied in a way that does not violate any WTO requirements and that even if they did, they could be justified under the general environmental exceptions clause of GATT Article XX, particularly if they were consistent with provisions of an international agreement on climate change. However, just because these types of measures could be justified under WTO law, does not mean that they should be used. It appears prudent for policy makers to try to find a multilateral solution first, rather than imposing unilateral measures, which could distort the ongoing and politically sensitive negotiations for a future international agreement on climate change. In addition, using border carbon adjustments could distort the delicate balance related to the concept of common but differentiated responsibilities, a principle that lies at the heart of the United Nations Framework Convention on Climate Change and recognizes historical differences in the contributions of developed and developing States to global environmental problems, and differences in their respective economic and technical capacity to tackle these problems.

IV. Climate-related Subsidies and the WTO

WTO rules on subsidies, most notably the WTO Agreement on Subsidies and Countervailing Measures ("Subsidies Agreement"), come into play in various circumstances related to climate policies. First, governments make use of subsidies to achieve national GHG reductions. In this respect, governments may adopt subsidies for renewable energy production and distribution, subsidies for energy efficient production methods or purchase of energy efficient products, subsidies for advanced research and development in climate-friendly technologies and subsidies for forest conservation. Depending on structure and design these subsidy schemes might be in conflict with rules of WTO law. Second, some measures addressing competitiveness concerns, such as the allocation of free allowances to industry sectors exposed to increased foreign competition, might be considered as subsidies that violate WTO rules. Third, a controversially disputed idea is that countries that lack climate regulation effectively subsidize their domestic industries that are put into a competitive advantage compared to industries subjected to climate regulation and that such subsidization could be

countervailed by charging duties according to WTO law. Fourth, maintenance of subsidies for CO2 intensive industries or fossil fuel energies may impede a transition to less GHG intensive production and consumption patterns. WTO disciplines might be a tool to achieve the cessation of fossil fuel subsidization.

It is important to note that WTO law does not *per se* prohibit all kinds of subsidization. The definition of a subsidy in the Subsidies Agreement excludes certain subsidies that would be considered subsidization in economic terms. Moreover, only a limited category of subsidies meeting the requirements of a subsidy in WTO law are prohibited outright. For their assumed detrimental effects on international trade only export subsidies and local content subsidies are prohibited. Other subsidies might be “actionable” and can therefore be challenged by affected WTO Members, if they are “specific” and create adverse effects to the interests of another Member. Instead of challenging a prohibited or “actionable” subsidy, WTO Members are also entitled to impose countervailing duties on subsidized imports offsetting the subsidization. Note that apart from the Subsidies Agreement, the General Agreement on Trade in Services (GATS) and the Agreement on Agriculture (AoA) contain rules on subsidies. Applicability of the GATS, however, is unlikely in the context of climate policies.

The Subsidies Agreement defines a subsidy as a conferment of a benefit through a financial contribution from the government in the form of direct payments, tax schemes, provision of goods or services below production price, payments from private bodies exercising governmental functions or other forms of income or price support that are funded through governmental resources. Based on that definition some subsidies for renewable energy production and distribution would not constitute a subsidy under the Subsidies Agreement. For instance, variable prices above market level to be paid by grid operators for renewable energy are simply a market regulation with distributive effect, but do not form a conferment of a benefit through a direct or indirect financial contribution by the government. Moreover, taking over the cost of providing renewable energy in remote areas does not necessarily confer any benefit to enterprises, if these areas would not have been delivered by any enterprise without the subsidy. Likewise, WTO case law suggests that provision of land for the conservation of forests may not be considered a subsidy under WTO law if the trees are not destined to be harvested and commercialized. It is disputed whether lack of climate regulation could constitute a subsidy. Most commentators contend that the requirements of a definition of a subsidy are not met in this case. Free allocation of allowances, however, might meet this requirement since an entitlement to pollute up to a certain ceiling is indeed a valuable asset in connection with emission trading schemes. The government might be regarded as providing access to a natural resource, a provision of a good, without adequate remuneration. Most fossil fuel subsidies, taking the form of direct subsidization of energy providers or energy consumers would presumably meet the definition of a subsidy.

In most cases, subsidies supporting a transition to a climate-friendly economy will not fall into the category of prohibited subsidies. However, direct grants to consumers for the purchase of fuel efficient cars that are contingent upon buying domestic cars could be considered to be contingent upon the use of domestic products. The same might apply to

preferential loans to development of new offshore wind energy projects that are tied to requirements to purchase equipment only from domestic producers.

Since other subsidies might not be prohibited, but “actionable”, if they are “specific” and create “adverse effects”, the requirements of “specificity” and “adverse effect” might be of importance for the evaluation of some subsidies in the climate context. Based on the presumption that subsidies that are widely available within an economy do not cause a distortion in the allocation of resources, the “specificity” requirement limits the application of the Subsidies Agreement to those subsidies that have been specifically provided to an enterprise or industry, or a group of enterprises or industries. Subsidies that are *de lege* and *de facto* widely available to enterprises, including domestic and foreign enterprises, will generally not be considered specific. For example, if subsidies to acquire more energy efficient technologies were available to all enterprises and it was not a limited number of enterprises that were indeed benefiting from the subsidy, these subsidy schemes would likely escape a finding of specificity. However, sometimes simple budgetary limits explain restrictive eligibility criteria. Moreover, since free allocation of allowances will most times occur only with respect to certain sectors or sub-sectors, such measures are likely to be considered “specific”.

If a subsidy is “specific”, it is still necessary to determine whether it creates “adverse effects”, meaning that it harms another Member’s industry or results in serious disadvantages for another Member’s interest. While again this needs to be determined on a case-by-case basis, there are some general implications to note. Generally, proving adverse effects implicates significant costs for gathering the relevant information on harm and causation between the subsidy itself and the adverse effect. In the *US-Cotton* case the Appellate Body has emphasized that WTO Members need to ensure that other factors affecting the price of products are not improperly attributed to the challenged subsidy. Since fossil fuel subsidies could constitute actionable subsidies, WTO rules may form a legal basis to challenge some fossil fuel subsidies, but the need to prove adverse effects could frustrate opportunities to challenge fossil fuel subsidies. Given that the current subsidies disciplines enshrined in the WTO agreements focus on trade effects rather than on environmental consequences, they are probably not the ideal vehicle for dealing with fossil fuel subsidies from a climate perspective.

In the case of subsidies to renewable energies, adverse effects might be claimed by foreign producers of non-renewable energies. However, “adverse effects” must be shown with regard to producers of a “like product”. While the concept of “like products” has only been interpreted once in the context of subsidies, it appears that apart from criteria used in the context in the GATT, such as a product’s end-use, its physical properties and qualities, its tariff classification and the consumer tastes and habits, WTO panels and Appellate Body might look at how the respective industry has segmented itself. On the basis of these criteria, there is at least ground to argue that energy from renewable sources is different from its non-renewable counterparts. Interestingly, the first subsidies-related concerns were voiced by biofuels producers in the EU against biofuels subsidies in the US and did not relate to the distinction between renewable and non-renewable energies.

While a large number of subsidies that support the transition to a green economy are likely to be compliant with WTO disciplines, the WTO concept of subsidies in general may still be considered not to fit easily with environmental and climate objectives. The definition of a subsidy only looks at the conferment of a benefit to market participants without taking into account pre-existing market distortions, such as the historical failure to compel industries to internalize their environmental externalities. Subsidies that correct these market failures by favouring cleaner production methods, therefore, often fall into the scope of the subsidy disciplines of WTO law. Until January 2000, the Subsidies Agreement provided for a safe-haven for strictly defined subsidies for research and development and technological adaptations to stricter environmental regulation. While the narrowness of these carve-outs was criticized, reviving or adoption exemptions like these might give legal security to governments for subsidies as part of their climate policies.

V. Green Procurement

Public procurement that aims to go green or climate-friendly needs to have climate considerations central in the respective tender specifications. Best energy or fuel efficiency performance could be one key specification that would apply, for example, to electric appliances, lighting materials, vehicles, or the products and techniques used for insulating buildings. For other products, climate-friendliness depends less on the performance of the final product, but on the GHG intensity of the production method. Electricity generated from renewable sources would be one prime example in that respect. Biofuels that meet certain sustainability criteria, such as causing no harm to forests or biodiversity for their production would be another. Since labeling schemes can aim to display not only the levels of a product's energy performance, but also its carbon footprint, government bodies may feel inclined to base their procurement decisions on such labeling schemes or at least draw inspiration from these schemes to specify their tender.

The trade effects of such technical specifications resemble those of standards or labeling schemes. Particularly in the case of technical specifications on the production method exporters from developing countries would often see themselves in a disadvantaged position since they might be unable to employ the specified production method due to lack of financial capacity or access to the required technology. If the technical specifications are based on domestic labeling schemes or their underlying standards, foreign producers or service suppliers, even from industrialized countries, might not be familiar with the labeling scheme and/or its standards and may face high costs of compliance with the technical specifications. As a result, foreign manufacturers or service suppliers might be *de facto* excluded from the bidding process while domestic producers and service suppliers may fulfill the requirements more easily. If the government body expressed a preference for locally procured products to avoid transport emissions, trade effects would be particularly harsh as foreign manufacturers could be virtually excluded.

The relevant multilateral WTO Agreements namely the GATT, the TBT and the GATS all explicitly do not subject government procurement to their rules and principles with the small exception of procurement undertaken by state trading enterprises which is covered by the GATT. Still, some WTO Members, mainly industrialized countries, have acceded to the WTO Government Procurement Agreement (GPA) which sets forth specific rules for government procurement practices. In contrast to other WTO Agreements, the GPA is a plurilateral agreement that only applies to those Member states that have specifically signed and ratified it. The scope of the GPA is further limited since it only applies, if the following four conditions are met: first, *both* the procuring and the complaining WTO Member need to have *signed* the GPA; second, the procuring WTO Member has listed the good, e.g. electricity, in the Appendix to the GPA; third, the procuring WTO Member has listed the procuring entity, e.g. the federal environment ministry, in the Appendix to the GPA; fourth, the procurement exceeds the threshold of 130,000 Special Drawing Rights (SDR) for goods and services and 5,000,000 SDR for construction activities. SDR are the “artificial currency” used by the International Monetary Fund and is determined each day on the basis of the values of Euro, US Dollar, Japanese Yen and Pound Sterling. When the GPA applies, it requires its signatories to accord to the products, services and suppliers of any other signing state treatment “no less favorable” than they would give to their domestic products, services and suppliers. Moreover, signing states must accord the same treatment to all the products, services and suppliers of all other signing states. The GPA specifically demands its signing states not discriminate against those enterprises that are established under domestic law, but have strong affiliation with foreign companies or foreign ownership. Apart from these general non-discrimination principles the GPA provides for special procedures to ensure openness and transparency of the procurement process.

The GPA generally mandates that technical specifications shall not be adopted or applied in a way that they create unnecessary obstacles to trade. Regarding the criteria a government body may use in its technical specifications the GPA enumerates as examples, *inter alia*, “... *quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labelling, or the processes and methods for their production*” In addition, the GPA gives preference to performance related criteria over design and descriptive criteria and to technical specifications based on international standards or national standards where international standards do not exist. Energy efficiency, being a performance characteristic of the final product, clearly fits into the scope of technical specifications allowed under the GPA. Still, “*where appropriate*”, the required level of energy efficiency should be prescribed by using international or national standards.

When deciding on the final award of the contract, procuring public entities are not required to choose the lowest bid, but may choose the one which is most advantageous in light of the technical specifications in the call for tenders. If energy efficiency performance was one of the criteria set out in the technical specifications, the procuring entity may thus select the most energy efficient product over the cheapest product meeting the evaluation criteria.