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## Promotion of “Green” Electricity and International Dispute Settlement: Trade and Investment Issues

SHERZOD SHADIKHODJAEV\*

### Abstract

The issue of greater utilization of renewables in energy supply-mix has become a priority environmental agenda in many countries. Feed-in incentives, quota schemes, public tenders and net metering are common support programmes that are designed to encourage the production and consumption of electricity generated from renewable energy sources. Promotion policies of this kind have provoked a number of international disputes at both global and regional levels. This article examines disputes brought to the World Trade Organization (WTO), the Court of Justice of the European Union (“Court of Justice”) and investor-state tribunals, and explores some intersectional implications and comparisons for the government measures in question. While implementation of “green” electricity support schemes in compliance with the respective legal regimes will definitely minimize international frictions, intensification of cross-border exchanges of renewable electricity represents an additional tool that could be used for that purpose.

### I. Introduction

In order to cope with climate change problems and exhaustibility of fossil fuels, most nations have taken necessary action to increase the use of renewable energy for the sake of their present and future economic development. Recent statistics suggest that at least 144 countries have

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renewable energy targets, and 138 countries including many developing and emerging economies have renewable energy support policies in place.<sup>1</sup>

Renewables are widely considered as environmentally friendly substitutes for conventional energy-rich fuels and a significant contributor to securing sustainable power output. Governments play an important role in making them more attractive in the market by encouraging both supply and demand sides. The International Energy Agency estimated that renewables received 101 billion dollars in subsidies in 2012, with the largest portion of this amount being spent on electricity generation.<sup>2</sup> Among generating technologies, solar photovoltaic was the top recipient, followed by wind and bioenergy.<sup>3</sup>

Whereas the policy of “greening” energy supply is justified in today’s realities, the manner countries devise it to aid actors in this sector may cause tensions at both domestic and international levels. This article examines international trade and investment disputes over public support for renewables-based electricity initiated under judicial procedures of the WTO, the European Union (EU), and investment treaties. It shows that the litigation practice in such different frameworks offers interesting intersectional comparisons and implications for the government measures in question.

The remainder of this article is organized as follows. Section II discusses some specific attributes of electricity as a unique good and explains most common green schemes. Sections III, IV and V provide legal assessments for all relevant cases of the WTO, the EU, and investment agreements, respectively. Section VI examines the linkage between trade and investment regimes as related to the topic.

## II. Electricity and Green Support Schemes

Electrical energy – electricity – is considered in trade lexicon as a good,<sup>4</sup> and classified by the World Customs Organization under Harmonized System Code number 271600.<sup>5</sup> Only thirty-one countries have import

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1. RENEWABLE ENERGY POLICY NETWORK FOR THE 21ST CENTURY, RENEWABLES 2014 GLOBAL STATUS REPORT 14 (2014), [http://www.ren21.net/Portals/0/documents/Resources/GSR/2014/GSR2014\\_full%20report\\_low%20res.pdf](http://www.ren21.net/Portals/0/documents/Resources/GSR/2014/GSR2014_full%20report_low%20res.pdf) [hereinafter REN21].

2. INT’L ENERGY AGENCY, WORLD ENERGY OUTLOOK 2013, at 226 (OECD & IEA eds., 2013), <http://www.iea.org/publications/freepublications/publication/WEO2013.pdf>.

3. *Id.*

4. See Panel Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-In Tariff Program*, para. 7.11, n. 46, WT/DS412/R, WT/DS426/R (Dec. 19, 2012) (adopted May 24, 2013), [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S006.aspx?Query=\(@Symbol=%20wt/ds426/r\\*%20not%20rw\\*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds426/r*%20not%20rw*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#) [hereinafter Panel Reports]; see also Case C-158/94, *Comm’n v. Italy*, 1999 E.C.R. I-5789, para. 17.

5. HEYMI BAHAR & JEHAN SAUVAGE, *Cross-Border Trade in Electricity and the Development of Renewables-Based Electric Power*, in OECD TRADE & ENVIRONMENT WORKING PAPERS 2013/02, at 27 (OECD ed., 2013), <http://www.oecd-ilibrary.org/docserver/download/>

duties for electricity, and the tariff level is generally less than fifteen percent.<sup>6</sup> Compared to other goods, electricity possesses a number of peculiar characteristics. It is intangible, not easily storable, and must be produced and consumed simultaneously. The electricity supply chain includes consecutive stages, such as generation by power plants, transmission by operators, distribution via high-voltage and low-voltage transmission lines (collectively a “grid”), and consumption by end-users. Electricity networks can function properly as long as a balance between generation and consumption is maintained. Failing that, the system will experience voltage dips (brownouts) or blackouts causing damage to transmission infrastructures. This balance is preserved by a management system that coordinates all stages in the electricity supply chain and by a mix of base-load, intermediate and peaking generation facilities. Base-load generation occurs in e.g. nuclear and hydroelectric stations that are operated continuously virtually all the time to meet the base level of an expected demand in a given territory. As the power output cannot be easily adjusted, base-load generation is supplemented with more flexible intermediate and peak-load resources. Intermediate generating facilities – e.g. coal or natural-gas-fired plants – operate normally during the day and evening time when the demand for electricity is above its base level but still below its peak. Peak-load resources – e.g. oil or simple-cycle gas burning facilities – are used only when the demand is extremely high, for instance, in the hottest days of summer.<sup>7</sup>

As of the end of 2013, renewable electricity accounted for 22.1 percent of the global electricity production and comprised hydropower (16.4 percent), wind power (2.9 percent), bio-power (1.8 percent), solar photovoltaic (0.7 percent), geothermal energy and others (0.4 percent).<sup>8</sup> Whereas hydropower (in general), bio-mass and geothermal energy lead to relatively stable electricity output, “variable” renewables – solar energy, wind power and run-of-river hydropower without reservoir storage – allow only intermittent generation which depends on meteorological conditions.<sup>9</sup> Renewable electricity is often combined with conventional electricity to minimize any disruption in the power supply system and constitutes an integral part of the whole energy supply-mix.

In order to increase the share of renewable electricity, governments have established various support programmes that include, most typically, feed-in tariff (FIT) and premiums, quota obligations, public tenders or auctions, and net metering. Under the FIT system, generators sell renewable electricity at a fixed price on a contractual long-term basis. The price is set at the level

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6. *Id.*

7. The description of electricity and the electricity system is based on *id.*, at 46; Panel Reports, *supra* note 4, paras. 7.10-20.

8. REN21, *supra* note 1, at 25.

9. BAHAR & SAUVAGE, *supra* note 5, at 11; INT’L ENERGY AGENCY, *supra* note 2, at 208.

higher than the comparable market value to cover both production costs and profit. Unlike FITs, feed-in premiums are paid on top of the electricity market price and fluctuate over time. FITs and premiums lower investment and capital risks while guaranteeing access to the grid. As of early 2014, sixty-eight countries had feed-in policies in place.<sup>10</sup>

As quantity-driven instruments, quota schemes, which are used in twenty-nine countries, oblige utilities, electricity suppliers, consumers or other actors in the market to purchase a pre-determined minimum share of renewable electricity or else pay a fine for non-compliance.<sup>11</sup> The quota obligations are usually accompanied with specific certificates (or credits) that serve as proof of the renewable electricity utilization.<sup>12</sup> The actors can sell or buy the certificates when they exceed or fall short of their quota.<sup>13</sup>

Public tenders or auctions assure winning generators of stable purchases of renewable electricity within a defined period at a price fixed through the bidding process. This system provides a mechanism of price discovery in the respective market preventing potential windfall profits or underpayments while maintaining long-term guarantees for generators.<sup>14</sup> This makes it a popular support instrument in fifty-five countries.<sup>15</sup>

Finally, net metering allows households or small businesses that have generating facilities – normally, solar photovoltaic installations or small-scale wind turbines – to send back the excess (non-used) green power produced from those facilities into the grid in exchange for certain favours. In particular, the electricity meter of such customer-generators will run backwards to provide a credit that they can use against the electricity taken from the grid at other times. The customer-generators can also roll over excess electricity produced during one billing period to the next one.<sup>16</sup> This scheme works in forty-three countries.<sup>17</sup>

All the support programmes above are described in general terms only. As we will see in the next sections, they may have specific features in different

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10. See REN21, *supra* note 1, at 89-91.

11. See *id.*

12. HEYMI BAHAR, JAGODA EGELAND & RONALD STEENBLIK, *Domestic Incentive Measures for Renewable Energy with Possible Trade Implications*, in OECD TRADE & ENVIRONMENT WORKING PAPERS 2013/01, at 27 (OECD ed., 2013), <http://www.oecd-ilibrary.org/docserver/download/5k44srlksr6f.pdf?expires=1466439265&id=id&accname=guest&checksum=6E2B2EE91F6DCD2D724EE7722FD430C6>.

13. *Id.*

14. See, e.g., INT'L RENEWABLE ENERGY AGENCY, RENEWABLE ENERGY AUCTIONS IN DEVELOPING COUNTRIES, at 6, 44 (IRENA ed., 2013), [https://www.irena.org/DocumentDownloads/Publications/IRENA\\_Renewable\\_energy\\_auctions\\_in\\_developing\\_countries.pdf](https://www.irena.org/DocumentDownloads/Publications/IRENA_Renewable_energy_auctions_in_developing_countries.pdf); see also FAUNHOFER ET AL., AUCTIONS FOR RENEWABLE ENERGY IN THE EUROPEAN UNION 18 (Mara Marthe Kleiner ed., 2014), [https://www.agora-energiewende.de/fileadmin/Projekte/2014/Ausschreibungen-fuer-Erneuerbare-Energien-EU/Agora\\_Auctions-Paper\\_056\\_web.pdf](https://www.agora-energiewende.de/fileadmin/Projekte/2014/Ausschreibungen-fuer-Erneuerbare-Energien-EU/Agora_Auctions-Paper_056_web.pdf) (study on behalf of Agora Energiewende).

15. See REN21, *supra* note 1, at 89-91.

16. BAHAR ET AL., *supra* note 12, at 29.

17. See REN21, *supra* note 1, at 89-91.

nations. Some of those programmes may require the use of certain generating equipment or inputs of domestic origin, or introduce mechanisms for offsetting costs associated with renewables, with the form and degree of government’s engagement varying from country to country and scheme to scheme.

### III. WTO Dispute Settlement Cases

As of December 1, 2015, six disputes challenging renewable energy subsidies were brought to the WTO under the Subsidies and Countervailing Measures (SCM) Agreement.<sup>18</sup> Only two of them – *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* and *Canada – Measures Relating to the Feed-in Tariff Program* – have so far resulted in panel and appellate rulings adopted. The remaining four cases were brought in relation to biodiesel (*Argentina v. European Union*), solar cells and modules (*United States v. India*), the renewable energy generation sector (*China v. the European Union and certain member states*), and wind power equipment (*United States v. China*). The complainants in all six cases took issue about the respondent’s allegedly unlawful subsidies granted for renewable energy and/or related equipment. The analysis in this section will focus only on the findings in the two aforementioned cases jointly litigated against Canada (hereinafter collectively referred to as “*Canada – Renewable Energy / Canada – Feed-In Tariff Program*”).

In *Canada – Renewable Energy / Canada – Feed-In Tariff Program*, at issue was a FIT programme established by the government of Canadian province

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18. See Request for Consultations by Argentina, *European Union – Certain Measures on the Importation and Marketing of Biodiesel and Measures Supporting the Biodiesel Industry*, WT/DS459/1 (May 15, 2013), [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S006.aspx?Query=\(@Symbol=%20wt/ds459/1%20or%20wt/ds459/1/\\*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds459/1%20or%20wt/ds459/1/*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#); see also Request for Consultations by the United States, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/1 (Feb. 6, 2013), [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S006.aspx?Query=\(@Symbol=%20wt/ds456/1%20or%20wt/ds456/1/\\*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds456/1%20or%20wt/ds456/1/*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#); see also Request for Consultations by China, *European Union and Certain Member States – Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS452/1 (Nov. 5, 2012) [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S006.aspx?Query=\(@Symbol=%20wt/ds452/1%20or%20wt/ds452/1/\\*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds452/1%20or%20wt/ds452/1/*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#); see also Request for Consultations by the European Union, *Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS426/1 (Aug. 11, 2011), [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S006.aspx?Query=\(@Symbol=%20wt/ds426/1\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds426/1)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#); see also Request for Consultations by the United States, *China – Measures Concerning Wind Power Equipment*, WT/DS419/1 (Dec. 22, 2010), [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S006.aspx?Query=\(@Symbol=%20wt/ds419/1\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds419/1)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#); see also Request for Consultations by Japan, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*, WT.DS412/1 (Sep. 13, 2010), available at [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S006.aspx?Query=\(@Symbol=%20wt/ds412/1\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds412/1)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#).

Ontario in 2009. Under that programme, generators of solar or wind-power-based electricity are paid a guaranteed price per kWh of electricity delivered into the Ontario electricity system under twenty-year or forty-year contracts if they meet the “Minimum Required Domestic Content Level” for installation of related equipment.<sup>19</sup>

In September 2010 and August 2011, Japan and the European Union, respectively, initiated WTO dispute settlement proceedings claiming that the FIT scheme violates the national treatment provisions of Article III:4 of the General Agreement on Tariffs and Trade 1994 (GATT) and Article 2.1 of the Agreement on Trade-Related Investment Measures (TRIMs Agreement), as well as subsidy disciplines of Articles 3.1(b) and 3.2 of the SCM Agreement. The first two provisions forbid WTO members to discriminate against imported goods to the favour of competing domestic counterparts. Articles 3.1(b) and 3.2 of the SCM Agreement disallow subsidies contingent on the use of domestic over imported goods, i.e. import-substitution (or local-content) subsidies.

#### A. NATIONAL TREATMENT AND GOVERNMENT PROCUREMENT

Canada argued that the FIT programme regulating government procurement of renewable electricity was not subject to the national treatment provisions because of Article III:8(a) of the GATT,<sup>20</sup> which reads:

The provisions of [Article III of the GATT] shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.<sup>21</sup>

At the outset, the Appellate Body characterized Article III:8(a) as derogation from national treatment under both Article III of the GATT and the TRIMs Agreement.<sup>22</sup> The Appellate Body dismissed some panel findings and advanced its own interpretations instead. It said that the word “procurement” refers to the process of a governmental agency of obtaining products whereas the word “purchased” describes a way of how procurement can materialize.<sup>23</sup> Furthermore, the Appellate Body observed that public purchases must simultaneously meet both conditions of being “for governmental purposes” and “not with a view to commercial resale. . .” in

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19. Panel Reports, *supra* note 4, paras. 7.64-.68.

20. Panel Reports, *supra* note 4, paras. 7.86-.87.

21. Panel Reports, *supra* note 4, para. 7.116.

22. Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, paras. 5.33, 5.56, WT/DS412/AB/R, WT/DS426/AB/R (May 6, 2013) (*adopted* May 24, 2013), [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S006.aspx?Query=\(Symbol=%20wt/ds412/ab/r%20not%20rw\\*\)&Language=ENGLISH&ContextFomerScriptedSearch&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(Symbol=%20wt/ds412/ab/r%20not%20rw*)&Language=ENGLISH&ContextFomerScriptedSearch&languageUIChanged=true#) [hereinafter Appellate Body Reports].

23. *Id.* para. 5.59.

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order to be covered by Article III:8(a).<sup>24</sup> The expression “products purchased for governmental purposes” was construed to mean products “purchased for the use of government, consumed by government, or provided by government to recipients in the discharge of its public functions.”<sup>25</sup> Government purchases for “commercial resale,” which are to be excluded from the scope of Article III:8(a), are arm’s length transactions, and it is the nature of the relationship between a seller and buyer that, according to the Appellate Body, determines whether a transaction is made at arm’s length.<sup>26</sup>

Instead of applying each of these interpretative findings to the case at hand, the Appellate Body limited its analysis to the discussion of the product scope holding that, for the purposes of the Article III:8(a) derogation, the imported product being discriminated against must be in a “competitive relationship” with the domestic product purchased.<sup>27</sup> Because electricity (the product purchased) and electricity generation equipment (the product subject to discrimination) are not like products, it concluded that the FIT local-content requirement cannot be qualified as “laws, regulations or requirements” that are exempted by Article III:8(a).<sup>28</sup> Therefore, the FIT programme discriminating against foreign equipment was found to violate the national treatment provisions at issue.<sup>29</sup>

**B. SUBSIDY**

A “subsidy” regulated by WTO law consists of both a financial contribution (or alternatively income or price support), and a resulting benefit. Under the SCM Agreement, a “financial contribution” takes different forms, such as transfers of public funds, non-collection of otherwise due state revenues, and provision or purchase of goods.<sup>30</sup> The “benefit” exists where the financial contribution (or income/price support) makes its recipient better off compared to other entities in the same market.<sup>31</sup> The benefit is determined through comparison of the terms of receipt of the financial contribution with relevant market conditions.<sup>32</sup>

In the present case, the FIT programme requiring electricity purchases by the Ontario Power Authority, a public agency responsible for management of electricity supply and resources in the province, was characterized as the government purchase of goods, but the Appellate Body admitted that it could additionally fall under other forms of financial contribution or qualify

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24. *Id.* para. 5.69.

25. *Id.* paras. 5.68, 5.74.

26. *Id.* para. 5.71.

27. *Id.* para. 5.79.

28. *Id.*

29. *Id.* para. 6.1(a); Panel Reports, *supra* note 4, paras. 8.2, 8.6.

30. See Article 1.1(a)(1)(i)-(iv) of the SCM Agreement.

31. Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, para. 157, WT/DS70/AB/R (Aug. 2, 1999) (*adopted* Aug. 20, 1999).

32. *Id.*



as income or price support.<sup>33</sup> The benefit determination focused on whether FIT prices paid to generators were more advantageous than non-FIT electricity prices in the marketplace. The panel failed to find a FIT-related benefit because of the absence of a competitive electricity market in Ontario and the unsuitability of proposed price benchmarks outside Ontario.<sup>34</sup> The panel's analysis was based on the premise that the relevant market for the subsidy determination was a single market for electricity generated from all sources of energy, rather than a separate green electricity market as argued by Canada. The panel explained this with the fact that consumers in Ontario do not distinguish between renewable and conventional electricity.<sup>35</sup> But one of the panellists dissented and said that the mere existence of the FIT programme suggests that the benefit was conferred, as high-cost green projects would have failed without government's support.<sup>36</sup> On appeal, some panel's findings were reversed. The Appellate Body reminded that prices should be compared within a single market as appropriately defined. The latter, according to the Appellate Body, requires consideration of both demand-side (consumer-based) and supply-side (producer-based) factors to check if renewable electricity and conventional electricity are sufficiently substitutable to be deemed to be in the same market. In the present case, the panel confined itself only to the demand side where consumers do not differentiate between two types of electricity and concluded that the relevant market is the blended electricity market. But the Appellate Body found that supply-side factors, which are "important differences in cost structures and operating costs and characteristics among generating technologies,"<sup>37</sup> suggested that price comparisons should have been conducted within competitive markets of renewable electricity only. It is government's choice of the energy supply-mix including wind and solar power-generated electricity which, the Appellate Body said, enables creation of the market of renewable electricity.<sup>38</sup> But the Appellate Body emphasized that such supply-mix policy "in and of itself" cannot be said to confer a benefit.<sup>39</sup> In other words, the government's role in creation of a distinct green electricity market is not, *per se*, tantamount to a benefit, and hence a subsidy. Eventually, neither the panel nor the Appellate could confirm that the FIT programme at issue was indeed a WTO-contemplated "subsidy" subjected to the SCM Agreement disciplines.

### C. ASSESSMENT

The litigation in *Canada – Renewable Energy / Canada – Feed-In Tariff Program* is noteworthy in many aspects. First, both complaining parties have

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33. Appellate Body Reports, *supra* note 22, paras. 5.121, 5.128.

34. Panel Reports, *supra* note 4, para. 7.313(c).

35. *Id.* para. 7.318.

36. *Id.* para. 9.23.

37. Appellate Body Reports, *supra* note 22, para. 5.178.

38. *Id.* para. 5.175.

39. *Id.*

emphasized that they did not question the objectives of the FIT programme to combat climate change and reduce carbon emissions. As declared by Japan, this case involved “trade and investment,” rather than “trade and environment,” issues,<sup>40</sup> with panellists emphasizing that they did not opine about the legitimacy of Ontario’s goal of promoting renewables.<sup>41</sup> While all participants in this dispute seem to have fully acknowledged the necessity of adequate government responses to global warming, they were mainly concerned about the local-content obligation of the Canadian FIT programme. A basic but important lesson from this case is that governments can minimize trade conflicts by not attaching “localization” elements to their green electricity policy.

Second, it is the first time when the adjudicators construed the meaning of the government procurement clause under Article III of the GATT.<sup>42</sup> The question of Article III:8(a) applicability to public purchases of green electricity may arise in the future, for instance, in relation to those support mechanisms that, like some EU schemes considered below, do not extend to green electricity produced outside of the supporting country and thus treat domestic electricity more favourably. The provision in question would provide an ideal protection especially for government-dominated electricity systems, with purchasing, transmission and distribution functions allocated to public organizations. Indeed, where one public entity obtains electricity from generators and transmits it to other public entities for distribution to end-users, one may argue that these public bodies are closely related as government units and, as a result, there are no arm’s-length transactions between the purchaser and seller of electricity, and hence no “commercial resale.” Because “products purchased for governmental purposes“ refer, *inter alia*, to “what is provided by government to recipients in the discharge of its public functions,” it would arguably be right to say for our case with no private distributors in the system that it is a public function to supply end-users with electricity.

Third, the Appellate Body’s analysis of subsidy issues gives much food for thought and far-reaching implications from two sides of the same coin. On the one hand, some scholars<sup>43</sup> doubt whether the supply-side factors, the government choice of energy-mix and the bifurcation of public intervention in a new versus existing market, really matter to the subsidy determination.

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40. Panel Reports, *supra* note 4, para. 7.7.

41. *Id.* para. 7.153.

42. General Agreement on Tariffs and Trade art. III: 8(a), OCT. 30, 1947, 61 STAT. A-11, 55 U.N.T.S. 194.

43. See, e.g., Aaron Cosbey & Petros C. Mavroidis, *A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO*, 17 J. INT’L ECON. L. 11 (2014); Rajib Pal, *Has the Appellate Body’s Decision in Canada – Renewable Energy / Canada – Feed-in Tariff Program Opened the Door for Production Subsidies?*, 17 J. INT’L ECON. L. 125 (2014); Luca Rubini, *The Good, the Bad, and the Ugly. Lessons on Methodology in Legal Analysis from the Recent WTO Litigation on Renewable Energy Subsidies*, 48 J. WORLD TRADE 895 (2014); Rolf H. Weber & Rika Koch, *International Trade Law Challenges by Subsidies for Renewable Energy*, 49 J. WORLD TRADE 757 (2015).

They warn that the benefit analysis in this case could somehow weaken the WTO's stance towards trade-distorting public support in different industrial sectors and suggest that such "judicial acrobatics" should be replaced with the redrafting of the SCM Agreement to accommodate green subsidies in a more appropriate way.<sup>44</sup> But on the other hand, the appellate findings deserve praise from the environmental point of view.<sup>45</sup> At the time when WTO members as law-makers have so far remained idle over softening the existing subsidy regime where needed, the Appellate Body tried, through its interpretative authority, to carve out some policy space for promotion of clean energy. Indeed, the narrowed definition of the relevant market and the exclusion of the government's market-creating role from the definition of "subsidy" broaden the scope of environmental actions exempt from the SCM Agreement. Although it remains to be seen how this ruling will be followed in the future, many countries may perceive the appellate interpretations as an important signal of encouragement in implementation of their renewable energy agenda.

#### **IV. EU Dispute Settlement Cases**

Stimulus policies for renewable electricity have also been questioned under EU law. We could find four cases where economic operators disputed green schemes before national courts which, in turn, asked the Court of Justice for the interpretation of certain EU provisions at issue. This section examines those cases under EU rules on state aid and intra-regional import restrictions.

##### **A. STATE AID**

Article 107 of the Treaty on the Functioning of the European Union (TFEU) imposes a general ban on aid granted by a member state or through state resources – "state aid" – that distorts competition and trade within the EU area by favouring certain enterprises – "undertakings" – or the production of certain goods.

##### **1. *PreussenElectra***

In *PreussenElectra*, at issue was a German law that required regional electricity distribution undertakings to purchase electricity generated in their supply area from renewable energy sources at fixed minimum prices higher than its real economic value. It also obliged upstream suppliers of conventional electricity partially to compensate the distribution undertakings for additional costs arising from such a purchase obligation. *PreussenElectra*, an upstream electricity supplier, brought a complaint to a

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44. *Id.*

45. See Sherzod Shadikhodjaev, *First WTO Judicial Review of Climate Change Subsidy Issues*, 107 AM. J. INT'L L. 864 (2013); Sherzod Shadikhodjaev, *Renewable Energy and Government Support: Time to green\_b the SCM Agreement?*, 14 WORLD TRADE REV. 479 (2015).

court of Germany seeking recovery of the compensatory payment to Schleswag, a regional electricity distributor, on the grounds that the law in question was incompatible with European Community rules.<sup>46</sup> In the judgment of 2001, the Court of Justice recognized an “undeniable advantage” for producers of renewable electricity,<sup>47</sup> but eventually concluded that the FIT programme at issue did not constitute state aid. This finding was based mainly on the facts (i) that both the distributor and supplier of electricity were private entities, and (ii) that the mere legislative requirement for the former to purchase green electricity at fixed prices and for the latter to share the associated financial burden did not involve any direct or indirect transfer of state resources to generators.<sup>48</sup> The ruling stipulated that this conclusion was not undermined by the fact that the undertakings concerned made fewer profits due to their purchase obligation and that they had fewer taxes to pay as a result. This is so because “a diminution in tax receipt for the state” was an “inherent feature” of the German legislation and could not qualify as state aid through a tax waiver.<sup>49</sup>

## 2. *Vent De Colère*

The *Vent De Colère* case examined the French scheme under which additional costs arising from distributors’ purchases of wind-generated electricity at an above-market price have been offset by charges paid by final consumers of electricity in France. Pursuant to the Court of Justice’s previous interpretation, a measure constitutes “state aid” if four cumulative conditions are met: (i) there must be an intervention by the state or through state resources; (ii) that intervention must be liable to affect trade between member states; (iii) it must confer an advantage on the recipient; and (iv) it must distort or threaten to distort competition.<sup>50</sup> Considering that the measure at issue satisfied the last three conditions, the local authorities asked the Court of Justice whether it met the first condition as well. In the 2013 ruling, the Court of Justice basically addressed two questions as to whether the measure was attributable to the state, and whether arising advantages were granted directly or indirectly through state resources. With respect to the first question, the Court of Justice confirmed that this scheme was attributable to the French state, because the financial mechanism was established by legislation and hence through the involvement of the public agencies.<sup>51</sup> As for the second question, the Court of Justice recalled its previous interpretation that the concept of “intervention through state

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46. For the background of this dispute, see Advocate General Jacobs in Case C-379/98, *PreussenElektra AG v Schleswag AG* (2001) E.C.R. I-2099, paras. 1-62.

47. Case C-379/98, *PreussenElektra AG v Schleswag AG* (2001) E.C.R. I-2099, paras. 54, 61.

48. *Id.* paras. 59-61.

49. *Id.* para. 62; Advocate General Jacobs in Case C-379/98, *supra* note 46, paras. 161-62.

50. Case C-262/12, *Association Vent De Colère! Fédération nationale and Others v Ministre de l’Écologie, du Développement durable, des Transports et du Logement and Ministre de l’Économie, des Finances et de l’Industrie*, 2013, not yet published, para. 15.

51. *Id.* paras. 17-18.

resources” – the first component of “state aid” above – covers not only advantages granted directly by the state, but also those granted through a public or private body appointed or established by the state to administer the aid.<sup>52</sup> In the context of the present case, the Court of Justice noted that a public body indeed administered – and thus kept public control over – the funds collected from all final consumers with a view to transferring them to the electricity distributors concerned, and that domestic regulations determined the amount of charges imposed on consumers.<sup>53</sup> On this basis, it concluded that the offset mechanism constituted an intervention through state resources.<sup>54</sup>

## B. IMPORT RESTRICTIONS

As part of the principle of free movement of goods, Article 34 of the TFEU prohibits the use between member states of “[q]uantitative restrictions on imports and all measures having equivalent effect.”<sup>55</sup> According to the caselaw, this prohibition applies to any measure that “is capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.”<sup>56</sup>

### 1. *PreussenElectra*

It was stipulated in *PreussenElectra* that electricity, as a “good,” is covered by the import-restriction-forbidding rule.<sup>57</sup> The Court of Justice noted that the German law, which explicitly required purchase of the green electricity within the distributors’ area of supply, was able to prevent the use of that type of electricity from non-German sources,<sup>58</sup> such as renewable electricity produced in Sweden at a lower cost.<sup>59</sup> But it concluded that the legislation in question was not inconsistent with the EU ban on import restrictions given the contribution of the contested measure to the implementation of the EU policy for protection of the environment and the health and life of humans, animals and plants. The Court of Justice also noted the view of the European Commission that operation by each member state of a system of certifying the origins of renewable electricity would be essential in order to make trade in renewable electricity possible in practice.<sup>60</sup>

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52. *Id.* para. 20.

53. *Id.* paras. 19-33.

54. *Id.* para. 37.

55. Treaty on the Functioning of the European Union art. 34, March, 30, 2010 O.J. (C 83) 47.

56. Case C-379/98, *supra* note 47, para. 69.

57. Advocate General Jacobs in Case C-379/98, *supra* note 46, para. 197.

58. Case C-379/98, *supra* note 47, para. 71.

59. Advocate General Jacobs in Case C-379/98, *supra* note 46, para. 200.

60. *See* Case C-379/98, *supra* note 47, paras. 72-81.

## 2. *Ålands*

The *Ålands* case dealt with a Swedish green energy system, which awards producers of renewable electricity green certificates, special instruments that can be sold to local suppliers and users who have a quota obligation for the purchase of renewable electricity. Finnish company Ålands Vindkraft operated a wind farm in Finland connected to the closest Swedish grid. It applied for green certificates in Sweden, but the application was turned down on the grounds that only electricity generating facilities within Sweden were eligible for obtaining green certificates.<sup>61</sup> Notwithstanding its finding of the import-impeding effect on foreign green power in the sense of TFEU Article 34, the Court of Justice held in 2014 that the territorial restriction in question was nevertheless justified.<sup>62</sup> While agreeing with the view that the climate mitigation objective could, in principle, be achieved through the use of renewable electricity irrespective of its origin, the Court of Justice concluded that the territorial limitation did not go beyond what was necessary to attain that objective for several reasons.<sup>63</sup> First of all, EU law, as it stands, has not yet harmonized the national support schemes for green electricity across the region.<sup>64</sup> In other words, public incentives in this field do not need to benefit outsiders where the green energy market itself remains fragmented within the EU. Moreover, national stimulus programmes tend to target green electricity at its production (rather than consumption) stage, because the green nature of electricity can be easily tracked when electricity is produced. Thus, the environmental objectives of reducing carbon emissions can be pursued primarily at the production stage.<sup>65</sup> Interestingly, in an unusual departure from its typical practice, the Court of Justice did not follow the Advocate General’s opinion in this and the *Essent* cases. The Advocate General took the view that the territorial restrictions of the support at issue in fact violated the EU principle of the free movement of goods and that the EU rules permitting such restrictions should be invalidated.<sup>66</sup> His main idea was that the limited access to national support schemes would contradict one of the principal goals of EU’s renewable energy policy to “promote cross-border exchanges of green electricity.”<sup>67</sup>

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61. Advocate General Bot in Case C-573/12, *Ålands vindkraft AB v Energimyndigheten*, 2014, not yet published, paras. 24-26.

62. See Case C-573/12, *Ålands vindkraft AB v Energimyndigheten*, 2014, not yet published, para. 93; Advocate General Bot in Case C-573/12, *supra* note 61, para. 93.

63. Case C-573/12, *supra* note 62, paras. 93, 104.

64. *Id.* paras. 49-54, 94.

65. *Id.* paras. 94-96.

66. See Advocate General Bot in Case C-573/12, *supra* note 61, paras. 79-121; Advocate General Bot in Joined Cases C-204/12 to C-208/12, *Essent Belgium NV v. Vlaamse Reguleringsinstantie voor de Elektriciteits - en Gasmarkt*, 2014, not yet published, paras. 70-116.

67. Advocate General Bot in Case C-573/12, *supra* note 61, para. 87.

3. *Essent*

The Flemish Region of Belgium has operated a support scheme similar to the Swedish one above. Electricity suppliers there have to surrender each year a specified number of green certificates for renewable electricity of local origin or otherwise pay a fine. In order to fulfil its quota obligation, Belgian supplier Essent surrendered both green certificates for domestically produced electricity and guarantees of origin obtained in Denmark, Sweden, the Netherlands and Norway. But those guarantees were not accepted for issuance of green certificates.<sup>68</sup> Pursuant to the EU renewable energy directive, guarantees of origin are special instruments – mutually recognizable among EU members – that prove the green nature of electricity and facilitate trade in renewable electricity.<sup>69</sup> In 2014, the Court of Justice observed that guarantees of origin, unlike green certificates, did not entitle their holders to national support mechanisms.<sup>70</sup> In line with the *Ålands* findings, the Court of Justice found that the current EU rules did not require extension of those mechanisms to foreign green electricity, and ultimately confirmed the compatibility of the Flemish scheme with the EU principle of the free movement of goods on the basis of environmental and climate-mitigation considerations.<sup>71</sup> The Court of Justice stressed, however, that the territorial restriction is justified as long as the suppliers concerned can obtain green certificates under fair terms in a genuine market for certificates and no excessive penalties apply to traders who have not fulfilled their quota obligation.<sup>72</sup> On the question of whether the Flemish measure restricted the free movement of guarantees of origin as goods, the Court simply noted that even on the assumption that the guarantees were goods, the restriction of their movement could similarly be justified.<sup>73</sup>

C. ASSESSMENT

As renewable energy programmes are susceptible to state aid (or subsidy) challenges, governments are tempted to design sophisticated schemes that, for instance, make *private* entities pay for green electricity without actual public funds involved. But even this cannot fully prevent legal attacks as is evident from two state aid cases considered above.

The judgement in *PreussenElectra* implied that state aid comprises resources provided out of the public budget, with the corresponding EU rules not applying, as a result, to statutory requirements causing private

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68. For the factual background, see Joined Cases C-204/12 to C-208/12, *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits - en Gasmarkt*, 2014, not yet published, paras. 1-42.

69. *Id.* para. 79.

70. *Id.*

71. *Id.* paras. 88-116.

72. *Id.* para. 116.

73. *Id.* para. 73-81.

money to flow into pockets of green electricity producers.<sup>74</sup> Similarly, such requirements would hardly qualify as a “financial contribution” under the WTO regime. Yet, they may still fall under the category of “any form of . . . price support,” the alternative group of public actions caught by the WTO definition of “subsidy.” Indeed, the government-created mechanism of compulsory private purchases at fixed premium rates – analogous to the German scheme in *PreussenElectra* – represents what the WTO panel in *China – GOES* characterized as “direct government intervention in the market with the design to fix the price of a good at a particular level.”<sup>75</sup> This mechanism differs from measures causing “a random change in price” as an incidental side effect that, according to that panel, is excluded from the “price support” category.<sup>76</sup> It follows that unlike the EU regime, the WTO subsidy rules would capture the *PreussenElectra*-like schemes if the “benefit” element is confirmed to exist.

The *Vent De Colère* judgement indicates that where private resources are transferred to electricity producers through a public organization, this may well give grounds for a positive determination of state aid. In *PreussenElectra*, unlike *Vent De Colère*, no system of fund management existed and private operators were bound by the purchasing obligation by means of their own financial resources that were not under government control.<sup>77</sup> These factual differences led to contrasting conclusions in two cases dealing with non-public resources. One can draw a parallel with WTO subsidy law, which also applies to indirect subsidies granted through funding mechanisms or private bodies “entrusted” or “directed” by government.<sup>78</sup>

Despite the ability of green electricity imports to replace fuel-based electricity and thus contribute to the cutting of carbon emissions in the importing country, the Court of Justice made it clear in *Ålands* and *Essent* that this fact alone does not invalidate a territorial limitation of the importing country’s green electricity support. Some commentators suggest that this finding may have certain influence on on-going renewable energy reforms in many EU countries putting an end to the demands from the European Commission to make domestic promotion available to foreign generators.<sup>79</sup> But the judgments in those cases were simply based on the *current* EU renewable energy law that does not require abolishment of the territorial limitations in question. Thus, the formation of a single European market of renewable electricity in the future will likely render the “localized”

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74. Christian Koenig & Jürgen Kühling, *EC Control of Aid Granted through State Resources*, EUR. ST. AID L. Q. (2002), at 9, <http://estal.lexxion.eu/article/ESTAL/2002/1/6>.

75. Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, paras. 7.85-.86, WT/DS414/R (June 15, 2012) (adopted Nov. 16, 2012).

76. *Id.*

77. Case C-262/12, *supra* note 50, paras. 34-36.

78. See Article 1.1(a)(1)(iv) of the SCM Agreement.

79. See Joe Kirwin, *EU High Court: Single Market Rules Don't Apply to Renewable Energy Feed-In Tariffs*, BLOOMBERG BNA: INTERNATIONAL TRADE DAILY (July 3, 2014).



support schemes unjustifiable. The fact that, according to the *Ålands* decision, Norway and Sweden have managed to merge their green certificate support schemes suggests that regional integration of this kind is an achievable goal.<sup>80</sup> Although the Advocate General's conclusion about the free-movement-of-goods breaches was disregarded in both cases, we believe that he was, nevertheless, right in emphasizing the importance of cross-border exchanges of renewable electricity:

It is important to point out in this connection that one of the four elements of the European Union's environmental policy, set out in Article 191(1) TFEU, is "prudent and rational utilisation of natural resources." The development of cross-border trade in green electricity which would result from making national support schemes accessible to foreign electricity producers would contribute to the attainment of that objective by facilitating the optimal distribution of production between the Member States according to their respective potentials.<sup>81</sup>

With the global trend of growing support and production of green electricity,<sup>82</sup> the factual situations of EU cases may well be subjected to WTO's legal scrutiny as well. For instance, if WTO member *A*'s renewable energy programmes do not apply to related green imports from member *B*, the latter could, in principle, challenge *A*'s incentives as an import restriction being contrary to Article XI of the GATT and/or a discriminatory measure within the meaning of Article III of the GATT on national treatment. Articles XI and III apply to import restrictions at the border and within the border respectively. Article XI bans any "prohibition or restrictions other than duties, taxes or other charges . . . on the importation of any product of the territory of any other [Member]." The scope of border restrictions here comprises virtually any government measure (other than monetary charges)—not confined to ordinary quotas or licences—that have a restrictive effect on the value or volume of imports.<sup>83</sup> Thus, similar to the complainants in the EU cases above, *B* could argue that the restriction of the access to incentives is tantamount to a de facto limitation of imports of renewable electricity as domestic suppliers would prefer government-supported domestic electricity. EU jurisprudence has construed the EU clause outlawing quantitative import restrictions—which is comparable to Article XI—to embrace national support measures and, even, government encouragement of local-content purchases.<sup>84</sup> The EU rule, interpreted in that way, seems to blur the distinction between a border and internal

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80. Case C-573/12, *supra* note 62, paras. 22, 101.

81. Advocate General Bot in Case C-573/12, *supra* note 61, para. 109 (emphasis original, footnote omitted).

82. See INT'L ENERGY AGENCY, *supra* note 2, at 199-229.

83. See Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, paras. 7.227-275, WT/DS366/R (Apr. 27, 2009) (adopted May 20, 2009).

84. Case C-379/98, *supra* note 47, paras. 69-70; Advocate General Jacobs in Case C-379/98, *supra* note 46, para. 201.

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measures. Whereas this is not surprising for the EU, having a common market of goods without customs borders inside, the WTO draws a strict demarcation line between border and internal restrictions. Thus, Articles XI and III cannot apply to the same measure simultaneously,<sup>85</sup> unless they deal with different elements of the given measure.<sup>86</sup> The threshold WTO criterion, in distinguishing internal measures from border ones, is whether the factor triggering those measures takes place inside the border.<sup>87</sup> As the trigger factor for public favours in our case is the *internal* production and use of green electricity, Article III should be considered as more relevant than Article XI. But, even if incentives are challenged under Article III for being discriminatory against foreign green electricity, they may be defended in the WTO on different grounds, as follows.

First, if the government or a public utility is the purchaser of renewable electricity, a national treatment exception for government procurement under GATT Article III:8(a) could be invoked, with all interpretative parameters defined in *Canada – Renewable Energy / Canada – Feed-In Tariff Program* to be satisfied. Section III.C of this article above considers when this exception would apply.

Second, if the green incentive is considered to be a subsidy, an exception under GATT Article III:8(b) could apply. That provision exempts from the national treatment principle: (i) "the payment of subsidies exclusively to domestic producers" to the exclusion of foreign producers; and (ii) "subsidies effected through government purchases of domestic products."<sup>88</sup> The second category would be of help if green electricity subsidies materialize through government procurement. The first category is, however, limited to only direct subsidies to producers involving the expenditure of revenue by the government.<sup>89</sup> Conversely, subsidies to consumers or tax reductions aimed at encouraging the use of green electricity would not benefit from this exception.<sup>90</sup>

Third, Article XX of the GATT foresees general exceptions to GATT obligations where an otherwise illegal measure is taken for, inter alia, the

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85. See Mitsuo Matsushita, Thomas J. Schoenbaum & Petros C. Mavroidis, *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY* (2nd ed. 2006), at 270-71.

86. See Panel Report, *India – Measures Affecting the Automotive Sector*, paras. 7.224, 7.296, WT/DS146/R, WT/DS175/R (Dec. 21, 2001) (adopted Apr. 5, 2002); Appellate Body Report, *Argentina – Measures Affecting the Importation of Goods*, paras. 5.148-149, WT/DS438/AB/R, WT/DS444/AB/R, WT/DS445/AB/R (Jan. 15, 2015) (adopted Jan. 26, 2015).

87. See Appellate Body Report, *China – Measures Affecting Imports of Automobile Parts*, para. 163, WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R (Dec. 15, 2008) (adopted Jan. 12, 2009); Sherzod Shadikhodjaev, *Customs Duty or Internal Charge? Revisiting the Delineation Issue within Treaty Interpretation in the China – Auto Parts Case*, 7 *ASIAN J. WTO & INT'L HEALTH L. & POL'Y* 195 (2012), at 198-202.

88. General Agreement on Tariffs and Trade, *supra* note 42, art. III: 8(b).

89. Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, at 33-34, WT/DS31/AB/R (June 23, 1997) (adopted July 30, 1997).

90. See Rüdiger Wolfrum, Peter-Tobias Stoll & Holger P. Hestermeyer (eds.), *WTO – TRADE IN GOODS* (2011), at 159.

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protection of human, animal or plant life or health; or the conservation of exhaustible national resources.<sup>91</sup> Pursuant to a two-tee test developed in WTO caselaw, the exception is operational only if the invoking party proves that its measure is relevant to any of the identified public purposes and that it is not applied in a manner which constitutes “a means of arbitrary or unjustifiable discrimination,” or “a disguised restriction on international trade.”<sup>92</sup>

One should bear in mind, however, that the GATT exceptions apply within the context of the GATT and do not extend to other WTO treaties, absent some textual indication to the contrary.<sup>93</sup> For instance, Article III-exempt government purchases of electricity can still be caught by the SCM Agreement, which requires a separate legal analysis independent of whether this measure is justifiable under the GATT. Another caveat is that the applicability of the aforementioned flexibilities is decided on a case-by-case basis.

Future developments in the EU renewables sector may also cause third countries to take issue with the EU (or its member states). Suppose this regional bloc will eventually achieve full integration of electricity markets, with national support being available to both domestic and imported green electricity. Should, however, the incentives be limited to the EU territory, non-EU countries, especially close neighbours, whose electricity would be “disadvantaged” could claim the violation of the WTO’s most-favoured-nation (MFN) principle. In that case, GATT Article XXIV for regional trade agreements may come into the play. The EU could argue that the EU-wide extension of domestic support systems deepens free trade in compliance with the internal requirement of Article XXIV that demands substantial liberalization of intra-regional trade. But the opponents would argue that such an extension would be contrary to the external requirement of Article XXIV not to increase the existing barriers to trade with third countries, as EU suppliers would prefer subsidized EU-originating green electricity opposed to imports from non-EU countries. This imaginary, yet foreseeable, example suggests that in their efforts to harmonize their electricity systems EU policy-makers will also need to take into account the interests of outside countries. Ideally, making both EU and non-EU electricity operators eligible for EU members’ domestic incentives would be most desirable from the WTO-regime’s perspective.

Finally, national renewable-energy programmes have created new types of commercial items, such as green certificates and guarantees of origin, that can be used in international transactions. As the EU judicial practice suggests, creating barriers to cross-border exchanges thereof is a sound reason for trade tensions in the EU and beyond. But, the legal nature of

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91. General Agreement on Tariffs and Trade, *supra* note 42, art. XX.

92. Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, at 22, WT/DS2/AB/R (Apr. 29, 1996) (adopted May 20, 1996).

93. See Shadikhodjaev, *Renewable Energy and Government Support: Time to “Green” the SCM Agreement?*, *supra* note 45, at 503.

these items, such as whether they are goods or not, remains unclear. When it comes to the WTO, there is no across-the-board definition of “goods.” But because green certificates or guarantees of origin can be sold to the market separately from electricity,<sup>94</sup> WTO provisions on goods should apply to them in principle. In this regard, it is noteworthy that the Appellate Body construed the term “goods,” used in the SCM Agreement, as comprising even items that are not both tradable as such and subject to tariff classification.<sup>95</sup>

## V. Investor-State Dispute Settlement Cases

Where a country infringes its obligations under an international investment agreement, the affected investors may bring a complaint against the host government through investor-state dispute settlement procedures.<sup>96</sup> This section discusses investment disputes related to renewable electricity support schemes. As all of them are still pending cases, we have mainly relied on disputing parties’ submissions, as well as other publically available sources to describe factual backgrounds and main legal issues.

### A. MESA POWER V. CANADA

In July 2011, US-based Mesa Power Group, LLC notified the Government of Canada of its intent to initiate international arbitration under the North American Free Trade Agreement (NAFTA) over certain aspects of Ontario’s FIT programme including its local content requirement.<sup>97</sup> Wind energy projects in Ontario normally go through a strict evaluation process resulting in priority ranking scores that the Ontario Power Authority uses to grant FIT contracts to successful applicants.<sup>98</sup> All four wind-power generation projects proposed by the claimant received low scores.<sup>99</sup> Being concerned about the accuracy of the ranking methodology, Mesa Power asked for clarification but was not provided with any substantive explanation from the Canadian Government.<sup>100</sup> Meanwhile, the Ontario Power Authority unexpectedly issued a new set of rules for awarding FIT contracts that, according to Mesa Power, disfavoured its proposed

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94. At the *Essent* hearing, it was acknowledged that “a guarantee of origin may, like a green certificate, be sold separately from electricity.” See Advocate General Bot in Joined Cases C-204/12 to C-208/12, *supra* note 66, para. 112.

95. Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, para. 67, WT/DS257/AB/R (Jan. 19, 2004) (adopted Feb. 17, 2004).

96. See *Factsheet on Investor-State Dispute Settlement*, EUROPEAN COMMISSION (Oct. 3, 2013), available at [http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc\\_151791.pdf](http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151791.pdf).

97. This case deals with the same Ontario FIT program as the WTO case in section III of this article; *Mesa Power Group LLC v. Government of Canada*, (Perm. Ct. Arb. 2011) Case No. 2012-17, Notice of Intent (July 6, 2011), paras. 1-21.

98. *Mesa Power Group LLC v. Government of Canada*, *supra* note 97.

99. *Id.*

100. *Id.*

projects as those rules allowed rival wind projects to move from other parts of Ontario to the region in which the claimant was interested.<sup>101</sup>

In this dispute, Mesa Power claims that the arbitrary and non-transparent contract-awarding process violated NAFTA Article 1105 (minimum standard of treatment), and that the “buy local” element contravened Article 1106 that prohibits certain investment-related performance requirements.<sup>102</sup> In addition, it alleges that Canada treated Canadian and Korean companies more favourably in breach of Articles 1102 (national treatment) and 1103 (MFN) respectively, and that Canada did not comply with Article 1503(2) by failing to ensure that the Ontario Power Authority as a “state enterprise” acted properly in carrying out Canada’s NAFTA obligations.<sup>103</sup> It claims CDN \$775 million in damages.<sup>104</sup>

In response, Canada has raised objections on both procedural and substantive issues. First, it argues that the tribunal lacks jurisdiction because, *inter alia*, the claimant filed its notice of arbitration before a NAFTA-required six-month waiting period had elapsed.<sup>105</sup> Second, the challenged measures constitute, it says, public procurement that NAFTA Article 1108 exempts from the obligations under Articles 1102, 1103 and 1106.<sup>106</sup> Moreover, Canada disagrees with the alleged discrimination against the investor, because no single instance of favourable treatment of Canadian companies was identified in support of the Article 1102 claim, and because the Korean consortium, which was given certain preferences under a renewable energy scheme different from the FIT programme, and the claimant were not in “like circumstances.”<sup>107</sup> Canada also dismissed the Article 1105 claim on the grounds that FIT applications were, in fact, fairly and reasonably assessed and that the provision does not prevent the government from resorting to regulatory adjustments where needed.<sup>108</sup>

#### B. WINDSTREAM V. CANADA

In October 2012, Windstream Energy LLC, owned by a New York-based investment group, initiated an investor-state dispute under the NAFTA against Canada over the government of Ontario’s moratorium on a FIT project for offshore wind development.<sup>109</sup> The Ontario Power Authority granted Windstream a FIT contract with respect to 100-turbine offshore

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101. *Id.*

102. *Id.* paras. 22-28.

103. *Id.*

104. *Id.* para. 37.

105. Mesa Power Group LLC v. Government of Canada, (Perm. Ct. Arb. 2014) Case No. 2012-17, Respondent Counter-Memorial and Reply on Jurisdiction (Feb. 28, 2014), paras. 234-61.

106. *Id.* paras. 307-44.

107. *Id.* paras. 345-80.

108. *Id.* paras. 381-449.

109. Windstream Energy LLC v. Government of Canada, (Perm. Ct. Arb. 2012) Notice of Intent (Oct. 17, 2012), para. 15.

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generation facility in Lake of Ontario, the source of drinking water for the local population.<sup>110</sup> This was the largest single FIT contract awarded for wind-power generation.<sup>111</sup> Windstream expected that higher and steadier wind speeds in the offshore zone would produce a higher energy-generating capacity than any FIT project in the onshore area.<sup>112</sup> A full implementation of the project, however, required approvals from different competent bodies. Being informed by the Canadian side of some possible regulatory risks, Windstream nevertheless executed the contract, made some pre-payments, bore certain costs and entered into binding arrangements for purchasing turbine supply.<sup>113</sup> But lacking scientific certainty about possible effects on human health, safety and environment, the government of Ontario decided to delay all existing approval procedures and froze the project until more clarity would be made through yet-to-be established comprehensive assessment procedures.<sup>114</sup> But, Windstream alleges that the moratorium was politically motivated and imposed due to the higher cost of energy production from offshore facilities compared to onshore wind development.<sup>115</sup>

Windstream claims that Canada unlawfully expropriated Windstream’s investments contrary to NAFTA Article 1110, because the moratorium has deprived it of control of its investments and related benefits, with no market-value compensation paid.<sup>116</sup> Windstream argues that Canada violated its right to fair and equitable treatment under Article 1105 through “arbitrary, irrational and discriminatory” measures diminishing “legitimate expectations” of the investor.<sup>117</sup> Finally, the claimant argues that the moratorium as applied solely to this and not other FIT projects of domestic and foreign investors constitutes discrimination against Windstream within the meaning of Articles 1102 and 1103.<sup>118</sup> For these reasons, Windstream claims damages of at least CDN \$475,230,000.<sup>119</sup>

But the Canadian government refutes the Article 1105 claim saying that the claimant invested in a “highly speculative venture” with full knowledge of the associated risks before the FIT contract was signed.<sup>120</sup> As for the Articles 1102 and 1103 allegations, it argues that the moratorium applies to all offshore wind power projects without exception, and that the claimant’s examples of more favourable treatment apply, in fact, to completely different

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110. *Id.*

111. *Id.*

112. *Id.* para. 17.

113. *Id.* para. 30.

114. *Id.* paras. 25-26.

115. *Id.*

116. *Id.* paras. 32-44.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Windstream Energy LLC v. Government of Canada*, (Perm. Ct. Arb. 2012) Respondent Response to Notice of Arbitration (Apr. 26, 2013), para. 53.

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types of projects in different circumstances.<sup>121</sup> Finally, Canada dismisses the expropriation claim under Article 1110 as the moratorium is not intended to be permanent and does not deprive the claimant of its investment.<sup>122</sup>

C. EUROPEAN CASES

A number of investor-state disputes have recently attacked certain changes in green electricity promotion schemes in some European countries. Spain, Italy, and the Czech Republic are among the countries that have reportedly faced arbitral challenges. To date, at least seventeen arbitrations are pending.<sup>123</sup> At issue in these proceedings are various governmental measures that have retroactively reduced initially-fixed FIT rates or duration of green incentives, imposed extra taxes on FIT operators, introduced limits on production hours for electricity eligible for FIT prices, or otherwise modified statutory or contractual terms to the detriment of investors.<sup>124</sup> The national authorities have made those adjustments, typically for austerity reasons, amid the financial crisis in Europe or because of a fall in market prices of renewable energy. Although arbitration documents have not been publicized yet, the affected investors could presumably allege violations of provisions on (indirect) expropriation and fair and equitable treatment either under the plurilateral Energy Charter Treaty that provides investment protection in the (electrical) energy sector or under a respective bilateral investment agreement.<sup>125</sup>

D. ASSESSMENT

In general, the claimants in the cases above have challenged the host country's measure under investment treaty standards of non-discrimination, fair and equitable treatment and expropriation. With still no rulings, our assessment here is largely speculative. Given a wide variety of investment treaties, the investor-state jurisprudence is less consistent, and hence less predictable, than WTO or EU caselaw. Nevertheless, the judicial practice in this field has generally required quite a high threshold for establishing violations, except where government actions are excessively arbitrary, unfair and discriminatory against foreign investors or their investment.

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121. *Id.* paras. 44-48.

122. *Id.* paras. 57-60.

123. Ratchel W. Thorn, *Renewable Energy Policy Changes Lead to Damages Claims – Investment Treaties, European Feed-In Tariffs, Arbitration, Political Risk, Expropriation* (June 2014), available at [http://www.chadbourn.com/renewable\\_energy\\_policy\\_changes\\_june2014\\_projectfinance](http://www.chadbourn.com/renewable_energy_policy_changes_june2014_projectfinance).

124. See Jha Vyoma, *Trends in Investor Claims over Feed-in Tariffs for Renewable Energy*, INVESTMENT TREATY NEWS (July 19, 2012), available at <http://www.iisd.org/itn/2012/07/19/trends-in-investor-claims-over-feed-in-tariffs-for-renewable-energy/>; see also Rachel A. Nathanson, *The Revocation of Clean-Energy Investment Economic-Support Systems as Indirect Expropriation Post-Nykomb: A Spanish Case Analysis*, 98 IOWA L. REV. 863 (2013), at 892-97.

125. Vyoma, *supra* note 124.

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The claimants in *Mesa Power v. Canada* and *Windstream v. Canada* challenge the Ontario FIT programme as being less favourable in terms of both national treatment and MFN, while Canada argues the absence of a right comparator—a domestic or foreign investor whose treatment could appropriately be compared with that of the disputing investor. Thus, the issue of whether the treatment occurs in “like circumstances” is crucial here and needs to be addressed before proceeding with the allegations of discrimination as such.<sup>126</sup> For the purposes of such likeness analysis, one will need to check the existence of a competitive relationship between the investor concerned and a comparator, their association with a single economic (business) sector or consider other relevant factors.<sup>127</sup> In addition, NAFTA tribunals in three investment cases suggested that the rationale for the contested measure and its policy objective should also be given due attention.<sup>128</sup> In other words, reasonable government policies may make the foreign investor “unlike” to its comparators, provided that those policies: “(1) do not distinguish, on their face or de facto, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of [the investment treaty].”<sup>129</sup> Accordingly, where the government revokes foreign-invested green electricity projects for their environmentally-risky or health-hazard impacts, the foreign investors concerned and comparators whose projects have not been blocked may, in principle, be considered as not being “in like circumstances” if the cause of the revocation is the legitimate policy to protect the environment or public health, which satisfies those two conditions.<sup>130</sup> This argument could apply to Ontario’s moratorium on Windstream’s offshore wind project.

As with the *Canada – Renewable Energy / Canada – Feed-In Tariff Program* case, the claimant in *Mesa Power v. Canada* challenges the “buy local” requirement, while Canada claims exception under the NAFTA for public procurement.<sup>131</sup> Given factual similarities, we expect that the tribunal will consider the WTO findings on this particular issue but not mechanically transpose them into the NAFTA context in light of different applicable legal

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126. Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/5, Award (Nov. 21, 2007), para. 196.

127. For the review of the judicial practice on “like circumstances”, see Andrea K. Bjorklund, *Nat’l Treatment*, (August Reinisch ed., STANDARDS OF INVESTMENT PROTECTION) (2008), at 38-48.

128. See *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2 (Apr. 10, 2001), paras. 76-78; *GAMI Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award (Nov. 15, 2004), para. 114; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 2009), paras. 206-10 and 213.

129. See *Pope & Talbot Inc. v. Government of Canada*, *supra* note 128, para. 78.

130. *GAMI Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award (Nov. 15, 2004), para. 114.

131. *Mesa Power Group LLC v. Government of Canada*, Respondent Counter-Memorial and Reply on Jurisdiction, *supra* note 105, paras. 321-27.



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regimes.<sup>132</sup> For instance, NAFTA Article 1108 simply states in paragraphs 7(a) and 8(b) that specified investment standards do not apply to “procurement by a Party or a state enterprise” without replicating the GATT Article III:8(a) conditions that public procurement must meet in order to escape the national treatment disciplines.

Although the outright seizure of property is not at issue in the *Windstream* and European cases, they nevertheless deal with some “softer” forms of government intervention that have prevented the investors from full utilization of their investment. It is a controversial issue whether such “regulatory takings” qualify as indirect expropriation. On the one hand, the *Metalclad v. Mexico* award defined the term “expropriation” under the NAFTA in an overly broad way, criticized in a number of subsequent cases,<sup>133</sup> to include even “covert or incidental interference with the use of property,” which fully or partially deprives the owner of “the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host state.”<sup>134</sup> Moreover, the NAFTA tribunal in *S.D. Myers v. Canada* admitted that temporary or partial deprivation of the owner’s ability to make use of its economic rights would amount to expropriation “in some contexts and circumstances.”<sup>135</sup> On the other hand, the tribunal in *Methanex v. United States* held:

[A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.<sup>136</sup>

In order to draw a line between a non-compensable regulation and indirect expropriation in green electricity cases, arbitrators may refer to several criteria developed by recent caselaw, namely the extent of interference with the property right, the character of governmental measures (purpose and context), and the measure’s interference with reasonable and investment-backed expectations.<sup>137</sup>

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132. See, e.g., *id.*; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 2009), para. 193.

133. See *Fireman’s Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award (July 17, 2006), para. 177.

134. *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), para. 103.

135. *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (Nov. 13, 2000), para. 283.

136. *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (Aug. 3, 2005), Part IV - Chapter D - Page 4, para. 7.

137. See OECD, “*Indirect Expropriation*” and “*the Right to Regulate*” in *International Investment Law*, OECD Working Papers on International Investment, 2004/04, OECD Publishing, at 9-20.

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The litigation over the *ex post facto* regime changes affecting renewable electricity in Europe will probably raise a question as to whether the right to benefit from a FIT or similar scheme is eligible for protection under the relevant investment treaty. This right could be viewed either as (i) a statutory or contractual right that investment treaties may include in the definition of “investment,” or as (ii) merely an individual right associated with a larger or general investment which, taken as a whole, constitutes a qualified “investment” pursuant to the theory of “totality of rights.”<sup>138</sup> The verification of the fact of expropriation here will vary depending on which of these views prevails. In the first case, it is relatively straightforward to prove expropriation of the *per se* right of enjoyment if the adverse effect of the regulatory changes on the investor is significant enough. But the second case would likely result in a negative finding, as the support amendment would not necessarily deprive the claimant of full ownership and control of its general investment—be it enterprise, equity infusion, or property involved in green power generation.<sup>139</sup> It is this ownership or control factor that played a key role in earlier arbitrations on expropriation claims.<sup>140</sup> The Energy Charter Treaty arbitral decision in the *Nykomb v. Latvia* case, having a similar factual context, clearly shows this. Company Windau in Latvia, which was acquired by Sweden’s Nykomb, assumed a contractual obligation *vis-à-vis* a local state electricity distributor to produce heat and electricity via natural gas cogeneration in exchange of a preferential eight-year “double tariff.” But the Latvian law later scaled down, retroactively, the double tariff for cogeneration projects, which Nykomb claimed to be indirect expropriation. But the tribunal disagreed:

The Tribunal finds that ‘regulatory takings’ may under the circumstances amount to expropriation or the equivalent of an expropriation. The decisive factor for drawing the border-line towards expropriation must primarily be the degree of possession taking or control over the enterprise the disputed measures entail. In the present case, there is no possession taking of Windau or its assets, no interference with the shareholder’s rights or with the management’s control over and running of the enterprise—apart from ordinary regulatory provisions laid down in the production licence, the off-take agreement, etc.<sup>141</sup>

The standard of fair and equitable treatment is also invocable for the case of the *ex post facto* modifications.<sup>142</sup> It intends to protect the legitimate

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138. See Anatole Boute, *Combating Climate Change through Investment Arbitration*, 35 *FORDHAM INT’L L. J.* 613 (2012), at 627-31.

139. *See id.*

140. *Id.* at 632, 635.

141. *Nykomb Synergetics Technology Holding AB v. Republic of Latvia*, SCC Case No 118/2001, Award (Dec. 16, 2003), section 4.3.1, at 33.

142. UNCTAD, *World Investment Report 2010: Investing in a Low-Carbon Economy* (2010), at 137.

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expectations that investors have had on the basis of the legal regime created by the host government with a view of inducing investment.<sup>143</sup> Investors embark on costly green projects in reliance on public incentives promised at the time of investing, so that departure from that promise would arguably confound their expectations.<sup>144</sup> But this fact alone will not automatically guarantee a victory for disputing investors. For instance, the tribunal in *Electrabel v. Hungary* found that under the Energy Charter Treaty principle of fair and equitable treatment “the investor is promised protection against unfair changes,” but “the host state is entitled to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances in the public interest.”<sup>145</sup> Similarly, the tribunal in *Mobil v. Canada* observed that this standard in the NAFTA context does not prevent regulatory changes based on new policies and needs “even if some of those changes may have far-reaching consequences and effects, and even if they impose significant additional burdens on an investor.”<sup>146</sup> Therefore, the claimants will have to bear quite a heavy burden of proof to succeed on this point.

Finally, restrictions on foreign-invested renewable electricity projects may be eligible for additional flexibilities, other than public interest embedded by adjudicators in existing standards by the way of interpretation, that give some policy space for socially desirable government behaviour. First, signatories to international investment agreements may adopt interpretative statements that clarify or add some value to the existing rules with a view of exempting public-purpose measures from certain obligations *vis-à-vis* foreign investors and investment.<sup>147</sup> Second, a number of recent treaties contain general exceptions, usually modelled after the corresponding WTO provisions (typically, GATT Article XX), that make a blanket exemption for justifiable state wrongdoings.<sup>148</sup> Third, the current tendency in investment treaty-making is to explicitly recognize non-economic objectives in the text itself, which would arguably discourage arbitral decisions based on exclusive investment policy values.<sup>149</sup> All three of these options intend to strike a balance between a host state’s obligation to protect foreign investors (investment) and its sovereign right and duty to shelter the society and environment from adverse impacts of business activities.<sup>150</sup>

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143. See Roland Kläger, “Fair and Equitable Treatment” in *International Investment Law* (2013), at 116-17.

144. See *id.*

145. *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (Nov. 30, 2012), para. 7.77.

146. *Mobil Investments Canada, Inc. and Murphy Oil Corporation v. Government of Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (May 22, 2012), para. 153.

147. Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. INT’L ECON. L. 1037 (2010), at 1048-59.

148. *Id.* at 1059-64.

149. *Id.* at 1064-71.

150. *Id.*

## VI. Interplay between Trade and Investment Legal Regimes

Trade and investment legal regimes are mutually complementary in many ways. They share the common goal of de-restricting "working" conditions for economic operators in the respective field. For instance, local-content measures are equally condemned by international trade and investment disciplines for hampering imports and imposing undesirable performance requirements on investors. Additionally, both regimes provide for non-discrimination. Despite these commonalities, trade and investment rules may also clash under certain circumstances. Let us consider two situations with regard to renewable electricity schemes.

As a first example, suppose that international authorities find green incentives to be illegal under a trade regime and the complying country takes, as a result, retroactive actions of revocation or modification which affect investors. Retrospective remedies are not typical of the GATT/WTO dispute settlement procedures, but a few real cases show that they are not, in principle, ruled out under the multilateral trading system altogether.<sup>151</sup> For instance, in *Australia – Automotive Leather II (Article 21.5 – US)*, the WTO panel found that the subsidy at issue had to be fully repaid in the light of the SCM Agreement provision calling for withdrawal of prohibited subsidies.<sup>152</sup> Under EU law, mandatory recovery of unlawful state aid, i.e. recipient's repayment of public funds etc. together with interest where appropriate, is even a common practice that intends to "re-establish the situation that existed on the market prior to the granting of the aid."<sup>153</sup> The European Commission adopted around 110 state-aid recovery decisions in the period between 2000 and 2007 alone.<sup>154</sup> Such trade-law-consistent measures with the retrospective legal effect may well give rise to investor-state disputes. In *Micula v. Romania*, investors complained about the government's retroactive repeal of certain long-term tax incentives.<sup>155</sup> Romania abolished the tax benefits to comply with the EU state aid obligations, but the tribunal found this to be a breach of the investment treaty principle of fair and equitable treatment.<sup>156</sup>

A second example of the trade-investment clash can be seen through the investor-state disputes over green support changes in European countries, as

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151. For this issue, see Sherzod Shadikhodjaev and Nohyoung Park, *Cessation and Reparation in the GATT/WTO Legal System: A View from the Law of State Responsibility*, 41 J. WORLD TRADE 1237 (2007), at 1243-56.

152. Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States*, paras. 6.22, 6.39, 6.43-49, WT/DS126/RW (Jan. 21, 2000) (adopted Feb. 11, 2000).

153. Notice from the Commission — Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid, OJ C 272/4 (Nov. 15, 2007), para. 13.

154. *Id.* para. 2.

155. Ioan Micula, Viorel Micula and others v. Romania, ICSID Case No. ARB/05/20, Award (Dec. 11, 2013).

156. *See id.* para. 340.

considered above. If the arbitrators eventually side with the investors and award damages that must be paid by the defending European countries, the compensation to the investors could be questioned under EU's state aid disciplines.<sup>157</sup> In *Micula v. Romania*, for instance, the European Commission warned that compensation under the arbitral award would amount to illegal state aid to be recovered from the recipients.<sup>158</sup> But the investment adjudicators noted that it would be "inappropriate for the Tribunal to base its decisions in this case on matters of EU law" and opted not to address the issue of enforceability of the ruling.<sup>159</sup> Having lost that case, Romania partially executed the award, but the European Commission ordered Romania to suspend its implementation, which provoked a new dispute in the EU judicial procedures between the investors and the European Commission.<sup>160</sup> Some commentators suggest that enforcement of investment awards within the EU legal system would constitute illegal state aid if compensatory payment is ordered for government's repeal of economic benefits which, themselves, qualify as unlawful state aid.<sup>161</sup> Whether the payment of damages authorized in non-WTO fora would be against WTO subsidy rules has not yet been addressed in real cases. But at least in theory, compensation of this kind could amount to public funds benefiting selected recipients which would, in principle, fall within WTO's formal definition of an enterprise-specific "subsidy."<sup>162</sup>

It follows that, in the interest of legal certainty in both of the given situations, treaty-makers should (re-)formulate their agreements in a way that would effectively compromise their trade and investment obligations. For this purpose, they could make it explicit in investment treaties that the dispute settlement procedures thereof do not apply to public support withdrawals or amendments that are consistent with applicable international trade rules. In trade agreements, they could insert text that would exclude compensation ordered by international courts from the scope of disputable ("triable") measures under the respective trade regime. This approach would prevent a conflict of rules by making two regimes mutually exclusive

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157. See, e.g., Pietro Ortolani, *Intra-EU Arbitral Awards vis-à-vis Article 107 TFEU: State Aid Law as a Limit to Compliance*, 6 J. INT'L DISPUTE SETTLEMENT 118 (2015), at 126-27.

158. Ioan Micula, Viorel Micula and others v. Romania, *supra* note 155, paras. 334-36; see also European Commission, State Aid SA.38517(2014/C) (ex 2014/NN) – Romania Implementation of Arbitral award *Micula v. Romania* of 11 December 2013, Bruxelles (Oct. 1, 2014), C(2014) 6848 final.

159. Ioan Micula, Viorel Micula and others v. Romania, *supra* note 155, para. 340.

160. Case T-646/14, *Micula and Others v. Commission*, pending case, OJ C 439/29 (Aug. 12, 2014).

161. Christian Tietje and Clemens Wackernagel, *Outlawing Compliance? – The Enforcement of Intra-EU Investment Awards and EU State Aid Law*, Policy Papers on Transnational Economic Law, No. 41 (2014), Transnational Economic Law Research Center, Faculty of Law of Martin-Luther-University Halle Wittenberg, Germany, at 7.

162. Cf. European Commission, State Aid SA.38517(2014/C) (ex 2014/NN), *supra* note 158, paras. 27-50.

in relation to subsidy/state aid issues in general and green electricity stimulus programmes in particular.

The trade-investment clash in the first example above is a result of using *unlawful* renewable energy schemes. Thus, if governments refrain from giving troublesome subsidies, there will be no trade frictions and no inter-regime conflicts as a result. But the reality is that what seems lawful to the granting authority may eventually be found illegal in international fora. Thus, legislative reforms towards “greening” the existing trade disciplines would put subsidizing governments on a much safer footing.<sup>163</sup> Moreover, harmonization (integration) of renewable electricity schemes among economies involved in the supply chain would also lessen trade tensions. But this would require, *inter alia*, a mechanism of verifying the “greenness” of electricity and an operative interconnection of power grids between neighbouring countries that would facilitate cross-border exchanges of renewable electricity.

Last but not least, placing trade and investment regimes under a single international framework would greatly strengthen their mutual supportiveness within that framework. Therefore, it should become a normal practice for all trade agreements to contain investment rules with the ultimate effect of absorbing existing investment treaties between the parties concerned.

## VII. Conclusion

The legal cases reviewed in the preceding sections have arisen due to negative impacts of controversial clean energy programmes on trade and investment. Stimulus measures may impede imports of green electricity and associated materials. Non-transparent and arbitrary investment procedures as well as worsening of early-announced support conditions may frustrate foreign investors engaged in renewable electricity projects. While adjudicators in trade disputes have generally tried to preserve some policy space under respective rules, ongoing investor-state arbitral cases have yet to reveal whether the investment treaty provisions at issue allow regulatory flexibility in the renewables-related sector.

Government support for low-carbon activities generally play an encouraging role in the market, but it cannot properly deal with some constraints on green power development, such as intermittency of electricity generation from weather-dependent renewables or scarcity of certain renewable resources in particular regions. This necessitates the application of additional instruments to diversify the energy supply-mix. Where subsidization tools are not sufficient or efficient, governments should turn to explore the ways of intensifying cross-border movement of renewable electricity and related items by establishing the necessary infrastructure, removing market access barriers and harmonizing country-specific legal

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163. See Shadikhodjaev, *Renewable Energy and Government Support: Time to “Green” the SCM Agreement?*, *supra* note 45, at 493-506.

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regimes.<sup>164</sup> The WTO and EU cases suggest that this will also require development of an effective means of distinguishing between renewable and conventional electricity on both supply and demand sides. For countries where it is cheaper to import renewable electricity than to produce (or purchase) it domestically, electricity trade could either obviate the need for cumbersome incentive schemes there or otherwise provide foreign renewable electricity with greater access to their national support systems and, thus, reduce the extent of international tensions over stimulus policies in this field.

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164. Bahar & Sauvage, *supra* note 5, at 7 (concluding that “electricity trade is expected to become an increasingly important strategy to meet countries’ [renewable energy] goals”).