

Promoting Green Energy through EU Preferential Trade Agreements: Potential and Limitations

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ABSTRACT (175 words)

This article aims at assessing the potential and limitations of preferential trade agreements (PTAs) in safeguarding countries' efforts to promote renewable energy (RE). In particular, it explores whether and to what extent PTAs recently concluded by the European Union (EU) have addressed the main shortcomings found under the World Trade Organization (WTO) law. Namely, the fact that WTO rules are currently too stringent on the use of RE subsidies while too lenient on the use of trade remedy measures against RE technologies. It argues that EU PTAs could and should have gone further with regards to both subsidy and trade remedy disciplines that enable RE promotion, substantively as well procedurally, while still remaining WTO-compatible. The article further finds that much of the potential of EU PTAs has remained untapped due to inconsistency in policy practice, which reflects the lack of a coherent, ambitious and forward-looking negotiating strategy on the part of the EU. The article concludes by identifying which approach to RE promotion in PTAs is preferable and should be consistently pursued by the EU in future negotiations.

Keywords: climate change mitigation, renewable energy promotion, WTO law, green policy space, preferential trade agreements, EU

1. INTRODUCTION

Since the *Canada – Renewable Energy*¹ dispute at the World Trade Organization (WTO), the WTO Agreement on Subsidies and Countervailing Measures (SCM) has been the focal point of academic debate on the trade and climate change interface. In particular, it has been increasingly argued that WTO subsidy disciplines unduly constrain governments' policy space to support renewable energy (RE), which is deemed necessary towards achieving a rapid transition to a low-carbon green economy.² The problem is further complicated by the

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The authors are very grateful to Antonia Eliason, Gary Horlick, Anna Marhold, Gregory Messenger, Benedikt Pirker and all the participants in the 2018 Biennial Conference of the Society of International Economic Law (American University Washington College of Law, 12-14 July 2018) for the rich exchanges on an earlier draft of the paper. All opinions and any errors are our own.

¹ WTO Appellate Body Report, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector/Measures Relating to the Feed-in Tariff Program [Canada – Renewable Energy]*, WT/DS412/DS426/AB/R, adopted 24 May 2013.

² See, inter alia, G. Marín Durán, *Sheltering Government Support to 'Green' Electricity: The European Union and the World Trade Organization* 67 ICLQ 129, 132-135 (2018) and references therein. According to recent estimates, renewable energy subsidies rose to USD 140 billion in 2016, although this is still lower than fossil-fuel subsidies, which amounted to USD 260 billion in that same year: International Energy Agency (IEA), *Commentary: Fossil-fuel Consumption Subsidies Are Down, But Not Out* (December 20, 2017), <https://www.iea.org/newsroom/news/2017/december/commentary-fossil-fuel-consumption-subsidies-are->

fact that such a green policy space is not only being challenged multilaterally through WTO litigation but also, and indeed mostly, by means of unilateral trade remedy action. As reported in a global survey conducted by the United Nations Conference on Trade and Development (UNCTAD), the number of anti-dumping (AD) and countervailing duty (CVD) cases in the renewable energy sector ‘far outnumbers the number of [RE] disputes that have arrived at the WTO’,³ albeit this is often the case for other sectors too.

Thus far, the scholarship has predominantly focused on addressing this perceived trade/climate change tension through reforming the SCM Agreement, and no doubt has made a valuable contribution by advancing several proposals in this direction.⁴ And yet, it appears highly unlikely that WTO members would agree on amending current subsidy and trade remedy rules in order to shelter government support to climate-friendly renewable energy, at least in the short-to-medium term.⁵ Against this backdrop, we seek in this article to draw attention to another possible level of action for securing such a green policy space that has been largely neglected in the literature:⁶ namely, preferential trade agreements (PTAs).⁷ In remedying this gap, we will examine the practice of the European Union (EU) in its so-called second-generation ‘comprehensive’ and ‘deep’ PTAs,⁸ which it has been concluding over the past decade with a growing number of developed and developing countries that are also WTO members –namely, South Korea (2011),⁹ Central American countries (2012),¹⁰ Colombia and Peru (2012),¹¹ Singapore (2014),¹² Ukraine (2014),¹³

[down-but-not-out.html](#).

³ United Nations Conference on Trade and Development (UNCTAD), *Trade Remedies: Targeting the Renewable Energy Sector* (2014), http://unctad.org/en/PublicationsLibrary/ditcted2014d3_en.pdf, at 13.

⁴ See, inter alia, A. Cosbey & P. C. Mavroidis, *A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy – the Case for Re-drafting the Subsidies Agreement of the WTO*, 17 JIEL 11 (2014); P. D. Farah & E. Cima, *The World Trade Organization, Renewable Energy Subsidies, and the Case of Feed-in Tariffs: Time for Reform Towards Sustainable Development*, 27 *GeoIntEnvtLLRev* 515 (2015); R. Howse, *Securing Policy Space for Clean Energy under the SCM Agreement: Alternative Approaches*, International Centre for Trade and Sustainable Development (ICTSD)/World Economic Forum (December 2013), <http://e15initiative.org/publications/securing-policy-space-for-clean-energy-under-the-scm-agreement-alternative-approaches/>; L. Rubini, *Rethinking International Subsidies Disciplines: Rationale and Possible Avenues for Reform*, ICTSD/World Economic Forum (November 2015), <http://e15initiative.org/publications/rethinking-international-subsidies-disciplines-rationale-and-possible-avenues-for-reform/>; S. Shadikhodjaev, *Renewable Energy and Government Support: Time to Green the SCM Agreement?*, 14 *WTR* 479 (2015).

⁵ See in particular I. Espa, *New Features of Green Industrial Policy and the Limits of WTO Rules: What Options for the 21st Century?*, 53 *JWT* 979 (2019).

⁶ Among the few exceptions, see E. Cima, *Promoting Renewable Energy Through FTAs? The Legal Implications of a New Generation of Trade Agreements* 52 *JWT* 663 (2018), offering a taxonomy of the different legal techniques for integrating RE provisions into FTAs but with no specific focus on RE subsidies.

⁷ In this article, the term ‘preferential trade agreement’ is used generically (encompassing agreements establishing both free trade areas and customs unions), even though EU agreements have different terminology and often go beyond establishing preferential trade relations (see *infra* nn. 9-17).

⁸ See generally, B. A. Melo Araujo, *The EU Deep Trade Agenda – Law and Policy* (Oxford University Press 2016).

⁹ *Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part* [EU-Korea FTA], signed 15 October 2011, OJ [2011] L127/6.

¹⁰ *EU-Central America Association Agreement* [EU-Central America AA], signed 29 June 2012, https://trade.ec.europa.eu/doclib/docs/2011/march/tradoc_147660.pdf.

¹¹ *Trade Agreement between the European Union and its Member States of the one part, and Colombia and Peru, of the other part* [EU-COPE FTA], signed 26 June 2012, https://trade.ec.europa.eu/doclib/docs/2011/march/tradoc_147704.pdf.

¹² *EU-Singapore Trade Agreement* [EU-Singapore FTA], signed 17 October 2014, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=961>.

Canada (2016),¹⁴ Vietnam (2016),¹⁵ Japan (2017),¹⁶ and Mexico (2018).¹⁷ This choice is explained by the fact that the EU stands out as both a major player in supporting clean energy¹⁸ and a main hub in the global landscape of PTAs.¹⁹ Further, the EU has often claimed that its PTAs are a stepping stone (rather than a stumbling block) for multilateral trade rule-making: that is, by acting as a laboratory to build consensus bottom-up among a reduced number of countries and thereby prepare the ground for agreement at the multilateral level.²⁰ Assuming this policy rhetoric is true, to what extent may PTAs be used towards furthering the globally shared goal of assisting the development of climate-friendly renewable energy²¹?

In addressing this question, our analysis of RE-relevant provisions²² will be divided into two main parts, one looking at subsidy disciplines (Section 2) and the other at trade remedy rules (Section 3). In each case, we will first expose the main ways in which WTO law hinders governments' ability to boost renewable energy, both by being too inflexible on the use of RE subsidies and by being too flexible on the use of trade remedies measures against RE technologies. Thereafter, we will enquire into whether the selected EU PTAs include innovative WTO-plus provisions addressing the shortcomings previously identified in the multilateral legal framework. Ultimately, our aim is to assess both the potential and limitations of PTAs as a means to safeguard public stimulus for green energy. That is, have EU PTAs gone beyond the WTO to enable the promotion and deployment of renewable energy? If not, should they do so, bearing in mind WTO-based legal constraints and other systemic considerations?

2. RENEWABLE ENERGY AND SUBSIDY DISCIPLINES

2.1 MULTILATERAL ACTION AGAINST RE SUBSIDIES: OVERALL PICTURE

¹³ *Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part* [EU-Ukraine AA], signed 27 June 2014, OJ [2014] L161/3.

¹⁴ *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the EU and its Member States, of the other part* [EU-Canada CETA], signed 30 October 2016, OJ [2017] L11/23.

¹⁵ *EU-Vietnam Free Trade Agreement* [EU-Vietnam FTA], signed 1 February 2016, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>.

¹⁶ *Economic Partnership Agreement between the European Union and Japan* [EU-Japan FTA], signed 6 July 2017, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1684>.

¹⁷ *Agreement amending the Association Agreement between the European Union and its Member States, of the one part, and Mexico, of the other part* [EU-Mexico AA], agreed in principle on 21 April 2018, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1833>.

¹⁸ IEA & International Renewable Energy Agency (IRENA), *Global Renewable Energy – Joint Policies and Measures Database*, <https://www.iea.org/policiesandmeasures/renewableenergy/>.

¹⁹ WTO, *Regional Trade Agreements Information System*, <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>.

²⁰ See e.g., European Commission Communication, *Trade for All - Towards a More Responsible Trade and Investment Policy*, COM(2015) 497final (October 14, 2015), https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf, at 20-21.

²¹ See notably, United National General Assembly, *Transforming Our World: the 2030 Agenda for Sustainable Development*, UN Doc/A/RES/70/1 (September 25, 2015) [UN 2030 SDGs], and in particular SDG 7 'Ensure Access to Affordable, Reliable, Sustainable and Modern Energy for All' and SDG 13 'Take Urgent Action to Combat Climate Change and Its Impact'.

²² In this article, the term 'RE-relevant provisions' encompasses all subsidy and trade remedy rules that, while not RE-specific, may have an impact on government support to renewable energy since they apply horizontally to all sectors or specifically to energy/environmental issues (including renewable energy).

There are two interrelated reasons why scholars have urged for reforming the SCM Agreement as a means to safeguard government support to clean energy. The first is that RE subsidies have started to feature prominently in multilateral WTO disputes: albeit admittedly targeted in only a handful of WTO cases for now (7 out of the total 594 WTO disputes as of January 2020),²³ they have all occurred recently and within a relatively short time frame (since 2010) following the extraordinary growth in renewables and the changing global policy landscape,²⁴ whereas no single WTO case has thus far been initiated against the more prevalent and environmentally harmful fossil fuel subsidies.²⁵ The second is that the first of these disputes, the controversial *Canada – Renewable Energy* case, has generated a conventional wisdom that a tension exists between climate change mitigation goals and WTO subsidy law, due to the flexibility built-in by the Appellate Body (AB)'s interpretative approach to the benefit analysis. In other words, the attempts by the AB at forcing existing SCM disciplines have been interpreted as implicitly indicating there could at least be a risk of such an incompatibility, with a growing consensus that a judicial approach to the issue of green policy space was ever to be a second-best alternative to law reform.²⁶

Against this backdrop, it is useful to note that all but one (DS459) of these seven RE disputes have involved public support in the renewable electricity sector and, in most cases, what is conventionally considered in and of itself the 'greenest' type of RE subsidies, that is, feed-in-tariff (FIT) programmes.²⁷ Yet, and significantly, only (allegedly) *discriminatory* measures have been thus far targeted in WTO dispute settlement proceedings, mostly in the form of local content requirements (LCRs) attached to FIT schemes (DS412/426, DS452, DS456) or other forms of public stimulus given to RE manufacturers (i.e., fiscal or financial incentives given to producers of RE technologies in DS419, DS459, DS510, DS563).²⁸ As of January 2020, the WTO adjudicatory bodies have only ruled in two instances (*Canada –*

²³ That is, counting *Canada – Renewable Energy* as one, since both complaints challenged the same measure and resulted in joint Panel/Appellate Body reports. For an overview of WTO disputes targeting renewable energy subsidies, see I. Espa & G. Marín Durán, *Renewable Energy Subsidies and WTO Law: Time to Rethink the Case for Reform Beyond Canada – Renewable Energy/FIT Program* 21 JIEL 621, 629-630 (2018).

²⁴ See e.g., REN21, *The First Decade: 2004-2014 – Ten Years of Renewable Energy Progress* (2015), http://www.ren21.net/Portals/0/documents/activities/Topical%20Reports/REN21_10yr.pdf.

²⁵ On the reasons why this may be so, including the difficulties of challenging fossil fuel subsidies (usually consumer-targeted and non-discriminatory) under the SCM Agreement, see H. B. Asmelash, *Energy Subsidies and the WTO Dispute Settlement System: Why Only Renewable Energy Subsidies Are Challenged*, 18 JIEL 261 (2015).

²⁶ See, among others, Cosbey & Mavroidis, *supra* n. 4; L. Rubini, *Ain't Wastin Time No More: Subsidies for Renewable Energy, the SCM Agreement, Policy Space and Law Reform*, 15 JIEL 525 (2012); Shadikhodjaev, *supra* n. 4. For a qualification of this conventional wisdom, see Espa & Marín Durán, *supra* n. 23, at 643-650.

²⁷ FITs create the conditions for expanding green electricity generation or capacity deployment, thus exhibiting more proximate climate change mitigation goals compared to support programmes targeting RE technologies (i.e. equipment and associated components) used to produce that green electricity. See Cosbey and Mavroidis, *supra* n. 4, at 28.

²⁸ LCRs require foreign or domestic investors to source a certain percentage of intermediate goods from local manufacturers or producers in order to benefit from public support (e.g., eligibility for a FIT scheme is conditioned upon using at least 50% of domestically-produced solar panels in the construction of clean power generation facilities). For this reason, LCRs are conventionally considered industrial policy tools aimed at keeping the benefits arising out of renewable energy subsidization (e.g. the promotion of job creation, technology innovation and industry competitiveness) domestically. See, among others, J. Lewis, *The Rise of Renewable Energy Protectionism: Emerging Trade Conflicts and Implications for Low Carbon Development*, 14 *GlobEnvPol* 10 (2014).

Renewable Energy and India – Solar Cells) targeting discriminatory FIT schemes and in one instance (*US – Renewable Energy*) targeting discriminatory fiscal and financial measures,²⁹ whereas the other cases are still at panel proceedings or (formally) pending at the consultations stage.³⁰ In all reports adopted so far, the WTO adjudicating bodies (including, in the first two instances, the AB) unequivocally condemned the LCRs incorporated in the FIT programmes under Article III:4 of the General Agreement on Tariffs and Trade (GATT) and Article 2.1 of the WTO Agreement on Trade-related Investment Measures (TRIMs Agreement),³¹ but no findings of inconsistency were made under the SCM Agreement.

In *Canada – Renewable Energy*, in particular, the Appellate Body avoided condemning the Ontario's FIT scheme altogether as a prohibited subsidy (i.e., contingent on the use of domestic over imported inputs) under Article 3.1 (b) of the SCM Agreement by means of a convoluted – and very contentious – benefit test which, ultimately, made it very difficult for the AB to consider the targeted FIT programme a 'subsidy' within the meaning of the SCM Agreement.³² Interestingly, in *India – Solar Cells*, the US withdrew its initial claim that the Indian FIT scheme at issue was inconsistent with Article 3 SCM Agreement from its second request for consultations (intervened after the AB's ruling in *Canada – Renewable Energy*), and decided to keep its claims under the GATT/TRIMs non-discrimination provisions only.³³ Otherwise said, at least in the case of FIT schemes incorporating LCRs, WTO members have been dis-incentivized from raising claims under the SCM Agreement due to the heavier evidentiary burden entailed by the built-in flexibility created by the Appellate Body.

It seems clear by now that WTO law condemns discriminatory RE subsidies, but this ought not to be misrepresented as a clash between the international trade and climate change regimes. In fact, there is very little evidence that LCRs bring any added environmental benefits.³⁴ Quite the contrary, at least in the short-run, LCRs increase the cost of renewable energy by forcing investors to rely on less competitive local suppliers rather than importing cheaper foreign RE technology, and hence result in environmentally inferior outcomes. What is more, the supposed friction has not occurred at the level of the

²⁹ WTO Appellate Body Report, *Canada – Renewable Energy*, *supra* n. 1; WTO Appellate Body Report, *India – Certain Measures Relating to Solar Cells and Solar Modules [India – Solar Cells]*, WT/DS456/AB/R, adopted 14 October 2016; WTO Panel Report, *United States – Certain Measures Relating to the Renewable Energy Sector Modules [US – Renewable Energy]*, WT/DS/510/R, circulated 27 June 2019 (under appeal). See further, Espa & Marín Durán, *supra* n. 23, at 629-630.

³⁰ In the case of *China – Measures Concerning the Wind Power Equipment* (DS419), for instance, an amicable solution was found quite rapidly: Office of the United States Trade Representative (USTR), *Press Release: China Ends Wind Power Equipment Subsidies Challenged by the United States in WTO Dispute* (June 2011), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2011/june/china-ends-wind-power-equipment-subsidies-challenged>.

³¹ WTO Appellate Body Report, *Canada – Renewable Energy*, *supra* n. 1, para. 5.85; WTO Appellate Body Report, *India – Solar Cells*, *supra* n. 29, paras 5.41 and 6.2(c); WTO Panel Report, *US – Renewable Energy*, *supra* n. 29, para. 7.338.

³² For a more detailed discussion, see Espa & Marín Durán, *supra* n. 23, at 633-634 and references cited therein.

³³ See Asmelash, *supra* n. 25, at 277-278.

³⁴ See L. A. Cosbey & L. Rubini, *Does it FIT? An Assessment of the Effectiveness of Renewable Energy Measures and of the Implications of the Canada – Renewable Energy/FIT Disputes*, ICTSD/World Economic Forum (December 2013), <http://e15initiative.org/wp-content/uploads/2015/09/E15-Clean-Energy-Technologies-CosbeyRubini-FINAL.pdf>, at 1-2; and J.-C. Kuntze & T. Moerenhout, *Local Content Requirements and the Renewable Energy Industry – A Good Match?*, ICTSD/Global Green Growth Institute (May 2013), <https://pdfs.semanticscholar.org/6872/7a8d62a9722b28a250bef0470aeb847108f9.pdf>.

SCM Agreement as the conventional wisdom goes, but at the level of the GATT and the TRIMs Agreement which both provide for exceptions to the non-discrimination principle, including for environmental protection purposes, informed by a balancing test.³⁵

Yet, it cannot be excluded that a tension may materialize in the future, if WTO members decide to challenge *non-discriminatory* RE subsidies multilaterally.³⁶ As the authors have analysed at length elsewhere,³⁷ each RE subsidy faces varying degrees of legal risk when scrutinized under existing SCM disciplines, depending on the exact type of support measure and the extent to which the subsidised RE product is traded. In particular, non-discriminatory FIT programmes promoting green electricity generation – notably, the single most widespread and praised RE subsidy – are generally on a safer footing under existing SCM rules inasmuch as adverse effects (and hence, SCM-inconsistency) would be difficult to prove in light of the inherent limitations to cross-border electricity trade.³⁸ For the opposite reason, public incentives to manufacturers of globally traded RE technologies (i.e., equipment and associated components) conceivably face a higher risk of incompatibility with the SCM Agreement. The status of non-discriminatory RE subsidies, therefore, remains uncertain and very much dependent on a case-by-case fact-intensive enquiry into the nature and economic effects of the specific subsidy at issue.³⁹

2.2 MAIN SHORTCOMINGS OF THE WTO LEGAL FRAMEWORK

Leaving aside actual or potential WTO disputes, the SCM Agreement does exhibit at least three shortcomings from the perspective of securing policy space for (non-discriminatory) RE subsidies. The first limitation is the trade-injury focus of the SCM Agreement. That is, it targets all trade-distortive subsidies alike, irrespective of what their rationale may be.⁴⁰ Hence, insofar as subsidies are inherently discriminatory (i.e., contingent on export performance or import-substitution under Article 3 SCM Agreement), or are otherwise shown to be ‘specific’ and cause ‘adverse effects’ (Article 5 SCM Agreement) to the import-competing or export-competing interests of another WTO member, they are SCM-inconsistent, with no possibility to defend or justify those trade-distorting subsidies that pursue legitimate public policy goals. As such, there is no more tolerance or flexibility towards the trade-distortive effects of a RE subsidy programme that contributes to mitigating climate change vis-à-vis environmentally or socially harmful subsidies.

The second shortcoming follows from the first in that there is no legal justification in the SCM Agreement for ‘good’ RE subsidies, that is, RE subsidies whose trade-distortive effects, albeit present, can be presumed to be limited and outweighed by their benefits in contributing to climate change mitigation. Originally, the agreement did include a category of non-actionable (and thus non-countervailable) subsidies under Article 8, which positively

³⁵ See J. Salzman & M. Wu, *The Next Generation of Trade and Environment Conflicts: The Rise of Green Energy Policy* 108 *NwULRev.* 401, 451-454 (2014).

³⁶ This is leaving aside potential cases of ‘boundary’ LCRs, which could still theoretically materialize. For more details, see Espa, *supra* n. 5.

³⁷ See Espa & Marín Durán, *supra* n. 23, at 644.

³⁸ This is mainly due to geographical and infrastructural constraints hampering global trade in electricity: see *ibid.*, at 625-626.

³⁹ *Ibid.*, at 644.

⁴⁰ G. N. Horlick & P. A. Clarke, *Rethinking Subsidy Disciplines for the Future: Policy Options for Reform*, 20 *JIEL* 673, 681 (2017).

defined a legal shelter for certain categories of so-called ‘green light’ subsidies.⁴¹ Since this provision expired on 1 January 2000, however, WTO members have still not properly discussed the pros and cons of re-introducing an exemption that could shield certain RE subsidies from both multilateral and unilateral challenges. The debate on the desirability of resuscitating the category of permissible subsidies, in various forms, has been primarily academic, with a number of scholars suggesting to either ‘revive and enhance the scope for exemptions’ under Article 8.2 (c) of the SCM Agreement,⁴² or to negotiate ‘an interim but extendable renewables-specific’ exemption from scratch⁴³ as the optimal way to achieve legal clarity and predictability without sacrificing green policy space.⁴⁴ Yet, at least at the present juncture, these reform proposals seem unlikely to garner traction among the WTO membership due to the major political and practical difficulties inherent to any SCM amendment process.⁴⁵ The same holds true, *mutatis mutandis*, for the proposals to incorporate into the SCM Agreement an exception clause *à la* Article XX GATT, that is, incorporating a balancing test, or even making Article XX GATT itself applicable to violations of the SCM Agreement.⁴⁶

The third and final drawback of SCM disciplines for our purposes is the weakness of its procedural and institutional provisions, and notably the notification and consultation requirements mostly monitored by the SCM Committee. In particular, the overall compliance record with the notification requirements remains, in the words of the SCM Committee Chair, ‘discouragingly low’⁴⁷ and RE subsidies do not appear to have received focused attention in the WTO, neither internally (e.g., within the Trade Policy Review Mechanism and the SCM and Trade and Environment Committees), nor as part of institutional dialogues with other competent international bodies. Such a low reporting performance is arguably the result of many factors, including the weak sanctioning mechanism for non-compliance, the fear of self-incrimination and the absence of a systematic reporting format.⁴⁸ Yet, the failure to collect better information on WTO members’ practice in relation to RE subsidies, as well as on their environmental

⁴¹ Article 8.2 (c) SCM Agreement sheltered in particular: ‘(i) research and development (R&D) subsidies; (ii) regional development subsidies; and (iii) environmental subsidies. The latter category, in particular, provided a safe harbour to those public support programmes aimed at promoting firms’ adaptation to new environmental regulations, provided the following strict conditions were met: (i) aid is a one-time non-recurring measure; (ii) is limited to 20 per cent of the cost of adaptation; (iii) does not cover the cost of replacing and operating the assisted investment, which must be fully borne by firms; (iv) is directly linked to and proportionate to a firm’s planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; and (v) is available to all firms which can adopt the new equipment and/or production processes’.

⁴² See in particular S. Z. Bigdeli, *Resurrecting the Dead? The Expired Actionable Subsidies and the Lingering Question of ‘Green Space’*, 8 *ManchJIntEconL* 2, 20 (2011).

⁴³ Shadikhodjaev, *supra* n. 4, at 495 on a renewables-specific ‘due restraint’ clause.

⁴⁴ See more generally on the re-establishment of permissible subsidies under the SCM Agreement, Horlick & Clarke, *supra* n. 40, at 679-680.

⁴⁵ See L. Borlini & C. Dordi, *Deepening International Systems of Subsidy Control: The (Different) Legal Regimes of Subsidies in the EU Bilateral Preferential Trade Agreements*, 23 *ColumJEurL* 551,

⁴⁶ For a more thorough analysis of reform proposals, see Espa & Marín Durán, *supra* n. 23, at 643-650.

⁴⁷ WTO News Item, *Chair cites ‘discouragingly low’ compliance with WTO subsidy notification requirements’* (October 25, 2016), https://www.wto.org/english/news_e/news16_e/scm_28oct16_e.htm; see also WTO Committee on Subsidies and Countervailing Measures, *Report 2016*, G/L/1272 (October 23, 2018), at 2, indicating that the vast majority of the WTO membership did not observe the notification requirement under the SCM Agreement (Art. 25).

⁴⁸ R. Steenblik & J. Simon, *A new template for notifying subsidies to the WTO*, International Institute for Sustainable Development (April 2010), <https://www.iisd.org/library/new-template-notifying-subsidies-wto>.

effectiveness and possible trade-distortive impact, certainly has had a bearing in keeping discussions on green policy space and SCM reform too abstract.⁴⁹

To sum up, in both substantive and procedural terms, WTO subsidy law is *not permissive* with regards to the subsidisation of clean energy – and this holds true irrespective of the fact that existing WTO disputes involving RE subsidies have not thus far limited green policy space *per se*, but rather discriminatory (i.e. industrially-inspired) RE subsidies. That being said, the legal status of *non-discriminatory* RE subsidies is yet to be fully addressed under the SCM Agreement and this legal uncertainty is in itself problematic. Due to its trade-injury focus, the SCM Agreement fails to provide for any kind of justification or exemption clause for at least certain non-discriminatory RE subsidies, whose climate mitigation benefits might well outweigh their trade-distortive impact. Should a multilateral challenge to such non-discriminatory RE subsidies materialize in the future, it is far from clear whether WTO judicial organs can –and indeed, whether they should– resort to *ad hoc* interpretative solutions for clarifying the boundaries of permissible government support to clean energy under the SCM Agreement. With this in mind, the next section turns to assess how far the selected EU PTAs have gone in designing clear and effective RE-relevant exemption clauses for subsidies and, more generally, what are, if any, the innovations that they have introduced both substantively and procedurally.

2.3 POTENTIAL AND LIMITATIONS OF EU PTAs

2.3.1 PROVISIONS RELEVANT TO RENEWABLE ENERGY IN SUBSIDY CHAPTERS

All EU PTAs contain some disciplines on subsidies, either included in specific chapters (i.e. EU-Canada CETA, EU-Japan FTA) or, most frequently, within chapters devoted to competition issues (i.e. EU-Korea FTA, EU-Singapore FTA, EU-Vietnam FTA, EU-Ukraine AA, EU-Mexico AA).⁵⁰ Although these provisions vary greatly depending on a number of factors (e.g. breadth of economic and political relations and/or prospects for accession to the EU), a clear pattern is visible as to the intention of the EU to use PTAs as an avenue to strengthen subsidy disciplines compared to multilateral WTO rules, if not always in terms of substantive rules at least from a procedural standpoint.⁵¹ None of such set of disciplines, however, is RE-specific, although they are formulated in a way that makes them relevant for government support to renewable energy. In substantive terms, they mainly consist of WTO-plus clauses aimed at providing legal justification for certain good types of subsidies. Depending on how ambitious and detailed these are, their impact varies both with regards to their level of normativity and to their level of enforceability.

At the one end of the spectrum are high-ambition PTAs that go a long way in addressing the lack of legal justification for (RE) subsidies in the SCM Agreement. However, such PTAs are context-specific, that is, they are agreements concluded with countries

⁴⁹ For more details, see Espa & Marín Durán, *supra* n. 23, at 652-653.

⁵⁰ In some cases, disciplines are very marginal and only include transparency provisions incorporated into more general chapters. See, e.g., the EU-Central America AA, where Art. 344 devoted to ‘Transparency in Subsidies’ is included into Ch. 4 on ‘General Provisions’, Title XII ‘Transparency and Administrative Procedures’. The same holds true, *mutatis mutandis*, for the EU-COPE FTA (see Art. 293).

⁵¹ For a more general analysis of the main innovations introduced through EU PTAs, see Borlini & Dordi, *supra* n. 45, at 577-579.

covered by the European Neighbouring Policy (ENP), such as the EU-Ukraine AA.⁵² This agreement de facto integrates the EU State aid *acquis* into Ukraine's legal order⁵³ inasmuch as it includes a State aid prohibition modelled after Article 107(1) TFEU,⁵⁴ which is complemented by a number of derogations that reproduce the system of broadly-framed justifications laid out in Articles 107(2)-(3) TFEU.⁵⁵ The incorporation of the EU State aid *acquis* is, furthermore, completed by an explicit reference to the application of EU-derived criteria in the enforcement of such rules. According to Article 264 of the EU-Ukraine AA, in particular, relevant sources of interpretation of State aid rules include:

[t]he criteria arising from the application of Articles 106, 107 and 93 of the Treaty on the Functioning of the European Union, *including the relevant jurisprudence of the Court of Justice of the European Union, as well as relevant secondary legislation, frameworks, guidelines and other administrative acts in force in the European Union* (emphasis added).

Importantly for our purposes, this includes the EU's sophisticated two-track regime for sheltering renewable energy subsidies, namely: (i) the general 2014 General Block Exemption (GBE) Regulation,⁵⁶ which automatically authorizes State aid meeting certain general and category-specific conditions, including investment aid for the production of energy from renewable energy resources and operating aid for the production of electricity from renewable energy resources and of energy from renewable energy resources in small-scale installations, without prior notification and individual scrutiny by the European Commission; and, (ii) the specific 2014-2020 Guidelines on State Aid for Environmental Protection and Energy,⁵⁷ which set out the principles and criteria against which the Commission assesses the compatibility of notified State aid (that is, State aid that is not eligible under the GBE Regulation) and authorizes it on a case-by-case basis against a number of 'Common Assessment Principles' and category-specific compatibility criteria.⁵⁸ Interestingly, such a plain transplant of the EU State aid *acquis* from a substantive point of view is matched with the incorporation of a system of both *ex ante* and *ex post* control on State aid similar to that of the EU, for which an appropriate national authority is to be established.⁵⁹

⁵² Other agreements concluded within the context of the ENP are the EU-Moldova AA and the EU-Georgia AA, but they are overall less ambitious.

⁵³ Note that the relevant chapter of the EU-Ukraine AA (Ch. 10, s. 2) is titled 'State Aid' rather than 'Subsidies'. The EU-Moldova AA also incorporates an Art. 107(1) TFEU-like prohibition of State aid (see Art. 339), whereas the EU-Georgia AA only includes one provision on 'Subsidies' (Art. 206), which does not make any reference to EU law.

⁵⁴ EU – Ukraine AA, Art. 262(1).

⁵⁵ *Ibid.*, Arts 262(2)-(3). While Articles 107(2)-(3) TFEU do not explicitly mention environmental protection and/or RE promotion grounds, these are certainly encompassed within the broad objectives provided therein. See further Marín Durán, *supra* n. 2, at 151.

⁵⁶ *Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in the application of Articles 107 and 108 TFEU*, OJ [2014] L187/1 [2014 GBE Regulation].

⁵⁷ European Commission, *Guidelines on State Aid for Environmental Protection and Energy 2014-2020*, OJ [2014] C 200/1 [2014-2020 EEA Guidelines].

⁵⁸ For a full account, see Marín Durán, *supra* n. 2, at 129-165.

⁵⁹ See EU-Ukraine AA, Art. 267.

At the other end of the spectrum are low-ambition PTAs, which do not really advance SCM disciplines – and hence do not address any of the SCM shortcomings identified above – but mainly reinstate the commitment of the parties to comply with their existing WTO obligations. This include the EU-Canada CETA, the EU-Central America AA, and the EU-COPE FTA.⁶⁰ In such cases, we shall assume that whatever policy space is left to WTO members under the SCM Agreement would also be available, *mutatis mutandis*, for the EU and its partners in their preferential trade relations. This side of the spectrum is, furthermore, completed by the EU-Korea FTA – namely, the first new-generation agreement concluded by the EU (notably, a key user of countervailing duties), with a strategically important partner (and a frequent target of countervailing duties).⁶¹ Although this agreement does contain WTO-plus substantive disciplines on subsidies,⁶² it is still situated at the lower end of the spectrum given that none of such disciplines impact on the policy space available to the EU and South Korea under the SCM Agreement to use RE subsidies.⁶³ Otherwise said, this agreement does not contain any WTO-plus exemption that could be interpreted in a way as to give a larger margin of manoeuvre compared to the SCM Agreement for at least certain types of RE subsidies.

In between are a number of medium-ambition PTAs that still address, albeit to different degrees, the absence of legal shelter for RE subsidies by providing for WTO-plus obligations on subsidies matched with RE-relevant exemptions. Within this group, it is possible to graduate the agreements depending on how much additional green policy space they create and how certain such a policy space is. The most interesting agreements in this respect are the EU-Singapore FTA and the EU-Vietnam FTA in that they both include a list of certain permissible subsidies that somewhat mirrors Articles 107(2)-(3) TFEU. In the case of the EU-Singapore FTA, the list is formulated as an exemption to the ‘Principles Applicable to Other Subsidies’ (see Annex 11-A), whereby the expression ‘other subsidies’ stands for subsidies other than prohibited subsidies (including those with LCRs).⁶⁴ According to paragraph 1 of the Annex, such subsidies in principle ‘should not be granted by a Party when they affect, or are likely to affect, the trade of either Party’. Notwithstanding this, paragraph 2 lists a number of subsidies categories that:

may be granted when they are necessary to achieve an objective of public interest, and when the amounts of the subsidies involved are limited to the minimum needed to achieve this objective and their effect on trade of the other Party is limited.

⁶⁰ For a full recollection, see Borlini & Dordi, *supra* n. 45, at 567-568.

⁶¹ See WTO, *Statistics on subsidies and countervailing measures*, https://www.wto.org/english/tratop_e/scm_e/scm_e.htm. Available data cover the period January 1995-December 2018.

⁶² This, in particular, consists of the inclusion of two additional categories of prohibited subsidies: unlimited debt or liabilities of certain undertakings and support to insolvent or ailing undertakings in whatever form: see Art. 11.11 EU-Korea FTA.

⁶³ By contrast, Art. 11.11 of the EU-Korea FTA contains an explicit carve-out for subsidies given to the coal industry.

⁶⁴ As per Art. 11.7 EU-Singapore FTA, this incorporates by reference Art. 3 SCM-prohibited subsidies and includes a few additional categories drawn from EU State aid law which bear however no relevance to renewable energy.

Among the listed categories are, in particular, ‘subsidies to facilitate the development of certain economic activities or of certain economic areas, where such aid does not affect conditions of trade of either Party and competition between the Parties,⁶⁵ including inter alia ‘subsidies for clearly defined research, development and innovation purposes, ... subsidies for environmental purposes and subsidies in favour of small and medium-size enterprises’.⁶⁶ Clearly many types of RE subsidies may fit within such taxonomy, although it remains to be seen to the extent with which the stringent impact standards imposed could be complied.⁶⁷ Yet, and notably, not only ‘there is no indication of procedures and institutions to assess these subsidies’,⁶⁸ but neither the dispute settlement nor the mediation mechanism established under the EU-Singapore FTA are available to address any problematic cases that may arise in this respect.⁶⁹ This is not only regrettable as such, but even more so given the fact that the legal technique used in the agreement to introduce an RE-relevant exemption clause (that is, a provision included in an annex) is unorthodox and raises questions as to the extent to which it could be relied upon for the purposes of seeking justification. Such questions, however, will be left unanswered as long as no procedural mechanism is available to interpret and apply such an exemption clause.

The EU-Vietnam FTA is based on the same underlying logic but goes one step further than the EU-Singapore FTA, inasmuch as the former: ‘is the [first] EU bilateral agreement where the recognition of the importance of subsidies to pursue a public objective ... as a “general goal to deliver an outcome in the overall public benefit” foregoes – at least in the form of a general statement – the acknowledgement of their potential distortive effects on the functioning of the market and trade liberalization’.⁷⁰ Indeed, the list of certain permissible categories of subsidies is found in a general provision titled ‘Principles’ which, unlike in the case of the EU-Singapore FTA, is potentially applicable to all subsidies, including those with LCRs that are otherwise prohibited. Article 10.4, Section II on ‘Subsidies’ states, in the relevant part:

(1) The Parties agree that subsidies can be granted by a Party when they are necessary to achieve a public policy objective. The Parties acknowledge, however, that certain subsidies have the potential to distort the proper functioning of markets and undermine the benefits of trade liberalisation. In principle, subsidies granted to enterprises providing goods or services should not be granted by a Party when they negatively affect, or are likely to affect, competition and trade.

⁶⁵ EU-Singapore FTA, Annex 11-A(2)(e).

⁶⁶ EU-Singapore FTA, Annex 11-A, footnote 1.

⁶⁷ This is especially considering that, in the case of the EU-Korea, the EU-Singapore and the EU-Vietnam FTAs, this includes the impact ‘not only on trade between the Union and the other Party to the relevant FTA, but includes also third (export) markets where undertakings of the EU and its trading partners compete’. See Borlini & Dordi, *supra* n. 45, at 596.

⁶⁸ *Ibid.*, at 574.

⁶⁹ EU-Singapore FTA, Art. 11.14. The Parties have committed to ‘use their best endeavours to remedy or remove through the application of their competition laws or otherwise, distortions of competition caused...’ (Art. 11.8).

⁷⁰ Borlini & Dordi, *supra* n. 45, at 575, emphasizing that, in the case of the EU-Vietnam FTA, the first general statement is about the importance of subsidies to achieve public objectives in general, rather than just constitute the premise for the granting of the exemption.

(2) An illustrative list of public policy objectives for which subsidies could be granted by a Party, subject to the conditions set out in this Section,⁷¹ includes the following: ...

(d) facilitating the development of certain economic activities or of certain economic areas, including but not limited to, subsidies for clearly defined research, development and innovation purposes, subsidies for training or for the creation of employment, subsidies for environmental purposes, subsidies in favour of small and medium-sized enterprises as defined in the Parties' respective legislations; and

...

(3) Each Party shall ensure that enterprises use the specific subsidies provided by a Party only for the policy objective for which the specific subsidies have been granted⁷².

This RE-relevant exemption clause is seemingly formulated in a relatively less burdensome way as compared to the corresponding provision in the EU-Singapore FTA.⁷³ But most importantly, in case of the EU-Vietnam FTA, it is possible for the Parties to activate both the specific consultation procedures⁷⁴ or the dispute settlement provisions of the agreement⁷⁵ if any Party considers that a specific subsidy covered under Article 10.4 negatively affects or may negatively affect its trade or investment interests – a possibility that is lacking in the EU-Singapore FTA. This is yet another difference that arguably makes the EU-Vietnam FTA a far better model than the EU-Singapore FTA within the medium-ambition side of the spectrum.

Much less sophisticated are instead the EU-Japan FTA and the EU-Mexico AA, albeit still containing potentially RE-relevant subsidies exemptions. The former includes a chapter on 'Subsidies', where Article 12.1 on 'Principles' plainly mirrors paragraph 1 of Article 10.4 of the EU-Vietnam FTA. What is missing, however, is a list of public policy objectives for which subsidies may be granted along the lines of the EU-Vietnam FTA. Article 12.9 EU-Japan FTA, however, incorporates by reference the general exceptions of the GATT and the General Agreement on Trade in Services (GATS) – Article XX and Article XIV, respectively. Similarly, the EU-Mexico AA contains an Article on 'Principles' that is more or less identical to Article 12.1 of the EU-Japan FTA⁷⁶ but, contrary to this agreement, it does not incorporate any explicit GATT/GATS exception clauses. While the generic reference to 'public policy objective' contained in the EU-Mexico AA may *per se* suffice to make it in

⁷¹ According to Art. 10.5(7) of the EU-Vietnam FTA, in particular, the entire discipline applies only to 'specific subsidies of which the amount per beneficiary over a period of 3 years is above 300,000 Special Drawing Rights'.

⁷² Footnote 1 to Article 10.5(7) of the EU-Vietnam FTA also importantly states: 'For greater certainty, when a Party has set up the *relevant legislative frameworks and administrative procedures* to this effect, the obligation is considered to be fulfilled'.

⁷³ Arguably, Article 10.4(2) of the EU-Vietnam FTA does not explicitly require that the exempted subsidies be 'limited to the minimum needed to achieve this objective' and have a 'limited effect on trade of the other Party' when they are 'necessary to achieve a public policy objective' in contrast to what happens in Annex 11.A(2) of the EU-Singapore FTA.

⁷⁴ See EU-Vietnam FTA, Ch. 11, s. II, Art. x.5.

⁷⁵ See EU-Vietnam FTA, Ch. 10, s. II, Art. 10.8(2).

⁷⁶ See EU-Mexico AA, Ch. 24, s. B, Art. x.6.

principle RE-relevant, problematic cases where a Party considers that a subsidy of the other Party causes 'significant adverse effects' to its trade or investment interests can be addressed via a detailed consultation procedure, whereby the requesting Party may obtain that the requested Party 'will use its best endeavours to eliminate or minimise those adverse effects within one year'.⁷⁷ Alternatively, the affected Party may resort to the dispute settlement provisions of the agreement.⁷⁸ Similar consultation procedures, albeit more stringent,⁷⁹ and the relevant dispute settlement mechanism⁸⁰ are also available to the Parties under the EU-Japan FTA.

Finally, all EU FTAs contain procedural disciplines on subsidies, namely transparency and notification requirements that address, to a lesser or broader extent, the general procedural weaknesses of the SCM Agreement. At the one end of the spectrum are the provisions contained in low-ambition PTAs, such as EU-Canada CETA, EU-COPE FTA and EU-Central America AA, together with, interestingly, a medium-ambition agreement such as the EU-Singapore FTA. The main difference among them is that, under the EU-Canada CETA, the specific transparency mechanism set up under the agreement⁸¹ is eviscerated by explicitly accepting that Parties simply render SCM-compliant notifications.⁸² At any rate, none of these agreements subject such provisions to the dispute settlement system established therein.⁸³ Much more sophisticated transparency and notification requirements are provided for in more ambitious (medium-ambition and high-ambition) PTAs. Albeit they may exhibit differences at the level of, inter alia, frequency of required notifications (e.g. one year in EU-Ukraine AA, 2 years in EU-Singapore FTA, 4 years in EU-Vietnam FTA),⁸⁴ minimum threshold amounts (e.g. not less than EUR 200.000 per undertaking over a period of three years in EU-Ukraine AA, not less than less than 450,000 special drawing rights per beneficiary for a period of three consecutive years in EU-Japan FTA),⁸⁵ structure of the process and amount of information required (e.g. compare EU-Ukraine AA vs. EU-Vietnam FTA or EU-Mexico AA),⁸⁶ and transitional periods (e.g. 5 years in EU-Ukraine AA, 4 years in EU-Vietnam FTA),⁸⁷ they all provide for an autonomous mechanism (that is, independent from that of the WTO), which is generally subject to the dispute settlement provisions of the relevant PTA.⁸⁸ Evidently, these provisions are not RE-specific but are still very important

⁷⁷ *Ibid.*, Article x.10(4).

⁷⁸ *Ibid.*, Article x.13.

⁷⁹ See EU-Japan FTA, Ch.12, s. B, Art. 12.6. According to para. 5, in particular, 'if the requesting Party, after the consultations, still considers that the subsidy has or could have a significant negative effect on its trade or investment interests under this Chapter, the requested Party *shall* accord sympathetic consideration to the concerns of the requesting Party. Any solution shall be considered feasible and acceptable by the requested Party'.

⁸⁰ *Ibid.*, Article 12.10.

⁸¹ See EU-Canada CETA, Ch. VII, Art. 2. According to para. 1, Parties have to report every two years the legal basis, form and amount of any subsidy granted within their territories.

⁸² *Ibid.*, Art. 2(2). The same holds true for the transparency mechanism set up under the EU-Japan FTA (see Ch. 12, Art. 12.5(2)); yet, in such case, the mechanism is subject to dispute settlement (see Ch. 12, Art. 12.10). For the limits of SCM-notifications, see *supra*, s. 2.2.

⁸³ See EU-Canada CETA, Ch. VII, Art. 9; EU-COPE FTA, Article 293(6); EU-Singapore FTA, Ch. 11, Art. 11.14.

⁸⁴ See EU-Ukraine AA, Art. 263(1); EU-Singapore FTA, Art. 11.9; and EU-Vietnam FTA, Art. 10.7 (1).

⁸⁵ See EU-Ukraine AA, Art. 263(1) and EU-Japan FTA, Art. 12.3(4).

⁸⁶ See EU-Ukraine AA, Art. 263; EU-Vietnam FTA, Art. 10.7; and EU-Mexico FTA, Ch. 24, Art. x.9.

⁸⁷ See EU-Ukraine AA, Art. 263(5) and EU-Vietnam FTA, Art. 10.7(2).

⁸⁸ In certain cases, the transparency mechanism is not subject to dispute settlement in every instance – e.g. in the case of the EU-Mexico AA, subsidies to services shall not be subject to the dispute settlement provisions (see Ch. 24, Art. 13).

inasmuch as they will contribute to build a common knowledge on the amount and form of government support to the clean energy sector, and hence on which green policy space is actually at stake.⁸⁹

2.3.2 PROVISIONS RELEVANT TO RENEWABLE ENERGY IN OTHER CHAPTERS

For the purposes of assessing whether EU PTAs go further than SCM disciplines in providing policy space for RE promotion, our analysis above needs to be complemented with the perusal of any other provisions which, albeit not subsidy-specific, may still be relevant to RE subsidies. In this perspective, a few chapters are worth exploring, where available and going from the more specific to the more general: (i) chapters on renewable energy; (ii) chapters on energy; and (iii) chapters on trade and sustainable development. The inclusion of at least one of such chapters is a recurring feature in the new-generation EU PTAs and reflects the much broader scope and the increased level of ambition of such agreements.

The EU-Singapore and the EU-Vietnam FTAs are the only two of the examined EU PTAs to include a specific chapter on ‘Non-Tariff Barriers to Trade and Investment in Renewable Energy Generation’.⁹⁰ These chapters, which are very similar, are inspired by the objective of ‘promoting, developing and increasing the generation of energy from renewable and sustainable sources, particularly through facilitating trade and investment’.⁹¹ Accordingly, they both contain, inter alia, a prohibition of qualitative and quantitative local content requirements,⁹² and an explicit reference to the agreements’ general exceptions mirroring Article XX GATT.⁹³ The inclusion of such a prohibition, enforceable through the agreements’ dispute settlement mechanism, in a RE-specific chapter was technically redundant inasmuch as LCRs were already captured by means of: (i) the chapters on non-discrimination, reinstating the GATT national treatment principle, along with the relevant general exceptions clauses;⁹⁴ (ii) the explicit reference to Article 3 SCM contained in the agreement’s subsidy chapters; (iii) the fact that the list of admissible subsidies listed therein applies to subsidies other than prohibited subsidies (that is, including subsidies contingent on the use of domestic content).⁹⁵ Reiterating the Parties’ intention to refrain from using LCRs, however, assumes symbolic value inasmuch as it shows a convergence of the Parties’ view on the unlawfulness of such practice irrespective of any climate-related narrative.⁹⁶ At the same time, it seems to suggest that, should a RE subsidy be at issue because of its discriminatory content, the way to go would be to sever the LCR and challenge it separately from the overall support scheme, especially if fitting in principle within the purview of the admissible subsidies list, along the lines of what has already been occurring at the WTO level.⁹⁷

⁸⁹ In most cases, however, it is still early to assess whether such mechanisms are effective. See, e.g. Borlini & Dordi, *supra* n. 45, at 572.

⁹⁰ See EU-Singapore FTA, Ch. 7 and EU-Vietnam FTA, Ch. 14.

⁹¹ See EU-Singapore FTA, Ch. 7, Art. 1 and EU-Vietnam FTA, Ch. 14, Art. 1.

⁹² See EU-Singapore FTA, Ch. 7, Art. 4(1)(a) and EU-Vietnam FTA, Ch. 14, Art. 4(1)(a).

⁹³ See EU-Singapore FTA, Ch. 7, Art. 6 and EU-Vietnam FTA, Ch. 14, Art. 6.

⁹⁴ See EU-Singapore FTA, Ch. 2 and EU-Vietnam FTA, Ch. 2.

⁹⁵ See *supra*, s. 2.3.1. As previously mentioned therein, the latter point is only valid in the case of the EU-Singapore FTA.

⁹⁶ I. Espa & K. Holzer, *Negotiating 21st Century Rules on Energy: What is at Stake for the European Union, the United States and the BRICS?* 19 *JWIT* 415, 431 (2018).

⁹⁷ See *supra*, s. 2.1.

In two other cases, the EU PTAs contain a chapter on energy more generally: the EU-Ukraine AA includes Chapter 11 on 'Trade-Related Energy', whereas the EU-Mexico AA includes Chapter 5 on 'Energy and Raw Materials'.⁹⁸ Although the two chapters exhibit many differences, their overall inspiration is very similar. In both cases, the chapters are very much focused on creating the enabling conditions for fostering competition in the energy sector and are thus primarily revolved around the liberalization of the sector in the interest of energy security. Albeit the majority of the provisions are hence fossil fuels-driven, a few provisions may be relevant for RE promotion: this is the case, for instance, of third-party access provisions⁹⁹ inasmuch as RE deployment depends on free market conditions, including unbundling of vertically integrated companies and access to energy supply infrastructure for private third party operators.¹⁰⁰ Another example is the provision on cooperation on standards in the area of renewable energy.¹⁰¹ Yet, such provisions do not have a direct bearing on the question of policy space left under the agreements for RE subsidies.¹⁰²

Finally, all EU FTAs contain a chapter on 'Trade and Sustainable Development'. This is a more general chapter, which conventionally contains a number of substantive provisions covering a wide range of environmental and labour issues, as well as specific compliance mechanisms.¹⁰³ In all cases, the chapters include a more or less detailed provision on 'Trade and Investment favouring Sustainable Development', where parties reaffirm their commitment to promote trade and investment in renewable energy, including by means of 'the adoption of policy frameworks conducive to the deployment of best available technologies'.¹⁰⁴ The level of normativity of such provisions is, however, very weak (e.g. 'shall strive to facilitate')¹⁰⁵ and the same applies to their degree of enforceability.¹⁰⁶ Overall, they do not seem susceptible to affect policy space for RE subsidies under the agreements. The importance of such chapters for the purposes of fostering renewable

⁹⁸ The EU text proposals for the EU-Australia FTA and EU-New Zealand FTA negotiations also include a chapter on 'Energy and Raw Materials': European Commission, *Negotiations and Agreements*, <http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/>.

⁹⁹ See for instance EU-Ukraine AA, Art. 273 and EU-Mexico AA, Art. 5.7.

¹⁰⁰ Espa & Holzer, *supra* n. 96, at 432.

¹⁰¹ See EU-Mexico AA, Art. 5.10.

¹⁰² Note that the EU text proposals for an 'Energy and Raw Materials' chapter in the EU-Australia FTA and EU-New Zealand FTA also incorporate a RE-specific article titled 'Access to infrastructure for producers of electricity generated from renewable energy sources' (see Art. X.12 in both cases). The provision seeks to create the conditions for increasing the share of renewables into the grid of the two Parties by ensuring that renewable energy suppliers of the other Party are accorded access to and use of the electricity network for renewable electricity generation facilities located within its territory on reasonable and non-discriminatory terms and conditions.

¹⁰³ For an overview, see G. Marín Durán, *Innovations and Implications of the Trade and Sustainable Development Chapter in the EU-Korea Free Trade Agreement* §8, 130-139 (James Harrison ed., Cambridge University Press 2014) and D. Prévost & I. Alexovičová, *Mind The Compliance Gap: Managing Trustworthy Partnerships for Sustainable Development in The European Union's Free Trade Agreements*, 2 IJPLAP 236 (2019).

¹⁰⁴ See, e.g., EU-Mexico AA, Ch. 27, Art. 10(2)(b); EU-Ukraine AA, Art. 293; EU-Singapore FTA, Article 12.11(2).

¹⁰⁵ See, e.g. EU-Japan FTA, Art. 16.5(c); EU-Ukraine AA, Art. 293(2); EU-Vietnam FTA, Art. 15.9(b).

¹⁰⁶ Most often, chapter-specific dispute resolution procedures are provided for, but do not envisage sanctions in cases of non-compliance: see, e.g. EU-Mexico AA, Ch. 27, Arts 15-17; EU-Ukraine AA, Art. 301; EU-Singapore FTA, Arts 12.16-17.

energy seems in this respect to have been overstated in part of the scholarship on trade and climate change.¹⁰⁷

2.3.3 COULD AND SHOULD EU PTAs GO FURTHER?

The analysis above has shown that EU PTAs advance substantive subsidy disciplines compared to the SCM Agreement when it comes to providing RE-relevant (but not RE-specific) WTO-plus exemptions. However, they do so very much inconsistently. In the case of high-ambition PTAs concluded in the context of the ENP, it is clear that the EU has attempted to narrow the regulatory gap between its unique EU State aid regime and the legal framework applicable to subsidies in its partners' jurisdictions. As we have seen, the EU-Ukraine Association Agreement fully incorporates the EU State aid *acquis* and, albeit not having RE in mind, the side effect is that the agreement's subsidy disciplines need to be interpreted in light of, inter alia, the EU's sophisticated two-track regime for sheltering renewable energy subsidies (i.e. the GBE Regulation and the 2014-2020 Guidelines). In other words, this avenue permits to transplant the clearly and narrowly defined eligibility criteria for permissible RE subsidies from the EU legal framework into the trade relations with Ukraine in the interest of legal clarity and predictability.

Whether this high-ambition model can in practice be replicated so as to remedy the lack of a RE exemption in the SCM Agreement seems however unlikely, at least at the present juncture. Our analysis points to the fact that such a model has been highly policy-specific and has only proved feasible for particular categories of countries (that is, candidates and potential candidate countries, neighbouring countries exhibiting particularly strong economic and political ties with the EU, which are targeted by special policies of the EU).¹⁰⁸ Here, regulatory convergence and even harmonisation could be realized because of the far-reaching integration goals subsumed under such PTA on both sides, rather than because of a shared concern to safeguard policy space for RE promotion. The range of countries potentially targeted by this ambitious regulatory model remains thus limited and, at any rate, not susceptible to include big players in the RE subsidy game with much stronger negotiating power vis-à-vis the EU.

Looking at the other EU PTAs, however, the lack of consistency in RE-relevant exemption clauses contained in subsidy chapters may be seen as a missed opportunity to consolidate what we have defined as the medium-ambition model for treating RE subsidies. Here, the reference is to the EU-Singapore FTA and the EU-Vietnam FTA, which did include a list of RE-exemption clauses for subsidies that somewhat resembles the general clauses included under Articles 107(2)-(3) TFEU. Such a model does create more policy space for RE promotion than is currently available under the WTO legal framework, while not fully imposing on trading partners the EU's own two-track system for justifying RE subsidies. When looking at it from a WTO law perspective, there seemingly is no reason why the medium-ambition model has not been consistently replicated in other agreements following the EU-Singapore FTA and EU-Vietnam FTA examples, so in this respect EU PTAs *could* have gone further. Whether they *should* have gone further is not as obvious. Based on recent WTO case law, the practical value of negotiating RE-relevant exemption clauses remains

¹⁰⁷ See, e.g. M. Gehring et al., *Climate Change and Sustainable Energy Measures in Regional Trade Agreements (RTAs): An Overview*, ICTSD (August 2013), <http://www.ictsd.org/sites/default/files/research/2013/08/climate-change-and-sustainable-energy-measures-in-regional-trade-agreements-rtas.pdf>, at 26.

¹⁰⁸ Borlini & Dordi, *supra* n. 45, at 557-558.

rather limited inasmuch as RE subsidies exempted in PTAs can still be challenged multilaterally and in some cases, as we have seen,¹⁰⁹ be found SCM-inconsistent.¹¹⁰ Put differently, WTO law as such does not impede the negotiation of RE exemption clauses in PTAs, but both the EU and its PTA partners maintain their rights to challenge RE subsidies in the WTO dispute settlement as long as there is no equivalent justification clause in the SCM Agreement. One could still argue, however, that the inclusion of RE exemption clauses in PTAs is politically important and instrumental to building consensus bottom-up with a view to prospective multilateralization. It is in this perspective, which is allegedly part of the EU PTA strategy, such agreements should have gone further in consolidating the practice of negotiating RE-relevant exemption clauses.

Following on from this point, the second aspect in which EU PTAs could and should have gone further is from an institutional standpoint. Leaving aside the special case of the EU-Ukraine AA,¹¹¹ EU policy practice is still much inconsistent as to whether PTAs provide for detailed consultation procedures, mediation and dispute settlement mechanisms, with major differences even within the medium-ambition model. As previously mentioned, the EU-Vietnam FTA is in this respect the most advanced of all medium-ambition PTAs, inasmuch as it provides for a set of procedural mechanisms that could be used to interpret broad RE-exemption clauses and thereby ensure legal clarity and abuse-prevention, in contrast to the EU-Singapore FTA.

A third and final aspect where EU PTAs still have untapped potential concerns transparency. As shown above, PTAs can go a long way in strengthening the extremely weak and fallacious SCM notifications but have often not been effectively used to 'raise the bar' in this respect. This is a missed opportunity considering, in particular, that this is an area where there is complementarity between WTO and PTAs: that is, the more PTAs can bring about transparency and knowledge on RE subsidies, the better from a WTO standpoint. From this angle, EU PTAs should be used more actively towards the reinforcement and the streamlining of subsidy notification procedures, including by making the process subject to the dispute settlement mechanisms.

3. RENEWABLE ENERGY AND TRADE REMEDY RULES

3.1 TRADE REMEDY ACTION AGAINST RE TECHNOLOGIES: OVERALL PICTURE

While most academic attention has thus far focused on the high-profile disputes at the WTO, unilateral trade remedy action has in practice emerged as a much greater constraint on government support to renewable energy. According to a study conducted by the International Centre for Trade and Sustainable Development (ICTSD), a total of 45 trade remedy investigations were initiated in the RE technology sector over 2006-2015: 28 anti-dumping and 17 parallel countervailing proceedings. Almost half of these cases (21)

¹⁰⁹ See *supra*, s. 2.1.

¹¹⁰ See WTO Appellate Body Report, *Peru — Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R, adopted 31 July 2015, paras 5.26-5.27 and footnote 106, where the Appellate Body opined that WTO members cannot relinquish their right to have recourse to the WTO dispute settlement in PTAs.

¹¹¹ Because it fully incorporates the EU State aid *acquis*, the Agreement is the only one that reproduces the full-fledged, Commission-centred *ex-ante* and *ex-post* control system provided for under EU State aid law and establishes an independent third institution for this purpose. Borlini & Dordi, *supra* n. 45, at 590.

targeted solar technology products (e.g., solar cells and modules, solar grade polysilicon and solar glass), whereas 9 cases involved wind technology products (e.g., wind towers) and the other 15 cases instead concerned biofuels (i.e., biodiesel and bioethanol).¹¹² The EU has been the main trade remedy user in this area (7 AD and 4 CVD measures imposed), followed by the United States (6 AD and 3 CVD measures imposed), China (3 AD and 1 CVD measures imposed), Australia (3 AD and 1 CVD measures imposed), Peru (1 AD and 1 CVD measures imposed), and Canada (1 AD and 1 CVD measures imposed).¹¹³ This pervasive use of trade remedies in the clean energy sector is explained not only by the fact that public incentives to investment in and manufacturing of RE technologies have increased significantly over the past decade,¹¹⁴ but also that such products are frequently traded across global supply chains.¹¹⁵

It could be argued, nonetheless, that the unilateral trade remedy track is less constraining on green policy space than multilateral challenges, insofar as it may only result in the imposition of offsetting ADs/CVDs on RE technology imports and not in the removal of RE subsidies altogether.¹¹⁶ However, the widespread application of (often, excessively high)¹¹⁷ trade remedy duties undeniably comes at a cost from a climate change mitigation standpoint:¹¹⁸ it increases the price of RE technologies, slows down the deployment of clean energy and prevents it from becoming a viable competitor with conventional energy from (heavily subsidised) fossil fuels. This situation can hardly be seen as optimal at a time when it is imperative to reduce the costs of clean energy as part of the global pledges to combat climate change¹¹⁹ and to achieve the UN 2030 Sustainable Development Goals (SDGs).¹²⁰ Overall, it has been estimated that AD/CVD measures against RE technologies resulted in a global trade loss of approximately USD 68 billion over the period 2008-2012, with associated costs for renewable energy generation.¹²¹

While collectively known as trade remedy measures, it is nonetheless important to distinguish countervailing duties from anti-dumping duties in how they relate to RE subsidies. In principle, only CVDs are a direct response to, and hence require a finding of,

¹¹² K. Kappel, *Options for Disciplining the Use of Trade Remedies in Clean Energy Technologies*, ICTSD (May 2017), https://www.ictsd.org/sites/default/files/research/options_for_disciplining_trade_remedies_in_cets.pdf, at 12-14.

¹¹³ *Ibid.*, at 15.

¹¹⁴ *Ibid.*, at 7-9; and IEA, *Energy and Climate Change – World Energy Outlook Special Report* (2015), <https://www.iea.org/publications/freepublications/publication/WEO2015SpecialReportonEnergyandClimateChange.pdf>, at 13 and 85, projecting subsidies to investment in and deployment of RE technologies to increase substantially from USD 270 billion in 2014 to USD 400 billion in 2030.

¹¹⁵ See S. Charnovitz & C. Fischer, *Canada – Renewable Energy: Implications for WTO on Green and Not-So-Green Subsidies*, 14 WTR 177, 184-185 (2015), explaining that the market for RE generation equipment and associated components is global, whereas the electricity market has been predominantly local; and Kappel, *supra* n. 112, at 12.

¹¹⁶ Conversely, see Arts 4.7 and 7.8 SCM Agreement for multilateral remedies.

¹¹⁷ Notably, the US has imposed anti-dumping duties as high as 250% on Chinese imports of solar cells in 2012: see Edwin Vermulst and Medison Meng, *Dumping and Subsidy Issues in the Renewable Energy Sector* §17, 337-342 (Thomas Cottier and Ilaria Espa eds, Cambridge University Press 2017).

¹¹⁸ For a similar view, Espa, *supra* n. 5; and G. N. Horlick, *Trade Remedies and Development of Renewable Energy*, ICTSD (December 2013), <https://e15initiative.org/wp-content/uploads/2015/09/E15-Clean-Energy-Technologies-Horlick-FINAL.pdf>, at 1-2.

¹¹⁹ United Nations Framework Convention on Climate Change (UNFCCC), done at Rio de Janeiro (May 9, 1992), 771 U.N.T.S. 107, Art. 2; Paris Agreement, done at Paris (December 12, 2015), Arts 2(1)(a), 3 and 4(2).

¹²⁰ See UN 2030 SDGs, *supra* n 21.

¹²¹ Kappel, *supra* n. 112, at 17.

subsidized (RE technology) imports, whereas ADs are taken in reaction to *dumped* imports – that is, goods placed on the market of the importing WTO member at a price below the market rate in the exporting country (or ‘normal value’).¹²² In other words, RE technology imports may be dumped and subject to ADs with or *without* these imports being subsidized, even though RE subsidies can generally enable manufacturers of RE technologies to sell them at a lower price than would otherwise be the case.¹²³ In practice, as previously noted, anti-dumping and countervailing proceedings have often been conducted in parallel against imports of RE technology products that were alleged to be both dumped *and* subsidized,¹²⁴ with well-known examples being those of the EU and the United States involving imports of solar panels and their components from China.¹²⁵ Nonetheless, this article places greater emphasis on CVD rules in the SCM Agreement given their more proximate relationship with RE subsidies.

3.2 MAIN SHORTCOMINGS OF THE WTO LEGAL FRAMEWORK

The WTO Anti-Dumping and SCM Agreements lay down similar substantive and procedural requirements for the imposition of ADs and CVDs respectively,¹²⁶ although there are important differences and notably the first condition of whether the imported products at issue are dumped or subsidized. Notwithstanding this, both agreements share three main shortcomings from the perspective of government measures promoting RE technologies.

The first problem is that WTO trade remedy rules display a strong bias in favour of (over-)protecting the interests of the domestic industry producing the ‘like’ (or competitive) goods (e.g., in our context, manufacturers of solar panels). In substantive terms, this is first evident from the fact that the main purpose of anti-dumping and countervailing investigations is to assert whether the effect of dumped or subsidized imports is to cause (or threaten to cause) ‘material injury’ to the domestic industry concerned.¹²⁷ If this can be demonstrated, unilateral trade remedy measures would be imposed to counteract such an injurious effect of dumped or subsidized imports (*in casu*, RE technologies/components), *even if* other players in the domestic economy (*in casu*, RE producers using these technologies/components and consumers) or the environment are negatively affected by such measures (i.e., due to higher price of RE technologies and slower RE deployment). Put differently, it is simply assumed that (dumped/subsidized) imports of cheaper RE technologies are negative for the importing country as a whole, just because they hurt one specific domestic industry. Moreover, ADs and CVDs may provide such a domestic industry with protection above and beyond what is actually necessary to remedy the injury inflicted

¹²² Art. 2.1 Anti-Dumping Agreement. Note that, in certain circumstances, the Anti-Dumping Agreement acknowledges that the home market price may not produce an appropriate ‘normal value’ for the purpose of comparison with the export price and provides for alternative method for its determination (e.g., third-country surrogate): see Art. 2.2 Anti-Dumping Agreement.

¹²³ Salzman & Wu, *supra* n. 35, at 421.

¹²⁴ This raises the issue of ‘double remedies’ but a discussion is beyond the scope of this article: see, *inter alia*, C. Barthelemy & D. Peat, *Trade Remedies in the Renewable Energy Sector: Normal Value and Double Remedies* 16 JWIT 436 (2015).

¹²⁵ For a discussion, see Fang Meng, *The Rise of Trade Remedies in the Renewable Energy Sector and the Need for Bilateral Agreement between the EU and China* §5 (in Peter Hefele et al. eds, Springer 2019); Shadikhodjaev, *supra* n. 4, at 488-489; Vermulst & Meng, *supra* n. 117, at 339-346.

¹²⁶ For a detailed examination, see P. Van den Bossche & W. Zdouc, *The Law and Policy of the World Trade Organization* 846-864 (Cambridge University Press, 2d ed 2017).

¹²⁷ Arts 3-4 Anti-Dumping Agreement; Arts 15-16 SCM Agreement.

by the dumped/subsidized imports. This is because WTO law only places an upper ceiling on the amount of the ADs (shall not exceed the dumping margin)¹²⁸ and CVDs (must not exceed the amount of subsidization),¹²⁹ which is equal to the level of the 'unfair trade' action rather than the injury level. As a result, trade remedy duties can be applied at a higher rate so as to bring the import price to what is deemed 'fair' or 'normal'. It is true that WTO law expresses a preference for AD/CVD measures not to exceed the level of injury caused to the domestic industry,¹³⁰ but it is ultimately up to each WTO member whether to incorporate such a discretionary 'lesser duty rule' (LDR) as a mandatory requirement into its domestic trade remedy legislation.¹³¹

Furthermore, this injured-industry bias is reinforced in procedural terms, given that domestic import-competing producers generally trigger the initiation of anti-dumping and countervailing investigations¹³² and are guaranteed a number of procedural rights as 'interested parties' in such investigations.¹³³ Conversely, WTO law does not require that industrial users and consumers of the products subject to the investigation be treated as interested parties, and only contains meagre and discretionary provisions on the consideration of their interests by domestic investigating authorities while deciding on the application of ADs/CVDs.¹³⁴ That being said, WTO members are certainly not precluded from including industrial users, consumer organizations or any other actor as interested parties in their domestic trade remedy legislations.¹³⁵

Following on from this point, the second shortcoming of WTO remedy rules is the absence of an explicit 'public interest' clause, which would demand that domestic investigating authorities consider and balance the benefits of ADs/CVDs to the domestic industry against the costs for other economic operators and broader public policy objectives. This is in contrast with the WTO Agreement on Safeguards,¹³⁶ which does provide that:

[the] investigation shall include reasonable public notice to *all interested parties* and public hearings or other appropriate means in which importers, exporters and other

¹²⁸ Art. 9.3 Anti-Dumping Agreement.

¹²⁹ Art.19.4 SCM Agreement.

¹³⁰ Art. 9.1 Anti-Dumping Agreement reads: 'It is *desirable* that the imposition be *permissive* in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry' (emphasis added); Art. 19.2 SCM Agreement reads: 'It is *desirable* that the imposition should be *permissive* in the territory of all Members, that the duty *should be* less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry' (emphasis added).

¹³¹ For instance, the EU applies the lesser duty rule in its anti-dumping legislation, whereas the US does not: see Vermulst & Meng, *supra* n. 117, at 338-9.

¹³² Art. 5.1 Anti-Dumping Agreement; Art. 11.1 SCM Agreement.

¹³³ Art. 6.11 Anti-Dumping Agreement; Art. 12.9 SCM Agreement.

¹³⁴ E.g., Art. 19.2 SCM Agreement reads: 'It is *desirable* ... that *procedures should be established* which would allow the authorities concerned to take due account of representations made by *domestic interested parties* [defined as including consumers and industrial users of the imported product subject to investigation] whose interests might be adversely affected by the imposition of a countervailing duty'. See also, albeit more limited, Art. 6.12 Anti-Dumping Agreement.

¹³⁵ See, e.g., Art. 12.11 SCM Agreement: 'This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.'

¹³⁶ Unlike anti-dumping and countervailing duties, safeguards are not considered a 'trade remedy' measure against unfair trade practices under WTO law, but an 'economic emergency' action that is applied to fair trade: WTO Appellate Body Report, *United States — Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002, para. 83.

interested parties could *present evidence and their views ... inter alia, as to whether or not the application of a safeguard measure would be in the public interest.*¹³⁷

In the course of the Doha Round negotiations, a number of proposals were initially brought forward to include a similar public interest clause into the Anti-Dumping Agreement, but the 2011 Chairman Report indicated that WTO members remained ‘sharply divided’ on this issue, with the United States being one of the main opponents. But even among the proponents, there were divergent views on which elements should be taken into account as part of the public interest test and whether decisions made thereunder should be subject to domestic judicial review and WTO dispute settlement proceedings.¹³⁸

At the same time, it ought to be emphasized that WTO law takes a permissive approach towards the imposition of trade remedy measures. Even where a duly conducted anti-dumping or countervailing investigation confirms the injurious impact of dumped or subsidized imports on the domestic industry, the imposition of ADs/CVDs remains optional and at the full discretion of the importing WTO member.¹³⁹ This being so, nothing in WTO law prevents the inclusion of a public interest test or another balancing mechanism in domestic trade remedy legislation.¹⁴⁰ Applying this to our case, WTO members have ample policy space to undertake a holistic assessment of whether the injurious effects on domestic producers caused by (dumped/subsidized) imports of low-cost RE technologies are outweighed by the benefits these bring to other economic operators within its nation and climate change mitigation, and decide on this basis *not* to impose ADs or CVDs on such products.

The third and final drawback of WTO remedy rules is the lack of a neutral decision-maker. That is, in AD/CVD proceedings, determinations are made by domestic administrative agencies with an inherent tendency towards protecting the interests of the petitioning domestic industry, rather than promoting national economic welfare or global environmental gains.¹⁴¹ In principle, under the SCM Agreement, it is possible to take action against subsidized imports of RE technologies causing material injury in the WTO dispute settlement system and, hence, before a more impartial adjudicator. However, as seen above, WTO members have tended to resort instead to unilateral countervailing action, which is generally less costly and time-consuming than multilateral review by the WTO judicial bodies.¹⁴² Moreover, even if trade remedy measures may be challenged in WTO

¹³⁷ Art. 3.1 Safeguards Agreement (emphasis added).

¹³⁸ WTO Negotiating Group on Rules, *Communication from the Chairman*, TN/RL/W/254 (April 21, 2011), at 19. This public interest issue does not seem to have received further attention in subsequent negotiations.

¹³⁹ Art. 9.1 Anti-Dumping Agreement; Art. 19.1 SCM Agreement. See also, WTO Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, WT/DS141/AB/RW, adopted 24 April 2003, para. 122.

¹⁴⁰ In fact, practice varies across WTO members in this regard. For an overview, see V. Kotsiubska, *Public Interest Consideration in Domestic and International Anti-Dumping Disciplines*, World Trade Institute MILE Thesis (September 2011), Ch. 3.

¹⁴¹ Horlick & Clarke, *supra* n. 40, at 688-9.

¹⁴² Salzman & Wu, *supra* n. 35, at 442. Notably, the Anti-Dumping Agreement (Art. 7.3) allows for provisional measures to be applied (following a preliminary affirmative determination of dumping, injury and causation) 60 days following the initiation of the investigation, and similarly does the SCM Agreement for provisional CVDs (Art. 17.3).

dispute settlement proceedings once they have been imposed,¹⁴³ any finding of WTO-inconsistency will not lead to a repayment of any illegally collected ADs or CVDs.¹⁴⁴

To sum up, in both substantive and procedural terms, WTO trade remedy law may have opened the door to the recent surge in AD/CVD cases against (dumped/subsidized) imports of cheaper RE technologies, which have hindered the rapid deployment of carbon-neutral and climate-friendly renewable energy. Yet importantly, largely due to the *permissive* nature of key aspects of such multilateral rules, WTO law has not foreclosed the possibility that WTO members regulate the use of trade remedies in a more climate-supportive manner in their national legislations, or indeed in PTAs. With this in mind, the next section turns to assess how far the selected EU PTAs have gone in this direction.

3.3 POTENTIAL AND LIMITATIONS OF EU PTAs

3.3.1 PROVISIONS RELEVANT TO RENEWABLE ENERGY IN TRADE REMEDY CHAPTERS

All of the EU PTAs under consideration contain a chapter on ‘Trade Remedies’,¹⁴⁵ which usually begins by reaffirming the Parties’ rights and obligations under the WTO Anti-Dumping and SCM Agreements.¹⁴⁶ Nonetheless, they also contain one set of WTO-plus provisions that is particularly relevant for renewable energy promotion: the so-called ‘Consideration of Public Interest’ clause which, in some instances, is accompanied by a mandatory list of relevant stakeholders that goes beyond the list of interested parties under WTO law. While this clause is found in all selected EU PTAs but that with Mexico,¹⁴⁷ its substantive content and legal strength varies significantly across agreements. At the one end of the spectrum are high-ambition PTAs containing a public interest clause that is framed in obligatory terms and is detailed as to the relevant stakeholders whose interests are to be considered by the investigating authorities, along the lines of the public interest provision found in EU trade remedy legislation discussed below. This exportation of EU norms does not only occur in the specific case of the EU-Ukraine AA,¹⁴⁸ but also in other agreements such as the EU-Singapore FTA:

Anti-dumping and countervailing duties *shall not be applied* by a Party where, on the basis of the information made available during the investigation, it can *clearly be concluded that it is not in the public interest* to apply such measures. Public interest *shall take into account* the situation of the domestic industry, *importers and their representative organizations, representative users and consumer organizations*, to

¹⁴³ For an account of WTO disputes concerning trade remedies in the RE sector, see Espa, *supra* n. 5.

¹⁴⁴ This is because WTO law provides only for forward-looking prospective remedies, rather than remedies compensating for damage suffered retrospectively: see van den Bossche & Zdouc, *supra* n. 126, at 207-8; and G. Vidigal, *Re-Assessing WTO Remedies: The Prospective and Retrospective* 16 JIEL 505 (2013).

¹⁴⁵ Note that, in some cases (e.g., EU-Korea FTA, Ch. 3, ss A-C), these chapters include provisions not only on anti-dumping and countervailing duties, but also on safeguard measures: the latter are, however, beyond the scope of this article.

¹⁴⁶ See EU-Korea FTA, Art. 3.8; EU-Central America AA, Art. 92.1; EU-COPE FTA, Art. 37(1); EU-Singapore FTA, Art. 3.1; EU-Canada CETA, Art. 3.1; EU-Vietnam FTA, Art. 3.1; EU-Japan FTA, Art. 5.11(1); EU-Ukraine AA, Art. 46.1; EU-Mexico AA, Art. 2.1.

¹⁴⁷ Note that the EU-MERCOSUR Free Trade Agreement, in principle reached on 28 June 2019, equally lacks a public interest clause.

¹⁴⁸ EU-Ukraine AA, Art. 48.

the extent that they have provided relevant information to the investigating authorities.¹⁴⁹

At the other end of the spectrum, we find low-ambition PTAs with public interest clauses that are framed in hortatory and vague terms, such as that of the EU-Korea FTA: ‘the Parties *shall endeavour to consider* the public interests [not defined therein] before imposing an anti-dumping or countervailing measure’.¹⁵⁰ In the middle-ambition PTAs, the provisions are mandatory in nature, but are deferential as to whose interests are to be deemed as forming part of the public interest or/and fail to specify what may be the consequences of such a consideration. An example of the former is found in the EU-Canada CETA: ‘Each Party’s authorities *shall consider information in accordance with the Party’s laws*, as to whether imposing an anti-dumping or countervailing duty would be in the public interest.’¹⁵¹ An example of the latter is found in the EU-Japan FTA:

[the] investigating authorities of the importing Party *shall*, in accordance with its laws and regulations, *provide opportunities* for importers of the good, for industrial users of the good and for representative consumer organizations ... to *submit their views in writing* with regard to the anti-dumping and countervailing duty investigation, including concerning the potential impact of a duty on their situation.¹⁵²

This inconsistency in EU PTA practice may in some instances reflect WTO members’ divergent positions on the public interest clause, as previously discussed in the context of the Doha Round negotiations, but not in all cases. For instance, in the case of the EU-Canada CETA, both Parties have more elaborated public interest provisions in their domestic trade remedy legislation.¹⁵³ Furthermore, as noted above, WTO law neither requires, nor prohibits, the consideration of broader policy interests in anti-dumping and countervailing investigations, and hence there are no WTO-based legal constraints on replicating the more ambitious public interest clause of the EU-Singapore FTA into other preferential trade agreements. Such a clause would effectively open the door for a less one-sided industry assessment in anti-dumping and countervailing investigations by requiring consideration of the wider public interests in, for example, not increasing the cost of RE technologies through trade remedy duties.

Besides the limited ambition of some public interest clauses in EU PTAs, their legal significance is further undermined by the fact that trade remedy chapters are not subject to the dispute settlement and mediation mechanisms established under the agreements.¹⁵⁴

¹⁴⁹ EU-Singapore FTA, Art. 3.4 (emphasis added). A similar provision is found in Art. 3.3 EU-Vietnam FTA.

¹⁵⁰ EU-Korea FTA, Art. 3.10.

¹⁵¹ EU-Canada CETA, Art. 3.3(1) (emphasis added). See also Art. 94 EU-Central America AA.

¹⁵² EU-Japan FTA, Art. 5.13 (emphasis added). Similarly, see Art. 39 EU-COPE FTA.

¹⁵³ For the EU, see *Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union* [EU Anti-Dumping Regulation], OJ [2016] L176/21, Art. 21; *Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union* [EU Anti-Subsidy Regulation], OJ [2016] L 176/55, Art.31. For Canada, see *Special Import Measures Act* (R.S.C., 1985, c. S-15), s. 45.

¹⁵⁴ EU-Korea FTA, Art. 3.15; EU-Central America AA, Art. 98; EU-COPE FTA, Art. 42; EU-Singapore FTA, Art. 3.5; EU-Canada CETA, Art. 3.7; EU-Vietnam FTA, Art. 3.5; EU-Japan FTA, Art. 5.11(2); EU-Ukraine AA, Art. 52 (but see Art. 50*bis* (‘Consultations’) and Art. 51 (‘Institutional Dialogue on Trade Remedies’)).

This means that the implementation of public interest clauses is entirely dependent on domestic investigating authorities, whose decisions are not subject to review by an international and impartial adjudicator. In our case, this begs the question of whether these provisions have been used as a basis for considering whether the imposition (or continuation) of ADs/CVDs on RE technology imports is in the broader public interest, including from a climate change mitigation perspective. In order to answer this question, one would have to look thoroughly at the domestic practice of the various countries involved, but the EU provides an interesting example being thus far the main user of trade remedy measures in the clean energy sector.

3.3.2 'PUBLIC INTEREST' CLAUSE AND RENEWABLE ENERGY IN EU PRACTICE

The EU Regulations 2016/1036 and 2016/1037 establish the substantive and procedural rules for the application of anti-dumping and countervailing duties respectively, and they both contain a public interest clause –referred to as ‘Union interest’¹⁵⁵– that is mandatory for all new and review investigations. In other words, after determining that there have been dumped/subsidised imports, injury to the domestic industry and causation, the European Commission must go on to evaluate whether the imposition of ADs or CVDs is or is not in the Union interest. This is broadly defined as an ‘appraisal of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers’,¹⁵⁶ and hence may in principle include both economic and non-economic (e.g., environmental) considerations. In addition, the Union interest provision broadens the list of interested parties vis-à-vis the WTO legal framework to encompass ‘trade unions, importers and their representative organizations, representative industrial users, representative consumer organizations’,¹⁵⁷ who are all guaranteed a number of procedural rights to have their views known and taken into account by the Commission (and the Member States) provided the information is submitted in accordance with the stipulated requirements.¹⁵⁸

However, the injured-industry focus still persists in the Union interest examination as the ‘need to eliminate the trade-distorting effects of injurious subsidisation [or dumping] and to restore effective competition shall be given special consideration’.¹⁵⁹ Furthermore, the Union interest clause can be characterized as a negative one, since there is a starting presumption in favour of applying ADs or CVDs, unless ‘it can be *clearly* concluded that it is *not in the Union interest* to impose such measures’.¹⁶⁰ Put differently, as an exception to the norm, the standard for the non-imposition of ADs and CVDs under the Union interest test is rather high and not easy to establish: that is, the negative impact of such duties on the broader public interest must be clearly disproportionate when compared to any benefit they bring to the injured manufacturer(s) of the product(s) under review. And even when this high threshold is met, the language of the Union interest clause remains discretionary (‘may not be applied’) and fails to lay down a bold obligation not to impose trade remedy

¹⁵⁵ EU Anti-Dumping Regulation, Art. 21; EU Anti-Subsidy Regulation, Art. 31.

¹⁵⁶ EU Anti-Subsidy Regulation, Art. 31(1); EU Anti-Dumping Regulation, Art. 21(1).

¹⁵⁷ EU Anti-Subsidy Regulation, Art. 31(2); EU Anti-Dumping Regulation, Art. 21(2), as amended by EU Regulation 2018/825, OJ [2018] L 143/1.

¹⁵⁸ EU Anti-Subsidy Regulation, Arts 31(2)-(4) and (7); EU Anti-Dumping Regulation, Arts 21(2)-(4) and (7).

¹⁵⁹ EU Anti-Subsidy Regulation, Art. 31(1); EU Anti-Dumping Regulation, Art. 21(1).

¹⁶⁰ EU Anti-Subsidy Regulation, Art. 31(1); EU Anti-Dumping Regulation, Art. 21(1).

measures.¹⁶¹ In practice, only in a few trade remedy cases has the European Commission decided not to impose ADs/CVDs on the grounds of the Union interest,¹⁶² and none concerns the renewable energy sector. However, this should not lead to the conclusion that the Union interest clause has been of no practical significance.

In our context, it is worth highlighting that the Union interest clause has paved the way for climate change concerns to be raised and considered during the parallel anti-dumping and countervailing investigations by the EU against (allegedly) subsidised imports of solar panels and their components from China,¹⁶³ which is one of the largest trade remedy actions thus far taken by the European Commission. These were initiated in September 2012 and November 2012 based on an application by EU ProSun (an association representing more than 20 European solar manufacturers) and resulted in the imposition of definitive anti-dumping duties (ranging from 27.3% to 64.9%)¹⁶⁴ and countervailing duties (ranging from 3.5% to 11.5%)¹⁶⁵ in December 2013, which were extended following an expiry review in March 2017 for a period of eighteen months.¹⁶⁶ Notably, during the CVD expiry review,¹⁶⁷ a significant number of interested parties, including EU upstream and downstream companies operating in the solar sector as well as five environmental non-governmental organisations, called for the termination of the CVDs on grounds (inter alia)¹⁶⁸ of their negative impact on the promotion of renewable energy and thus the achievement of the EU's climate policy objectives. In particular, they pointed to changed circumstances since the CVDs were adopted in December 2013, and notably the adoption of the EU Climate and Energy Policy Framework setting a new target of increasing the share of renewable energy sources to at least 27% in EU final energy consumption by 2030,¹⁶⁹ as well as the ratification by the EU of the Paris Agreement in October 2016.¹⁷⁰ They further

¹⁶¹ Similar discretionary language is found in the EU's text proposals in the on-going FTA negotiations with Australia and New Zealand (see Art. X.3 in both cases).

¹⁶² This may be partly due to the wide margin of discretion granted to the Commission as to the methods for analysing and weighing the various interests involved when assessing the Union interest. Such an assessment is only subject to limited review by the European courts: Case T-432/12, *Volžskij trubnyi zavod OAO (VTZ OAO) and Others v. Council*, EU:T:2015:248, para. 143. For a more in-depth analysis, see van Bael and Bellis, *EU Anti-Dumping and Other Trade Defence Instruments* 377-98 (Wolters Kluwer, 6th edition 2019).

¹⁶³ *Commission Implementing Regulation (EU) 2017/366 of 1 March 2017 imposing definitive countervailing duties on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China* [Commission Regulation 2017/366], OJ [2017] L56/1; *Commission Implementing Regulation 2017/367 of 1 March 2017 imposing a definitive anti-dumping duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China* [Commission Regulation 2017/367], OJ [2017] L56/131.

¹⁶⁴ Commission Regulation 2017/367, para. 1.

¹⁶⁵ Commission Regulation 2017/366, paras 1-2. Note, however, that a Minimum Price Undertaking was accepted by the Commission, which reportedly covers roughly 75% of the solar panel imports from China being thus exempt from the definitive CVDs: see Vermulst & Meng, *supra* n. 117, at 345-346.

¹⁶⁶ Commission Regulation 2017/366, para. 784; Commission Regulation 2017/367, para. 373.

¹⁶⁷ See similarly for the AD expiry review, Commission Regulation 2017/367, paras 314-320 and 334-335; and discussion in K. Kulovesi, *International Trade Disputes on Renewable Energy: Testing the Ground for Mutual Supportiveness between WTO Law and Climate Change Law*, 23 *RECIEL* 324, 348-352 (2014).

¹⁶⁸ See other arguments in Commission Regulation 2017/366, para. 636.

¹⁶⁹ European Commission, *Communication on a Policy Framework for Climate and Energy in the period from 2020 to 2030*, COM(2014) 15final (January 22, 2014), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2014%3A15%3AFIN>, at 6. This target has now been raised to 32%: see *Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources*, OJ [2018] L328/82, Art 3.

¹⁷⁰ Commission Regulation 2017/366, para. 725.

submitted that the CVDs at issue ‘make the achievement of these climate targets more difficult by slowing down the deployment of solar energy’, and argued that ‘restoring market global prices for solar will allow the Union to decarbonize faster its power generation’.¹⁷¹ From this angle, they criticized the inconsistency between the EU’s climate and trade policies: ‘[w]hile the former is promoting and subsidizing the renewables, the latter is increasing their price and affecting availability’.¹⁷²

The European Commission, however, considered that the CVDs on Chinese solar imports had ‘only a limited impact on the achievement of the short term Union climate objectives’, mainly because ‘the Union’s demand for solar installations in the two to three years to come will only be affected to a limited extent by [these] measures [and] this will only change once retail grid parity becomes a significant source of demand.’¹⁷³ While falling short of resulting in the non-continuation of CVDs, the Union interest clause nonetheless had an impact on limiting the duration of such duties, which were ‘exceptionally prolonged for 18 months only’¹⁷⁴ as opposed to the usual five years.¹⁷⁵ The Commission held that it was not possible to take a view on the Union interest for a period exceeding 18 months, due to the fact that the CVDs may have an impact on EU solar demand in the future, once the transition of RE support policies will be completed and grid parity will be achieved across wider parts of the EU.¹⁷⁶ At the end of this 18-month period, the Commission rejected a new request by the European solar industry for an expiry review investigation and decided it was ‘in the best interest of the EU as a whole’ to terminate the trade remedy measures on Chinese solar panels and their components on 3 September 2018.¹⁷⁷ This suggests that the public interest clause has served as a basis for balancing the industry-specific injurious effects of (subsidized) imports of cheaper RE technologies against their broader environmental benefits for the EU as a whole.

3.3.3 COULD AND SHOULD EU PTAs GO FURTHER?

While the examined EU PTAs do contain some innovative provisions on trade remedies vis-à-vis the WTO legal framework, they could and should have gone further in disciplining the use of such measures as a means to facilitating trade in RE technologies and thereby lowering the cost of renewable energy and scaling up its deployment. This is so in at least three important respects.

Firstly, in substantive terms, the inclusion of a public interest clause in EU PTAs (but of that with Mexico) is significant in tackling the injured-industry bias of the WTO legal framework by demanding the input of a broader range of stakeholders and forcing investigating authorities to make a more balanced assessment on whether or not the

¹⁷¹ *Ibid.*, para. 726.

¹⁷² *Ibid.*, para. 726.

¹⁷³ *Ibid.*, paras 727, 729, 731; and s. 6.3 for the Commission’s full analysis and finding that the CVDs have only had a limited impact on solar demand in the EU thus far. This position may certainly be challenged, and it was indeed by a number of parties during the expiry review: Commission Regulation 2017/366, paras 720-724.

¹⁷⁴ *Ibid.*, para. 746.

¹⁷⁵ Art. 11 Anti-Dumping Agreement.

¹⁷⁶ Commission Regulation 2017/366, paras 745-746.

¹⁷⁷ European Commission, *News – Commission decides not to extend trade defence measures on solar panels from China* (August 31, 2018), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1904>; *Notice of the Expiry of Certain Anti-Dumping Measures*, OJ [2018] C310/4 and *Notice of Expiry of Certain Anti-Subsidy Measures*, OJ [2018] C310/5.

imposition of ADs/CVDs on (for example) cheap RE technologies may do more harm than benefit to the importing jurisdiction as whole. This is certainly an improvement vis-à-vis a situation where no balancing of competing interests occurs (e.g., US anti-dumping laws). However, as we have seen, EU PTA practice has not been consistent in this regard and there is no legal reason why the mandatory and detailed public interest provision of the FTAs with Singapore and Vietnam (as well as of the EU-Ukraine AA) have not been matched by the same level of ambition in other agreements (notably, EU-Canada CETA). As previously mentioned, WTO law adopts a permissive approach in that WTO members may always choose not to impose trade remedy duties because of environmental or other public interest considerations. Arguably, the liberalising spirit of Article XXIV GATT (i.e., the PTA exception)¹⁷⁸ would seem to generally support the elimination of ADs and CVDs among PTA parties,¹⁷⁹ including on RE technology products.¹⁸⁰ In this sense, the lack of consistency in EU PTA practice may be seen as a missed opportunity in light of the EU's own rhetoric that such agreements can serve as a laboratory to build consensus bottom-up for the Doha multilateral negotiations on a public interest clause. From this angle, EU PTAs should be used more actively towards the development of a public interest test, which is not only clearly mandatory but also sufficiently detailed as to the interested parties involved (as already done in the three most ambitious EU PTAs) and as to what is meant by the term 'public interest' –e.g., by including climate change/environmental impact among a non-exhaustive list of criteria to be considered for measuring public interest.

A second substantive aspect in which EU PTAs could and should have gone further is in relation to the LDR, which can be useful in avoiding over-protection of the injured domestic industry and in limiting the increase in the costs of RE technologies as a result of ADs/CVDs (i.e., by making such duties proportionate to the injury level, rather than the full extent of dumping or subsidisation). Whereas all EU PTAs under consideration do contain LDR provisions, none is cast in bold mandatory language and hence add little to the existing discretionary provisions under WTO law examined earlier. For instance, the EU-Ukraine AA, the EU-Singapore FTA and EU-Vietnam FTA simply replicate the non-compulsory language ('should be') found in the LDR provisions of the Anti-Dumping and SCM Agreements.¹⁸¹

Should a Party decide to impose a provisional or definitive anti-dumping or countervailing duty, the amount of such duty shall not exceed the margin of dumping or countervailable subsidies, but it *should be* less than the margin if such a lesser duty would be adequate to remove the injury to the domestic industry.¹⁸²

¹⁷⁸ WTO Appellate Body Report, *Peru — Agricultural Products*, *supra* n. 110, para. 5.166.

¹⁷⁹ In particular, Art. XXIV(8)(b) GATT provides in the case of a free trade area: 'the duties and other restrictive regulations of commerce (*except*, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are *eliminated on substantially all the trade* between the constituent territories in products originating in such territories' (emphasis added). Note that neither Art. VI GATT (ADs), nor Art. XVI GATT (CVDs), are listed in the parenthesis as exempted from this obligation, which could be interpreted as requiring their elimination on 'substantially all' bilateral trade between the PTA parties. This matter, however, is yet to be addressed in WTO jurisprudence. For further discussion, see A. T. Gobbi Estrella & G. N. Horlick, *Mandatory Abolition of Anti-Dumping, Countervailing Duties and Safeguards in Customs Unions and Free-Trade Areas Constituted between WTO Members: Revisiting a Long-Standing Discussion in Light of the Appellate Body's Turkey–Textiles Ruling* 40 JWT 909 (2006).

¹⁸⁰ Kampel, *supra* n. 112, at 57.

¹⁸¹ Art. 9.1 Anti-Dumping Agreement and Art. 19.2 SCM Agreement; see discussion *supra*, s. 3.2.

¹⁸² Art. 49 EU-Ukraine AA (emphasis added); see similar LDR provisions in EU-Singapore FTA (Art. 3.3) and EU-Vietnam FTA (Art. 3.4). The same approach is found in the EU trade remedy legislation: EU Anti-Dumping Regulation, Arts 7(2) and 9(4) and EU Anti-Subsidy Regulation, Arts 12(1) and 15(1).

LDR provisions in other EU PTAs are even weaker in legal terms, including in the EU-Canada CETA¹⁸³ and the FTAs with Latin American countries.¹⁸⁴ Here too, EU PTAs have missed the opportunity to discipline the use of trade remedies in a more climate-supportive manner through the consistent incorporation of a mandatory LDR provision,¹⁸⁵ even though there is no apparent impediment to do so from a WTO law standpoint. In fact, this appears to be more motivated by the EU's desire to retain discretion in imposing higher duties (i.e., up to the dumping margin or subsidy amount) when deemed necessary to protect the EU industry, as evidenced by the changes introduced to the LDR as part of the recent overhaul of its trade defence legislation in June 2018.¹⁸⁶

The third aspect in which EU PTAs could and should have been more ambitious is in institutional terms. With the exception of the EU-Ukraine AA,¹⁸⁷ there is no Trade Remedies Committee or other specialised body to oversee the implementation of the trade remedy chapter of EU PTAs, nor is it subject to the dispute settlement or mediation procedures set out in the agreements. To be sure, the public interest clauses found in these agreements raise complex questions as to what would be the appropriate scope of judicial review (i.e., only procedural aspects, such as the right to be heard, or also substantive ones?), but this difficulty is not a sufficient reason for excluding judicial review altogether.¹⁸⁸ In fact, there seems to be limited practical value in having innovative WTO-plus provisions in EU PTAs if there are no institutional mechanisms to ensure their effective implementation and enforcement.

4. CONCLUSIONS

It is widely recognised that a rapid scale-up and deployment of renewable energy will be critical to the pursuit of multilateral commitments under the UNFCCC to address climate change, as well as to achieve the 2030 SDGs. And yet, it is similarly known that governments' ability to boost renewable energy sources and technologies has been increasingly challenged not only in the WTO dispute settlement system, but even more so through unilateral trade remedy action. Whereas a multilaterally negotiated solution remains undoubtedly the ideal option for protecting this green policy space, the prospects of reforming WTO subsidy and trade remedy disciplines remain rather distant. And yet, the imperative of tackling climate change urges us to move beyond the choice between 'WTO action' and 'no action', and explore other possible avenues for legal development at the 'minilateral'¹⁸⁹ level in a way that is still compatible with WTO rules and principles. In

¹⁸³ EU-Canada CETA, Art. 3.3.2 reads: 'the Party's authorities *may consider* whether the amount of the anti-dumping or countervailing duty to be imposed shall be the full margin of dumping or amount of subsidy, or a lesser amount, in accordance with the Party's laws' (emphasis added).

¹⁸⁴ See, e.g., EU-COPE FTA, Art. 40 and EU-Mexico AA, Art. 2.3.

¹⁸⁵ Similarly, the EU's text proposals on the LDR in the on-going EU-Australia and EU-New Zealand FTA negotiations (Art. X.4) are framed in discretionary language ('may be less than').

¹⁸⁶ European Commission, *Factsheet – Europe's Trade Defence Instruments: Now Stronger and More Effective* (June 7, 2018), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1859>, at 2-3.

¹⁸⁷ EU-Ukraine AA, Art. 51.

¹⁸⁸ Notably, Art. 3.1 of the WTO Safeguards Agreement is subject to review by the WTO dispute settlement bodies.

¹⁸⁹ This term is borrowed from: K. Kulovesi, *Addressing Sectoral Emissions outside the United Nations*

particular, minilateral initiatives within PTAs among key players in the RE sector, even if inherently limited as to the number of countries involved, can already make a significant contribution towards enabling the promotion and deployment of carbon-neutral green energy.

On this premise, this article has assessed the potential and limitations of selected EU PTAs in safeguarding countries' efforts to promote renewable energy. In this regard, we first find that PTAs have far more potential in terms of disciplining the use of trade remedy measures against (dumped/subsidized) imports of cheaper RE technologies than in sheltering the provision of certain good RE subsidies. This should not come as a surprise given that WTO law is essentially permissive with regards to the imposition of ADs and CVDs, and hence WTO members are free to limit (or eliminate) their use on climate-friendly products within PTAs. Conversely, as we have seen, an RE exemption clause within PTAs provides only a very partial safe harbour for RE subsidies inasmuch as these remain subject to WTO disciplines and can always be challenged in the WTO dispute settlement system.

Second, we show that practice across EU PTAs has thus far been inconsistent, when it comes to both creating a legal justification for certain good RE subsidies (notably, the three levels of ambition identified vis-à-vis RE-relevant exemption clauses), as well as limiting the imposition of trade remedy duties on imports of low-cost RE technologies (notably, the three levels of ambition identified vis-à-vis the public interest clause). Although this lack of consistency can in some instances be explained by the specific policy context (e.g., ENP), it is at odds with the EU's rhetoric that its PTAs may serve to build consensus bottom-up and pave the ground for an agreement at the WTO level, at least in so far as RE promotion is concerned. Moreover, EU PTAs have missed the opportunity to go beyond WTO rules altogether in certain important respects, such as the LDR provisions (i.e., all PTAs simply replicate discretionary WTO provisions) and RE-specific chapters (i.e., almost no PTAs include RE-specific provisions and, when they do, these largely reinstate what is already clear as a matter of WTO law, such as the prohibition of LCRs).

In conclusion, and seizing the occasion of a greener leadership at the European Commission,¹⁹⁰ the EU could and should put forward a more ambitious and consistent strategy on RE promotion in PTA negotiations. Based on our analysis, we suggest that the EU's model negotiating text should have the following key components: 1) with respect to RE subsidies, an exemption clause along the lines of the higher end of the medium-ambition PTA model (i.e. the EU-Vietnam FTA), matched with adequate institutional and procedural mechanisms aimed at ensuring abuse-prevention and transparency; 2) with respect to trade remedies in the RE sector, public interest clauses along the lines of the high-ambition PTA model (e.g., the EU-Vietnam and EU-Singapore FTAs) as well as mandatory LDR provisions, accompanied by institutional mechanisms to ensure their effective implementation. To be sure, both of these proposals are partial improvements for green policy space: the first would not shelter RE subsidies from challenge in the WTO dispute settlement system, while the second would not provide a full guarantee against the imposition of trade remedy duties on RE technologies. But every step matters in the global fight against climate change, and not the least for the EU which aspires to play a leading role in this cause and is

Framework Convention on Climate Change: What Roles for Multilateralism, Minilateralism and Unilateralism? 21 RECIEL 193, 194 (2012), where 'minilateralism' is depicted as a 'more targeted approach that would bring to the table the smallest possible number of countries needed to have the largest possible impact on solving a particular problem.'

¹⁹⁰ See European Commission, *The European Green Deal*, COM(2019) 640final (December 11, 2019).

constitutionally bound to ensure consistency between its international trade and climate change policies.¹⁹¹

¹⁹¹ Art. 21 TEU; and Arts 11, 191(1) and 207(1) TFEU.