

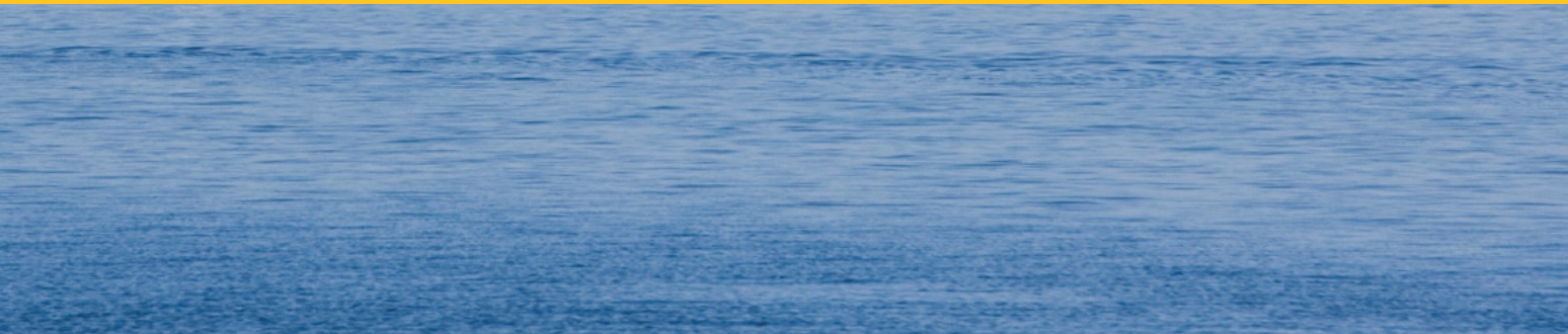
Strengthening the multilateral trading system



Trade Remedies on Clean Energy

A New Trend in Need of Multilateral Initiatives

Jonas Kasteng, Trade Policy Adviser, National Board of Trade



Think piece for the E15 Expert Group on Clean Energy

Content

Executive Summary	3
Introduction	4
1. A New Trend in Trade Remedies	5
1.1 The increasing use of trade remedies on clean energy	5
1.2 Trade remedies on clean energy affect the climate objectives	7
2. Multilateral Initiatives on Trade Remedies on Clean Energy	9
2.1 Focus on improving the WTO agreements on trade remedies	9
2.2 Exploring options to limit the use of trade remedies in other agreements of the WTO	11
Conclusions	14
Literature	15

Executive Summary

In recent years, trade remedies have increasingly been directed towards clean energy, such as solar panels, wind turbines and biofuels (biodiesel and bioethanol). This new trend has become apparent among most major producers of clean energy, such as the EU, the US, Australia, India and China. The trend has been particularly strong in the EU, which was also the first WTO member to use the trade remedies on clean energy on a major scale.

The use of trade remedies on clean energy is causing a conflict with the national climate goals of many countries, as well as a clash with the environmental objectives of international agreements. The measures risk having a negative effect on the global climate and the environment since clean energy will become more expensive and less competitive. As a consequence, the answers to this new trend should preferably be found on a multilateral level.

The paper explores different multilateral options for limiting the use of trade remedies on clean energy for further consideration. The main priority is to **(1) improve the current WTO agreements on trade remedies**. The concerns with the current trade remedy agreements are not limited to clean energy, even though the effects are particularly visible and negative for the environment. The current WTO provisions on trade remedies need to be improved to only target truly anti-competitive behaviour - and not normal competition as mainly is the case today.

As a step in this direction, **environment-specific provisions could be considered** in the agreements on trade remedies - for example in a public interest test or with regard to duty level, product scope, duration of the measures and/or a combination of these provisions. These provisions might be implemented in the current WTO agreements or as WTO-plus provisions, by the Member States in a unilateral, or plurilateral, manner as an example for others to follow.

As a consequence of the concerns with the current trade remedy provisions, which are targeting normal competition, it could also be relevant to **(2) further explore the pros and cons with environment provisions on the use of trade remedies in other WTO agreements**. In order not to undermine or circumvent the future tariff cuts of bound tariffs in environmental goods, **(i) a provision on the non-use of trade remedies in a future WTO agreement on environmental goods could be explored**. In order to avoid an escalation in the use of trade remedies in the field of clean energy, to the detriment of the environment, **(ii) the extension or revision of the WTO provisions on non-actionable environmental subsidies with regard to the use of trade remedies could be explored**. This initiative might make genuine environmental subsidies non actionable at a bilateral level to the benefit of the environment. This initiative might also be limited in time, i.e. a temporary “peace clause” on trade remedies could be introduced.

Introduction

Trade remedies are trade policy tools that allow governments to take remedial action against imports which are causing material injury to a domestic industry because of alleged price dumping or foreign subsidies. The use of trade remedies is regulated in three agreements in the WTO, which are generally thought of being too weak to prevent abuse for protectionist purposes.

Trade remedies have traditionally been used to protect declining industries in industrialized countries, such as steel and consumer electronics. A new and potentially worrying trend from an environmental perspective is the targeting of clean energy products in recent years, such as solar panels, wind turbines and biofuels. By making clean energy more expensive, these measures may slow down the transition from fossil fuels to clean energy, compromising both domestic and global climate goals.

The objective of this paper is to initiate a discussion on the extent of the problem and potential multilateral solutions. In doing so, we will first demonstrate that the trade remedy cases on clean energy suffers from the same shortcomings as other trade remedy cases. We will then propose some reforms of the WTO agreements on anti-dumping and/or subsidies and countervailing measures.

Chief among the proposals is to introduce a mandatory public interest test, which would force governments to assess the environmental consequences of their trade remedy actions. These reforms should preferably be available to all trade remedy cases, and not only to clean energy cases. However, given the resistance among many WTO members to change the trade remedy rules and the urgency of the climate change issue, we will also consider the option of introducing special disciplines on trade remedy cases on clean energy.

1. A New Trend in Trade Remedies

In recent years, the use of trade remedies on clean energy has intensified (see Box 1). This new trend has become apparent among most major producers of clean energy, such as the EU, the US, Australia, India and China. Trade remedies which imply high duties on clean energy products affect the use of

clean energy to the detriment of the environment and thereby comes into conflict with national and international climate and environment policies. The global environment will be affected by the imposition of trade remedies on clean energy, regardless of where they are imposed.

Box 1: What are trade remedies?

There are three kinds of trade remedies: (1) anti-dumping measures, targeting dumped imports; (2) anti-subsidy measures, targeting subsidized imports; and (3) safeguards, targeting sudden increases in imports. Trade remedies might only be used against dumped and subsidized imports if these are causing injury to the domestic industry. In certain countries there are 'WTO-plus' provisions to consider. In the EU, the trade remedies may only be imposed if it is not against the interests of the EU as a whole to raise the tariffs, i.e. the 'Union interest test'. Trade remedy investigations normally take a year. The measures are first introduced on a provisional basis and thereafter on a definitive basis for about five years. After this time period it is possible to prolong the measures for further periods.

Concerns: The current WTO definition of 'dumping' states that a product is being dumped if it is exported at a price lower than its domestic sales price. This definition does not consider the issue of abuse of dominant position or the degree of price undercutting sufficiently. Trade remedies should preferably only remedy truly anti-competitive behaviour and not normal (or 'undesired') competition, as is currently the case. In addition, there are a number of procedural weaknesses that should be addressed, in particular with regard to the identification of 'injury' and the 'causal link' between dumping or subsidization and injury. If the trade remedies would only target cases of truly anti-competitive behavior, the number of trade remedies on clean energy, as well as their levels and scope, would most likely be more limited as compared with the current situation where the measures mainly target normal competition.

1.1 The increasing use of trade remedies on clean energy

Over the last five years, trade remedy investigations have increasingly been directed towards different sorts of clean energy (National Board of Trade, 2013). This new trend has

intensified among all the major producers of clean energy (Lester & Watson, 2013). The EU was the first major user of trade remedies on clean energy, but other major producers, such as the US, Australia, India and China, have followed on their own initiative or as a measure of retaliation (see Table 1).

Table 1: List of the trade remedies on clean energy

Country Product	Country	Trade remedies	Initiation of investigation	Measures in force
EU				
Biodiesel	US	AD + AS	2008	2009
Biodiesel	Canada	AD + AS	2010	2011
Biodiesel	Singapore	AD + AS	2010	-
Biodiesel	Argentina	AD + AS	2012	2013
Biodiesel	Indonesia	AD + AS	2012	2013
Bioethanol	US	AD + AS	2011	2013
Glass fibres	China	AD	2009	2010
Solar panels	China	AD + AS	2012	2013
Solar glass	China	AD + AS	2013	[2013]
Peru				
Biodiesel	US	AD + AS	2009	2010
Australia				
Biodiesel	US	AD + AS	2010	2011
US				
Wind towers	China	AD + AS	2011	2012
Wind towers	Vietnam	AD	2011	2012
Solar cells	China	AD+ AS	2011	2012
China				
Solar grade polysilicon	US	AD + AS	2012	2013
Solar grade polysilicon	EU	AD + AS	2012	2013
Solar grade polysilicon	South Korea	AD	2012	2013
India				
Solar cells	China	AD	2012	[2013]
Solar cells	US	AD	2012	[2013]
Solar cells	Malaysia	AD	2012	[2013]
Solar cells	Taiwan	AD	2012	[2013]
Solar cells	EU	AD	[2013]	[2014]
Solar cells	Japan	AD	[2013]	[2014]

Note: Trade remedies in force are highlighted in bold. Investigations that have been terminated are erased. The remaining trade remedies are under investigation, but might come into force during 2013. The use of [...] means that the formal decision is not taken.

Source: Based on National Board of Trade (2013) and Lester & Watson (2013)

In 2009, the EU imposed anti-dumping and anti-subsidy measures on imports of biodiesel from the US. In 2011, the measures were extended to encompass imports of biodiesel from Canada, in order to avoid alleged circumvention. Imports of biodiesel from Singapore were also investigated, but the investigation was discontinued due to a lack of evidence of circumvention. In 2011, a combined anti-dumping and anti-subsidy investigation was initiated against biodiesel from Argentina and Indonesia. The anti-subsidy investigation was postponed in mid-2013 due to the lack of evidence

of the use of actionable subsidies, but anti-dumping measures were imposed in 2013.

In 2010, anti-dumping measures on imports of *glass fibre filaments* from China were imposed. Glass fibre filaments constitute an important input in the production of blades for wind turbines. In 2011, anti-dumping and anti-subsidy investigations on imports of *bioethanol* from the US were initiated. The anti-subsidy investigation was cancelled at the end of 2012 due to the lack of evidence of US subsidies, but anti-dumping measures were

imposed in 2013. The most recent anti-dumping and anti-subsidy investigations are targeted at imports of *solar panels* (i.e. solar cells, solar wafers and solar modules) from China. The anti-subsidy investigation was postponed in mid-2013 but anti-dumping measures were imposed in combination with the use of minimum import prices in 2013. New anti-dumping and anti-subsidy investigations also encompass *solar glass* from China. These measures might be imposed later in 2013.

In 2010, **Peru** imposed anti-dumping and anti-subsidy measures on biodiesel from the US. In 2011, **Australia** imposed anti-dumping and anti-subsidy measures on biodiesel from the US. In 2012, the **US** imposed anti-dumping and anti-subsidy measures on imported wind towers from China and Vietnam. In 2012, the US also imposed anti-dumping measures on solar cells from China (Lester & Watson, 2013). In 2012, **India** initiated an anti-dumping investigation on solar cells from China, the US, Malaysia and Taiwan. In 2013, it was proposed to extend the investigation to also encompass imports from the EU and Japan (Lester & Watson, 2013).

Finally, **China** initiated parallel anti-dumping and anti-subsidy investigations on imports of solar grade polysilicon from the US, the EU and South Korea in 2012, partly as a response to the measures that were imposed on Chinese exports. The anti-dumping and anti-subsidy measures on imports from the US and South Korea were imposed in 2013. The decision to impose measures on imports from the EU was delayed depending on the outcome of the negotiations between the EU and China (Lester & Watson, 2013).

1.2 Trade remedies on clean energy affect the climate objectives

Trade remedy investigations have an effect on imports from the time they are initiated due

to the unpredictability in terms of the scope of the duties, their level and the date they will be imposed. However, most importers are only directly affected once the measures are imposed at provisional and/or definitive level. When it comes to the trade remedy investigations on clean energy there has also been a tendency in certain countries, such as the EU, to impose the measures *retroactively*, something that affects the imports more than the normal procedure (National Board of Trade, 2013).

The investigations and impositions of trade remedies on clean energy affect consumer demand for the products in question. Trade remedies on intermediate products are also negative for the production of clean energy, for example trade remedies on polysilicon or solar glass in the production of solar panels and glass fibre filaments in the productions of wind turbine blades.

Trade remedies which imply high duties on clean energy products accordingly affect the use of clean energy to the detriment of the environment (see Table 2) and thereby comes into conflict with national and international climate and environment policies. In the EU, for example, the objective of the EU's climate policy is to adopt legislation to raise the share of energy consumed produced from clean energy, such as wind, solar and biomass, to 20 per cent by 2020 (European Commission, 2010). The trade remedies will, however, make clean energy more expensive and less accessible for the user industries and consumers in the EU. The same is true when it comes to the effects of trade remedies on the WTO negotiations on environmental goods. The use of trade remedies on clean energy also leads to measures and countermeasures that further might affect the availability of the clean energy negatively.

Table 2: List of trade remedy duties on clean energy

Product	Country	Duty level
EU		
Biodiesel	US	EUR 172.2/tonne (AD) EUR 237.0 /tonne (AS)
Biodiesel	Canada	EUR 172.2/tonne (AD) EUR 237.0 /tonne (AS)
Biodiesel	Argentina	EUR 104.92/tonne (AD)
Biodiesel	Indonesia	EUR 83.84/tonne (AD)
Bioethanol	US	9.5% (AD)
Glass fibre filaments	China	13.8% (AD)
Solar panels	China	Minimum import price (EUR 0.56/watt) or 68% (AD)
Solar glass	China	<i>[Investigation ongoing]</i>
Australia		
Biodiesel	US	AUD [confidential]/litre (AD) AUD [confidential]/litre (AS)
Peru		
Biodiesel	US	USD 212/tonne (AD) USD 178/tonne (AS)
US		
Wind towers	China	70.63% (AD) 28.34% (AS)
Wind towers	Vietnam	58.49% (AD)
Solar cells	China	249.96% (AD) 15.24% (AS)
China		
Solar grade polysilicon	US	57% (AD) 6.5% (AS)
Solar grade polysilicon	South Korea	12.3% (AD)
Solar grade polysilicon	EU	<i>[Investigation ongoing]</i>
India		
Solar cells	China	<i>[Investigation ongoing]</i>
Solar cells	US	<i>[Investigation ongoing]</i>
Solar cells	Malaysia	<i>[Investigation ongoing]</i>
Solar cells	Taiwan	<i>[Investigation ongoing]</i>
Solar cells	EU	<i>[Decision pending]</i>
Solar cells	Japan	<i>[Decision pending]</i>

Source: Based on National Board of Trade (2013) and Lester & Watson (2013).

Since the EU is a strong user of trade remedies on clean energy, the import values that are affected by these measures are highlighted with the EU as an example (see Table 3). Three of the trade remedies on clean energy, i.e. the trade remedies on solar panels from China, biodiesel from Argentina and Indonesia, and biodiesel from the US, are found in the top five of the EU's largest measures currently in force, when it comes to the import values that are affected. Two of the most recently imposed

measures, i.e. the trade remedies on solar panels from China and biodiesel from the US, are the EU's two largest measures ever (National Board of Trade, 2013).

The import value affected by the trade remedies on solar panels is one and a half times as large as that of the combined total of all of the EU's other trade remedies currently in force. The EU's other current trade remedies, i.e. about 120 measures,

together affect an import value of about EUR 8 billion. However, the trade remedies on solar panels alone affect an import value of about EUR 11.5 billion. The trade remedies on clean energy,

taken together, affect an import value of about EUR 14 billion, which is almost 75 per cent of the total for all of the trade remedies currently in force.

Table 3: List of trade remedies on clean energy by the import values affected.

Product	Country	Import value (EUR millions)	Ranking (Highest import values)
Solar panels	China	11 448	1
Biodiesel	Argentina/Indonesia	2 081	2
Tableware	China	728	3
Biodiesel	US	700	4
<i>Other products...</i>	
Bioethanol	US	430	Interval 5-10
<i>Other products...</i>	
Biodiesel	Canada	122	Interval 15-20
Glass fibre filament	China	110	Interval 15-20
Solar glass	China	N/A	N/A

Source: National Board of Trade (2013)

As a consequence of the high import values of clean energy that are affected by trade remedy investigations in the EU and in other major producing countries, there is a negative effect on the current high demand for clean energy. Ultimately, this has negative consequences for the shift towards clean energy and, in the long-term, for the environment. The imposition of trade remedies in an innovative and growing environmental industry, dependant on specialization, skills and global value chains clearly hampers the developments that are urgently needed for the environment. The global environment will be affected by the imposition of trade remedies on clean energy, regardless of where they are imposed. For the environment, it does not matter where the clean energy is produced (National Board of Trade, 2013).

2. Multilateral Initiatives on Trade Remedies on Clean Energy

In order to respond to the new trend of imposing trade remedies on clean energy, multilateral initiatives are needed. Due to the fact that the WTO agreements on trade remedies define the use of these measures, it is relevant to focus on new provisions that only target truly anti-competitive behaviour. This would decrease the use of trade remedies in general but also provide the most appropriate response to the increased use of trade remedies on clean energy. In this context, also environment-specific provisions on the use

of trade remedies in these agreements could be considered. It might also be relevant to explore the pros and cons with environmental provisions on the use of trade remedies in other areas of the WTO, for example the possible future provisions on environmental goods, as well as the lapsed provisions on non-actionable environmental subsidies.

2.1 Focus on improving the WTO agreements on trade remedies

In order to respond to the increasing use of trade remedies on clean energy, **the current provisions in the WTO Agreement on Anti-Dumping and in the WTO Agreement on Subsidies and Countervailing Measures should be addressed on a general level.** The concerns with the current trade remedy agreements are not limited to clean energy, even though the effects are particularly visible and negative in this area.

In most contexts, anti-dumping measures are claimed to be used to counter ‘unfair competition’ and to create a ‘level playing field’ in international trade. These concepts are, however, never considered in reality. According to most competition or anti-trust rules, abuse of a dominant position, such as price undercutting, might only be considered where one company has a market share of between 40-60% and the price undercutting is below the average variable

cost of production. In anti-dumping proceedings, the market share of allegedly ‘dumped’ imports is occasionally only required to be above a *de minimis* level of about 1% and dumping is defined as exports at prices under the domestic sales prices regardless of the degree of price undercutting, i.e. the price level might be include the total cost of production, including a reasonable profit (see Table 4). In addition, there are many valid reasons for price differentiation on products, in particular on export markets.

There are also a number of procedural weaknesses in anti-dumping and anti-subsidy investigations

with regard to the definition of injury, for example when it comes to the product definition, the selection of a sample of companies, the identification of indicators on injury, etc. that might make the investigations biased towards a certain outcome. It is also difficult to verify the causal link between dumping or subsidization and injury. In many cases, the findings tend to be based on correlation rather than causality. In sum, the proceedings used by many WTO member countries, based on the WTO rules on trade remedies, make it fairly easy to impose trade remedies on imports from third countries, including trade remedies on clean energy.

Table 4. Comparison between the EU’s anti-dumping rules and competition rules

	Competition rules	Anti-dumping rules
Market share	40% (one company)	1% (one country)
Price undercutting	<average variable cost	<average variable sales price (i.e. average variable costs + average fixed costs + profit)

Source: Elaborated by the National Board of Trade.

In order to limit the use of trade remedies on clean energy, the priority should, accordingly, be to link the anti-dumping rules closer to the competition or anti-trust rules in order to only remedy truly anti-competitive behaviour, as well as to make proceedings more stringent. This would, for example, require higher thresholds on dominant position and price undercutting for initiating anti-dumping investigations than in the current rules. Other important reforms would be to make the anti-dumping and the anti-subsidy investigations more objective when it comes to the definition of injury and causality, as well as to making them more transparent and predictable. Furthermore, it is needed to involve input from different stakeholders (such as importers, user industry and consumers) to a higher degree than today in a ‘public interest test’, and to limit the level of the duties and the time the measures are in force. A decrease in the level of the trade remedy duties in force, as well as a time limit for the measures to be in place, might, for example, be inspired by the current WTO Agreement on Safeguards.

Since the WTO negotiations on trade remedies are controversial between Member States, and

accordingly might last for several years, it might be relevant to **consider the inclusion of environment-specific provisions** in the trade remedy agreements as an option. These provisions might be more easily accepted than the general changes given their limited scope and the environmental concerns in general. They could also address the imperfect functioning of the markets when it comes to clean energy, and could lead to positive external effects on the environment. There are different viable provisions available for further discussion (Lester & Watson, 2013; National Board of Trade, 2013; and Wu & Salzman, 2013):

- Trade remedies on clean energy might be limited in level

The trade remedies could be limited in level, for example by making use of *the lesser duty rule* for trade remedy investigations on clean energy. The lesser duty rule in the EU’s current trade remedy investigations obliges the EU to impose a trade remedy that is not higher than the lesser of the dumping or subsidy margin and the injury margin. The lesser duty rule, accordingly, ensures that the

trade remedies are not higher than necessary to remove the injury inflicted on the EU industry. As of today, only the EU makes use of the lesser duty rule on a general basis. In the context of trade remedy investigations, the lesser duty rule might be applied on an environmental basis.

- Trade remedies on clean energy might be limited in time

The trade remedies could be limited in level, for example by introducing a time limit for the trade remedies on clean energy to be in place. There have been various recent examples of politically sensitive trade remedy investigations with shorter time-periods or where time limits have been imposed.

- Trade remedies on clean energy might be limited in scope

The trade remedies could be limited in scope, for example by only permitting measures on a certain number of clean energy products or a certain import value at the same time.

- Trade remedies on clean energy might be considered in the public interest test

A public interest clause on clean energy products could also be an option. In the WTO, Member States, such as the EU, that make use of a 'public interest test', the so-called, 'Union interest test', before trade remedies are imposed, it would be possible to include environmental interests as one of the interests to be considered. The EU's current regulation states that "[a] determination as to whether the Community interest calls for intervention shall be based on an appreciation of all the various interests taken as a whole" (European Council, 2009). The EU's climate policy objectives should accordingly be considered in the 'Union interest test' analysis before trade defence measures on clean energy are imposed. Environmental stakeholders might be included as interested parties in the trade

remedy investigations, something that is not the case today. In addition, an internal consultation within the investigating authority, or between different ministries, could be introduced in order to increase policy coherence (National Board of Trade, 2013). This initiative has actually been proposed in the 'modernisation review' of the EU's trade remedies.

In line with this reasoning, the use of trade remedies could be considered in a broader context, including aspects of climate and the environment. These provisions might be implemented in the current WTO agreements or as 'WTO-plus' provisions, by the Member States in a unilateral, or plurilateral, manner as an example for other Member States to follow.

2.2 Exploring options to limit the use of trade remedies in other agreements of the WTO

Beside the first option of revising the current WTO agreement on trade remedies, the option of introducing **limits to the use of trade remedies on clean energy in other WTO agreements** could be explored. In this context, it would also be necessary to consider the possible negative consequences of introducing new environment-specific exceptions to the rules in the WTO agreements (something that falls outside the scope of this paper).

Of particular interest for further consideration are, for example, the WTO negotiations on environmental goods and the now lapsed provisions on non-actionable environmental subsidies.

A clause on the "non-use" of trade remedies in the WTO provisions 'environmental goods'

The Doha Ministerial Declaration, Paragraph 31 (iii), states that the objective of the negotiations on 'environmental goods' is "*the reduction or, as appropriate, elimination of tariff and non tariff barriers to environmental goods and services*" (WTO, 2001).

Box 2: The APEC initiative on ‘environmental goods’

The consensus reached by the Asia-Pacific Economic Cooperation (APEC) countries is to reduce tariffs to 5% or less by 2015 on 54 environmental goods. In the APEC List of Environmental Goods “that directly and positively contribute to green growth and sustainable development objectives”, clean energy products that currently face trade remedies, such as photovoltaic cells, modules and panels and wind turbine blades are selected as environmental goods for tariff reductions (APEC, 2012). The APEC initiative on environmental goods was recently highlighted by President Obama in the US intention to use free-trade to halt climate change: “The U.S. will work with trading partners to launch negotiations at the World Trade Organization towards free trade in environmental goods, including clean energy technologies such as solar, wind hydro and geothermal. The U.S. will build on the consensus recently forged among the 21 Asia-Pacific Economic Cooperation (APEC) Economies in this area” (The White House, 2013.) The US wants to create a “coalition of the willing” comprised by countries that represent 90 per cent of the world’s trade in environmental goods (Lester & Watson, 2013). This is particularly relevant since many of the main users of trade remedies on clean energy already participate in the APEC initiative, such as the US, Australia, India, China and Peru.

In order not to circumvent or undermine the possible tariff cuts on bound tariffs on environmental goods in a future WTO agreement on environmental goods (see Box 2), it could be further explored to introduce a clause on the ‘non-use’ of trade remedies on these products (Lester & Watson, 2013). The new trend of using trade remedies on clean energy was most likely not anticipated at the initiation of the WTO negotiations on environmental goods but could be considered in the future negotiations explored this new trend.

It would however, also in this case, be necessary to consider the possible negative consequences of introducing specific exceptions to the rules on environmental goods.

The extension of the WTO clause on non-actionable environmental subsidies

Environmental subsidies are currently actionable in the WTO (see Box 3). WTO Member States can, accordingly, impose trade remedies and initiate WTO dispute settlement cases on clean energy. The fact that many countries provide subsidies to increase the use of clean energy at a domestic level and at the same time impose trade remedies against third country imports, has triggered the use of countermeasures at a bilateral level. This escalation of trade remedies and countermeasures on clean energy might entail a negative impact on the environment since it might limit the possibility for countries to use environmental subsidies for genuinely environmental purposes.

Box 3: What is the WTO Agreement on Subsidies and Countervailing Measures?

According to the WTO Agreement on Subsidies and Countervailing Measures the definition of a subsidy is a financial contribution by a government or any public body within the territory of a Member which confers a benefit. There are three kinds of subsidies: (i) prohibited subsidies; (ii) actionable subsidies; and (iii) non actionable subsidies. There are two kinds of *prohibited* subsidies: (a) export subsidies and (b) import substitution subsidies. Subsidies are *actionable* if they are ‘specific’, i.e. that they are provided to a specific enterprise, industry, region, etc. and not ‘horizontally’ available to all. Actionable subsidies might be targeted with anti-subsidy measures and they might be brought to the WTO dispute settlement mechanism. Subsidies identified as *non-actionable* were environmental subsidies, regional subsidies and subsidies designated to research. The category of non-actionable subsidies lapsed in 2000. This implies that subsidies that previously were non-actionable are actionable today. Environmental subsidies are accordingly actionable through the use of anti-subsidy measures and/or WTO dispute settlement today. This provision on non-actionable subsidies might be extended, or modified, by consensus of the SCM Committee. As of today no such consensus has been reached.

The WTO Agreement on Subsidies and Countervailing Measures (ASCM) originally contained a category of non-actionable subsidies, as it permitted certain types of government *“assistance to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms”* if certain conditions were fulfilled (WTO, 1994). In order to avoid an escalation in the use of trade remedies and WTO disputes on clean energy, to the detriment of the environment, an extension of the WTO provisions on non-actionable environmental subsidies might be further considered in the multilateral negotiations. The provisions on non-actionable subsidies might also be revised to better target clean energy and/or to be limited to the bilateral use of trade remedies on clean energy (and maintain the

possibility to bring environmental subsidies to the WTO’s dispute settlement body). The provisions might also be limited in time, i.e. a temporary ‘peace clause’ on trade remedies on clean energy could be introduced, something that would imply that the environmental subsidies would not be targeted during a transition period (in line with the now lapsed provisions in Article 13 on ‘Due restraint’ of the WTO Agreement on Agriculture).

Initiatives of this kind might explore the possibilities of making genuinely environmental subsidies on clean energy non actionable with trade remedies to the benefit of the environment. In any case, it is necessary to also discuss the possible negative consequences of introducing environmental-specific exceptions to the rules on subsidies in the multilateral trading system.

Conclusions

The paper explores different multilateral options for limiting the use of trade remedies on clean energy for further consideration. The main priority would be to improve the current WTO agreements on trade remedies. The concerns with the current trade remedy agreements are not limited to clean energy, even though the effects are particularly visible and negative for the environment. The current WTO provisions on trade remedies need to be improved to only target truly anti-competitive behaviour and not normal competition, as mainly is the case today. As a step in this direction, environment-specific provisions could be considered before the imposition of trade remedies on clean energy, for example in a public interest test or with regard to duty level, product scope, duration of the measures and/or a combination of these provisions. These provisions might be implemented in the current WTO agreements or as 'WTO-plus' provisions, by the Member States in a unilateral, or plurilateral, manner as an example for others to follow.

As a consequence of the concerns with the current trade remedy provisions, which are targeting normal competition, it could also be relevant to further explore the pros and cons with environmental provisions on the use of trade remedies in other areas of the WTO agreements. In order not to undermine or circumvent the future tariff cuts of bound tariffs in environmental goods, (i) the non-use of trade remedies in the WTO provisions environmental goods could be explored. In order to avoid an escalation in the use of trade remedies in the field of clean energy, to the detriment of the environment, (ii) the extension or revision of the WTO provisions on non-actionable environmental subsidies with regard to the use of trade remedies could be explored. This initiative might make the genuine environmental subsidies non actionable at a bilateral level to the benefit of the environment. This initiative might also be limited in time, i.e. a temporary 'peace clause' on trade remedies could be introduced.

Literature

APEC, 2012, ANNEX C - APEC List of Environmental Goods, Vladivostok, Russia, 8-9 September 2012.

European Commission, 2010, *Energy 2020: A strategy for competitive, sustainable and secure energy*, [COM(2010)639/3, 10.11. 2010].

European Council, 2009, *Council Regulation (EC) No 1225/2009, of 30 November 2009, on protection against dumped imports from countries not members of the European Community (codified version)*, Official Journal of the European Union [L 343, 22.12.2009].

Lester, S and K. W. Watson, 2013, *Free Trade in Environmental Goods: The Trade Remedy Problem*, Free Trade Bulletin, Herbert A. Stiefel Center for Trade Policy Studies, Cato Institute.

National Board of Trade, 2013, *Targeting the Environment: Exploring a New Trend in the EU's Trade Defence Investigations*, National Board of Trade, Sweden.

The White House, 2013, *The President's Climate Action Plan*, Executive Office of the President, June 2013.

WTO, 1994, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts*, GATT Secretariat.

WTO, 2001, Ministerial Declaration, Ministerial Conference, Fourth Session, Doha, 9-14 November 2001 [WT/MIN(01)/DEC/1].

Wu, M and J Salzman, 2013, *The Next Generation of Trade and Environment Conflicts: The Rise of Green Industrial Policy*, Harvard University.