



## Trade and Investment Law Clinic Papers, 2014

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# Addressing the rise of Trade Remedies against Environmental Goods

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## **Introduction**

This paper critically examines the significance of a recent surge in trade remedies on environmental goods (see Table 1) in the context of current efforts to liberalise trade in environmental products. The issue that this paper tries to address is, whether the unilateral imposition of trade remedies by *national* jurisdictions undermines liberalisation of *international* trade in environmental products.

This paper is divided into two parts. Part I will explain and analyze the current challenges that liberalisation of trade in environmental goods is facing in light of an increase of trade remedies on these products. Part II will discuss three recommendations that could be instrumental in overcoming these challenges.

As elaborated in Part I, liberalisation of international trade in environmental goods is currently facing two challenges:

- 1) The increased resort to trade remedies nationally on environmental goods<sup>1</sup> is prone to undermining the gains from ongoing efforts for tariff reduction on environmental goods internationally.
- 2.) Trade remedies are taking the place of support schemes such as subsidies (as in being used as a protectionist tool) in the light of withdrawal of national support schemes for certain types of environmental products domestically.

Part II of this paper proposes recommendations (implementable within the existent regime of international trade) that could help overcome these challenges. The first recommendation is to develop on the consensus reached in the recent Davos declaration<sup>2</sup> (by leading economies of the World), to further “achieve global free trade in environmental goods”<sup>3</sup>, by removing

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<sup>1</sup> See Table 1 for a list of recent and ongoing trade remedy determinations at the domestic level for environmental goods.

<sup>2</sup> Joint Statement Regarding Trade In Environmental Goods (24 January 2014\_ at Davos, Switzerland, available at <http://www.ustr.gov/sites/default/files/EGs-Announcement-joint-statement-012414-FINAL.pdf>

<sup>3</sup> Ibid

non-tariff barriers to trade in environmental goods.<sup>4</sup> The second recommendation relates to incorporating a “public interest test” in domestic trade remedy legislation, with an interpretative guide to include environmental interest within the meaning of “public interest”. This will ensure that environmental concerns act as an exception or as a mitigating factor in trade remedy determinations that are otherwise blind to environmental concerns and are guided by mercantilist concerns. Thirdly, countries may want to set up a Compensation Fund (Fund) that will overcome the present temporary disruptions in the domestic market caused by dumping and subsidizing of imported environmental goods. Foreign exporters who would otherwise have to pay anti-dumping or countervailing duties would fund this Fund. This fund is conceptually based on the model of the fund established in the *U.S. - Upland Cotton* case.

## **Part I - Problem Analysis**

### **1) Dichotomy between tariff reductions on environmental goods and the increase in use of trade remedies on environmental goods - a zero-sum game?**

The commitment on tariff reductions for environmental goods at the multilateral level and the unilateral imposition of trade remedies at the domestic level are dichotomous. In principle, all the progress made on trade liberalisation at the international level could be distorted and undermined by unilaterally imposed trade remedies on the very same products – resulting in a zero-sum game.

#### *Current efforts to liberalise tariffs on environmental goods*

At the multilateral level, negotiations at the World Trade Organization (WTO) on environmental goods and services (EGS) are a part of the Doha Round. However the member countries of the WTO are yet to reach a consensus on which EGS would qualify as such for tariff liberalisation. The goods discussed so far in these negotiations fall within a broad range of environmental categories, such as air pollution control, renewable energy, waste

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<sup>4</sup> Since the APEC members have already agreed to tariff reductions to 5% or less for environmental goods.

management and water treatment, environmental technologies, and carbon capture and storage.<sup>5</sup>

However outside the WTO, the Asian-Pacific Economic Cooperation (APEC) members have already made a commitment to lower tariff rates to 5 percent or less by 2015 for a list of 54 broad product categories of environmental goods.<sup>6</sup> The commitment to further build on the APEC consensus was recently reiterated in the aforementioned ‘Davos declaration’.<sup>7</sup>

### *Increased imposition of trade remedies on environmental goods*

The consensus for tariff reduction may result in a zero sum game if the practice of trade remedies on these environmental goods goes unabated. This risk is illustrated by the recent ‘trade war’ in relation to renewable solar energy between the U.S. and China. The U.S. Department of Commerce (DOC) and the International Trade Commission (ITC) imposed anti-dumping and countervailing duties pursuant to an investigation against the dumped imports of dumped and subsidized solar panels from China.<sup>8</sup> China, in turn, initiated an investigation into U.S. subsidies for the solar, wind and hydroelectric industries (renewable energy industry). Finally, China imposed anti-dumping and countervailing duties on solar-grade polysilicon imports from the U.S.<sup>9</sup> Please refer to the table below that demonstrates that trade remedies are being resorted to as retaliatory measures by national governments in the field of renewable energy.

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<sup>5</sup> See WTO Annual Report (2013) page 30, available at: [http://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/anrep13\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/anrep13_e.pdf)

<sup>6</sup> Detailed list available at: [http://www.apec.org/Meeting-Papers/Leaders-Declarations/2012/2012\\_aelm/2012\\_aelm\\_annexC.aspx](http://www.apec.org/Meeting-Papers/Leaders-Declarations/2012/2012_aelm/2012_aelm_annexC.aspx); Applied tariff rates will be reduced only for certain ‘environmental goods’ or ‘ex-outs’ from this broad 54 product categories

<sup>7</sup> See: <http://www.ustr.gov/sites/default/files/EGs-Announcement-joint-statement-012414-FINAL.pdf>

<sup>8</sup> USITC Pub. 4360 (2012), *Crystalline Silicon Photovoltaic Cells and Modules from China*, Inv. Nos. 701-TA-481 and 731-TA-1190 (Final), available at: [http://www.usitc.gov/publications/701\\_731/pub4360.pdf](http://www.usitc.gov/publications/701_731/pub4360.pdf).

<sup>9</sup> MOFCOM Announcement No. 69 (2011), 25 November, Its decision to launch a trade barrier investigation into the U.S. policy support and subsidies for its renewable energy sector. And final decisions imposing duty available at: <http://english.mofcom.gov.cn/article/newsrelease/significantnews/201401/20140100468686.shtml> and <http://english.mofcom.gov.cn/article/newsrelease/significantnews/201401/20140100468790.shtml>

**Table 1. Retaliatory Trade Remedies<sup>10</sup>**

Date	Dispute Type	Forum	Complainant	Respondent	Product Targeted	Status
US and China						
Oct 2011	AD/CVD Investigation	US DOC/ITC	US	China	Solar panels	Tariffs in place, appeal filed to expand scope <sup>11</sup>
Nov 2011	U.S. policy support and subsidies <sup>12</sup>	MOFCOM	China	US	Solar, wind and hydroelectric industries	Support policies and subsidies found to be in violation of the WTO by MOFCOM <sup>13</sup>
July 2012	AD/CVD Investigation <sup>14</sup>	MOFCOM	China	US and South Korea	Solar-grade polysilicon	Tariffs in place <sup>15</sup>
Feb 2014	AD/CVD Investigation <sup>16</sup>	US DOC/ITC	US	China and Taiwan	Solar Panels	Pending <sup>17</sup>
EU and China						

<sup>10</sup> The basic source of this information is Lewis, Joanna I., “The Rise of Renewable Energy Protectionism: Emerging Trade Conflicts and Implications for Low Carbon Development”(Forthcoming in Global Environmental Politics Volume 14, Number 4, November 2014) available at:

[https://blogs.commonsgorgetown.edu/jil9/files/2014/01/Lewis.RE\\_Intl\\_Trade\\_Draft\\_.11.2013.pdf](https://blogs.commonsgorgetown.edu/jil9/files/2014/01/Lewis.RE_Intl_Trade_Draft_.11.2013.pdf)

<sup>11</sup> USITC Pub. 4360 (2012), Crystalline Silicon Photovoltaic Cells and Modules from China, Inv. Nos. 701-TA-481 and 731-TA-1190 (Final)

<sup>12</sup> MOFCOM Announcement No. 69 (2011), 25 November, Its decision to launch a trade barrier investigation into the U.S. policy support and subsidies for its renewable energy sector

<sup>13</sup> MOFCOM Announcement No. 52, 2012 on Final Conclusion on the Trade Barrier Investigation against Part of the Support Policies and Subsidies for the U.S. Renewable Energy Industry

<sup>14</sup> MOFCOM Announcements No. 40 and No. 41, 2012, deciding to launch both anti-dumping and countervailing investigations on imports of solar-grade polysilicon from the U.S., and to launch an anti-dumping investigation on Imports of the same commodity from South Korea

<sup>15</sup> (MOFCOM Announcement No. 5 [2014], imposing definitive antidumping (AD) duties on imports of solar-grade polysilicon from Korea and the United States. On the same day, MOFCOM also published Notice No. 4 [2014], imposing definitive countervailing duties (CVDs) on the same product imported from the United States.

<sup>16</sup> USTIC Pub. 4454 (2014), Certain Crystalline Silicon Photovoltaic Products from China and Taiwan, Inv. Nos. 701-TA-511 and 731-TA-1246-1247 (Preliminary)

<sup>17</sup> Putting the U.S. on the brink of path toward escalating a tit-for-tat trade spat with China. The ITC agreed to SolarWorld Industries Americas request to broader investigate anti-dumping and anti-subsidy loop-hole claims over solar photovoltaic products from China and Taiwan. Since Chinese producers were allegedly shifting production to Taiwan to circumvent duties levied on Chinese imports

July 2012	AD/CVD investigation	European Commission	European Union	China	Solar panels	Price undertaking arranged, including an import quota and minimum price
Nov 2012	AD/CVD investigation <sup>18</sup>	MOFCOM	China	European Union	Solar-grade polysilicon	Pending
EU and Argentina- Biodiesel						
2012	AD <sup>19</sup>	European Commission	EU	Argentina & Indonesia	Biodiesel	Tariffs in place
DEC 2013	Request for consultation for AD measures <sup>20</sup>	WTO	Argentina & Indonesia	EU	Biodiesel	Ongoing

Imposition of trade remedies could completely undermine any benefits liberalisation in trade achieved through tariff reduction. This is because gains made through tariff reduction on these renewable energy goods would be taken away by the imposition of anti-dumping and countervailing duties. In this particular situation, trade remedies are being imposed at two stages of the global value chain, firstly, at raw material stage (polysilicon) by China and then at assembly stage (of wafers and cells into solar panels) by the US. The imposition of trade remedies may thus disturb global value chains in the relevant sectors. In addition, levying of anti-dumping and countervailing duties has also made renewable energy more expensive. This increase in prices in the long run will have adverse effect on consumer choice for green

<sup>18</sup> MOFCOM Announcement No. 70 and No. 71, 2012, anti-dumping and countervailing investigations on imports of solar-grade polysilicon from the EU

<sup>19</sup> Council Implementing Regulation (EU) No 1194/2013 Of 19 November 2013 Imposing A Definitive Anti-Dumping Duty And Collecting Definitively The Provisional Duty Imposed On Imports Of Biodiesel Originating In Argentina and Indonesia.

<sup>20</sup> [http://www.wto.org/english/news\\_e/news13\\_e/ds473rfc\\_20dec13\\_e.htm](http://www.wto.org/english/news_e/news13_e/ds473rfc_20dec13_e.htm)

products. Thus based on the foregoing, trade remedies could undermine both environment goals and trade liberalisation in the long run.

#### *Trade liberalisation and trade remedies compared*

At the same time, the problem of trade remedies versus tariff reductions on the same products may be smaller than it at first appears.

A review of domestic trade remedies determinations using the APEC list as a reference point shows that most of trade remedies have targeted renewable energy goods rather than the larger group of environmental products. Examples include trade remedies on photovoltaic cells, modules and panels as well as various components for utility scale wind turbines. In this vein, the risk of trade remedies undermining liberalisation on environmental products resulting in a zero-sum game is confined to the smaller subset of renewable energy goods rather than all environmental products.<sup>21</sup>

#### *Conclusion:*

Liberalisation efforts to facilitate low-tariff access to environmental products are ongoing. Trade remedies do not generally undermine these liberalisation efforts as they are targeted only at a subset of environmental products, namely renewable energy related goods. For this subset, however, the risk of a zero-sum game exists.

## **2) Trade Remedies as a substitute for domestic support schemes for renewable energy:**

Trade liberalisation and trade remedies on green products also interact on a second level. Increasingly, states have been using trade remedies on environmental products to protect their growing “green” domestic industry, shielding it from foreign competition. In this context, trade remedies are used as a protectionist tool either complementing or substituting domestic subsidisation programmes. Three domestic government policy actions are of relevance in this regard.

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<sup>21</sup> See Table 1, the table mostly reflects the APEC list of product categories, except for biofuels which has not been mentioned on the APEC list.



Firstly, in order to promote a transition towards a green economy governments across the globe have instituted support schemes to help incentivise the usage of environmental products primarily related to renewable energy.<sup>22</sup> As of 2013, 138 countries around the world had renewable energy support schemes.<sup>23</sup> For example the EU Agenda 2020<sup>24</sup> requires member states to ensure that, 20% of their energy needs are met by renewable sources by 2020. By way of further clarification, these support schemes can be broadly classified into two groups based on their two objectives<sup>25</sup>:

1. Policies to incentivise renewable energy usage, by provision of subsidy and tax benefits, which ultimately makes them economically viable or even cheaper sources of energy. Examples include production tax credit<sup>26</sup> and investment tax credit<sup>27</sup> in the US wind turbine power generation industry;
2. Policies that act as protectionist measures shielding domestic infant industries from international competition in the sector of renewable energy. Examples include Local Content Requirement (LCR) type programmes, like the Jawaharlal Nehru National Solar Mission (JNNSM), which has been responsible for development of the solar energy industry in India.<sup>28</sup>

These support schemes have been largely successful by making the related technologies easily and cheaply available and, as a result, helped increase reliance on renewable energy sources.

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<sup>22</sup> Bahar, H., J. Egeland and R. Steenblik (2013), “Domestic Incentive Measures for Renewable Energy With Possible Trade Implications”, OECD Trade and Environment Working Papers, 2013/01, OECD Publishing, available at: <http://dx.doi.org/10.1787/5k44srkkr6f-en>; also acknowledged in the ITC determination regarding solar panels and modules on page 22 available at: [http://www.usitc.gov/publications/701\\_731/pub4360.pdf](http://www.usitc.gov/publications/701_731/pub4360.pdf)

<sup>23</sup> See the report of Renewable Energy Policy Network “Key findings 2013” available at: [http://ren21.net/Portals/0/documents/activities/gsr/REN21\\_GSR2012\\_Key%20Findings.pdf](http://ren21.net/Portals/0/documents/activities/gsr/REN21_GSR2012_Key%20Findings.pdf)

<sup>24</sup> One of the most important targets of the EU Agenda for 2020, is relating to **Climate change and energy sustainability**. The relevant targets are:

- greenhouse gas emissions 20% lower than 1990 (or even 30%, if the conditions are right)
- 20% of energy from renewables
- 20% increase in energy efficiency

<sup>25</sup> See Table 2 for a country wise listing of Support Schemes.

<sup>26</sup> See: <http://energy.gov/savings/renewable-electricity-production-tax-credit-ptc>

<sup>27</sup> See: <http://energy.gov/savings/business-energy-investment-tax-credit-itc>

<sup>28</sup> See for further details: <http://mnre.gov.in/file-manager/UserFiles/draft-jnnsmpd-2.pdf>

The second action of domestic governments relevant in this context is the withdrawal and modification of these support schemes. In the wake of the financial crisis, governments cut back on their subsidisation programmes in light of budgetary constraints.<sup>29</sup> Therefore support schemes that were neutral in their application, that is, those that benefitted both domestic and foreign investments alike were modified, for example the Feed-in-Tariff (FIT) type schemes; also schemes that could have a sizeable impact on fiscal revenue like subsidies were modified. For example, Spain temporarily suspended its FIT schemes in 2012 and implemented retroactive FIT rate cuts in all solar installations dating back to 2009.<sup>30</sup> Germany also reduced support to solar installments by cutting FIT rates and imposed limits on financial support for renewable energy.<sup>31</sup> The withdrawal and modification of government support schemes for renewable energy has been a major cause for fluctuations in several domestic markets for renewable energy goods. This impact of changes were discussed at length in a number of decisions of domestic authorities for actions initiated for anti-dumping duties under the clause of “other known factors causing injury” under the injury analysis as per the WTO provisions.<sup>32</sup> For example in the EU determination regarding dumping of solar panels, cells and wafers from China, the impact of suspensions of the FIT scheme by Spain was discussed at length.<sup>33</sup> Also in the U.S. determination regarding the utility scale wind towers imported from China and Vietnam, the risk of discontinuation of production tax credit and investment tax credit was discussed as possible causes for market fluctuations.<sup>34</sup> Although these discussions on the influence of support schemes as possible cause for injury

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<sup>29</sup> See the report of Renewable Energy Policy Network “Key findings 2013” available at: [http://ren21.net/Portals/0/documents/activities/gsr/REN21\\_GSR2012\\_Key%20Findings.pdf](http://ren21.net/Portals/0/documents/activities/gsr/REN21_GSR2012_Key%20Findings.pdf)

<sup>30</sup> See page 68 of the report of Renewable Energy Policy Network “Renewable 2013- Global Status Report”, available at: <http://www.ren21.net/ren21activities/globalstatusreport.aspx>

<sup>31</sup> Ibid

<sup>32</sup> Article 3.5 of the ADA.

<sup>33</sup> See Para 173-175, decision available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:152:0005:0047:EN:PDF>. This was a provisional decision. By Decision 2013/423/EU of 2 August 2013, the Commission accepted an undertaking offered in connection with the anti-dumping proceeding concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers). The final decision of the Commission definitive anti-dumping duty and collecting definitively the provisional duty is available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0759:FIN:EN:PDF>

<sup>34</sup> See Pages 15-16 & 20, available at: [http://www.usitc.gov/publications/701\\_731/pub4372.pdf](http://www.usitc.gov/publications/701_731/pub4372.pdf)

to the domestic market were not decisive, they highlight the link between domestic support programs and trade remedies, which leads us to the third action of the government.

Thirdly, to complement the subsidisation programmes or to provide a substitute for the withdrawal of some support schemes, national governments have increasingly turned to the imposition of trade remedies. The concurrent launch of trade remedy investigations in several countries produced an escalation effect, sparking off a trade remedy war of sorts in the sphere of renewable energy like the above mentioned Chinese decision to impose anti-dumping duty<sup>35</sup> and countervailing<sup>36</sup> duty on solar-grade polysilicon (raw material in solar wafers and cells) from U.S. as a retaliatory measure against the U.S.' determination<sup>37</sup> imposing countervailing and anti-dumping duty on Chinese solar modules. The frequent resort to trade remedies by national governments and interest groups instead of initiating action before a WTO panel, is also due to the fact that these domestic procedures are within the control of the domestic government and the effects of imposing a trade remedy like anti-dumping or a countervailing duty are immediate from a time frame perspective as well.

In conclusion, only the first action by domestic governments in formulating domestic support schemes for renewable energy goods were made with the environmental objective in mind. The second action, that of withdrawal and modification of support schemes and continuation of the LCR type support scheme was directed by financial prudence considerations. The third action is a consequence of the first two. In that it continues the support that the second action took away. That is, by imposing trade remedies on the imports of renewable energy goods, domestic governments are trying to provide protection to their domestic industries, compensating for the withdrawal or modification of existent support schemes.

Thus the following conclusions can be drawn from the discussion above:

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<sup>35</sup> See the announcement in English:  
<http://english.mofcom.gov.cn/article/newsrelease/significantnews/201401/20140100468686.shtml>

<sup>36</sup> See the announcement in English:  
<http://english.mofcom.gov.cn/article/newsrelease/significantnews/201401/20140100468790.shtml>

<sup>37</sup> See the decision of the US International Trade Commission:  
[http://www.usitc.gov/publications/701\\_731/pub4360.pdf](http://www.usitc.gov/publications/701_731/pub4360.pdf)

1. Trade remedies on environmental goods are intrinsically linked to green industrial policy considerations. Like for other green industrial policy tools such as subsidisation, the group of products primarily targeted are the narrow sub-section of renewable energy goods within the larger group of environmental goods;
2. The above discussed developments are of an international, systemic nature (in that they are permissible within the WTO framework). Yet, the policy tool chosen, the unilateral imposition of trade remedies, operate domestically in isolation from the international context unless regulated by WTO rules;
3. At least some part of problem is temporary, insofar as it stems from withdrawal and modification of support schemes for renewable energy due to current fiscal consolidation efforts.<sup>38</sup>

## **Part II:**

### *Recommendations to overcome the problems identified*

From the above problem analysis based on the findings of recent determinations for trade remedies (see Table. 2) helps us make the following findings:

Firstly, policy-makers should focus their efforts on the subset of renewable energy goods where trade remedies are imposed rather than on the general debate on tariff reduction versus trade remedies on environmental goods. The over-all liberalisation of trade in environmental goods remains largely unaffected by the phenomenon of trade remedies apart from the subset of renewable energy goods;

Secondly, policy-makers should bear in mind that the increased resort to trade remedies by national governments may, in part, be a temporary and transient occurrence. In the aftermath of the recent financial crises, trade remedies are being used as a protectionist

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<sup>38</sup> In addition to the trade remedy determinations, certain foreign investors have initiated arbitration under BITs for financial losses suffered due to change in policy and tax measures. For example notice of arbitration has been filed against the Czech republic for its retroactive tax on solar profits. This seems to indicate that the instrument of trade remedies is of the many that is being employed by different industrial interest groups to safeguard themselves. See for further details on the arbitration notice on Czech republic: <http://www.rananasolar.cz/2013/05/09/ipvic-solar-arbitration-commencing-today/>

tool for infant industries in the renewable energies sector to compensate for the withdrawal of support schemes, which, until recently, had provided the necessary protection.

If, in the light of the above, decision-makers still find it necessary curb the use or effect of trade remedies especially in the renewable energy sector, this section will propose recommendations to overcome the challenges created by the frequent resort to trade remedies and also make suggestions for taking the trade and environment agenda forward. The first two recommendations are relevant in the larger context of liberalising trade in environmental goods, whereas the third recommendation is a practical way to deal with concerns of infant industries when faced by competition from imports.

**1) Davos declaration<sup>39</sup> on the APEC list: Commitment to pursue ‘global free trade for environmental goods’:**

Liberalisation of environmental goods via tariff reduction may not increase trade in environmental goods unless non-tariff barriers, trade remedies in particular, are also phased out. Even though the tariff on imports of environmental goods could be zero or very low, they may still face trade remedy investigations initiated to take remedial actions against imports that are allegedly causing material injury to a domestic industry. Under the Davos initiative, the open-textured commitment to pursue global free trade for environmental goods could be employed as a stage where further commitments in addition to mere tariff reduction on environmental goods could be pursued. For example, trade remedies for a list of clearly defined products relating to renewable energy could be phased out or capped at a certain maximum. This could take the form of a mere political commitment or could be put on the WTO agenda for future rule-making.

**2) Public Interest Test: Balancing environmental and mercantilist interest at the domestic level**

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<sup>39</sup> Available at: <http://www.ustr.gov/sites/default/files/EGs-Announcement-joint-statement-012414-FINAL.pdf>

To overcome the narrow mercantilist interests that the domestic authorities are often alleged to be serving while deciding trade remedies cases, it has been suggested that a public interest or national interest test should be made before the final determination in any trade remedy action is made.

In the EU determination in the case of dumping of solar panels from China, the environmental interests and the reference to EU Agenda 2020 were made in the context of the Union interest test.<sup>40</sup> However this did not influence or even mitigate the effect of the decision of the Commission in finding a case of dumping.<sup>41</sup> Article 19.2<sup>42</sup> of the Subsidies and Countervailing Measures Agreement (SCM Agreement) and Article 6.12<sup>43</sup> of the Anti-Dumping Agreement (ADA) are the relevant provisions that provide taking into account public interest in a trade remedy determination.

However these WTO agreements are limited in one respect, the interpretation of public interest is limited to economic interests, like industrial and consumer interests. Environmental interests do not form a part of this concept of public interest test. Some countries include environmental interests as a part of public interest in their domestic trade remedy legislation.<sup>44</sup> A public interest test that includes within its meaning safeguarding

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<sup>40</sup> Article 21 of the relevant Regulations of the EU provides for the Union Interest Test. The Community Interest is also referred to as the Union Interest.

<sup>41</sup> See para 257-258 of the decision.

<sup>42</sup> The decision whether or not to impose a countervailing duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the countervailing duty to be imposed shall be the full amount of the subsidy or less, are decisions to be made by the authorities of the importing Member. 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, and that procedures should be established which would allow the authorities concerned to take due account of representations made by domestic interested parties<sup>50</sup> whose interests might be adversely affected by the imposition of a countervailing duty

50. For the purpose of this paragraph, the term "domestic interested parties" shall include consumers and industrial users of the imported product subject to investigation.

<sup>43</sup> The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding dumping, injury and causality.

<sup>44</sup> For example Canada and Ukraine, for more information in this regard see Kotsiubaska, Iktoriia, Public Interest Consideration in Domestic and International Anti-dumping Disciplines (2011) available at: [http://www.wti.org/fileadmin/user\\_upload/wti.org/1\\_master-programme/pdfs/Masters\\_thesis\\_Viktoriia%20Kotsiubaska.pdf](http://www.wti.org/fileadmin/user_upload/wti.org/1_master-programme/pdfs/Masters_thesis_Viktoriia%20Kotsiubaska.pdf)

environmental interests could go a long way in mitigating or excluding trade remedies in the scenarios discussed above. Member countries could unilaterally amend legislations to incorporate environmental concerns into the public interest test in their domestic legislations.

### 3) Solar Manufacturing Settlement Fund: compensating the domestic producers of renewable energy

This recommendation could help to overcome adverse effects of the temporary market situations created through the use of trade remedies to substitute the withdrawal and modification of support schemes for renewable energy goods. It is geared towards limiting the detrimental effect of the policy change, though it uses the instrument of trade remedies as a reference point for certain calculations. The proposal for a compensation fund is based on the Technical Assistance and Capacity Building fund created in the *U.S. - Upland Cotton* case.<sup>45</sup> In this case as a part of the settlement, the U.S. agreed to establish a fund that would pay compensation to Brazilian cotton farmers, rather than having to pay high level of duties (as a result of WTO finding against its support schemes in favour of its domestic farmers). In the present context of the solar trade wars between U.S. and China, one of the main proponents of this proposal has been the Solar Energy Industries Association (SEIA)<sup>46</sup>. The main features of this fund proposed by SEIA are:

- Chinese companies would agree to pay a percentage of the price premium Chinese companies are currently paying to third-country cell producers to get around U.S. trade sanctions.
- A Solar Development Institute (Institute) would be established, funded by Chinese manufacturers. This Institute, would focus its resources on expanding the U.S. solar market for all participants and growing the US solar manufacturing base.
- The Chinese government would also agree to end its anti-dumping and countervailing duties investigations on U.S. polysilicon exports to China.

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<sup>45</sup> U.S.-Upland Cotton (DS267), further details available at:  
<http://www.brazilcouncil.org/sites/default/files/Brazil-U.S.FrameworkAgreement.pdf>

<sup>46</sup> <http://www.seia.org/news/seia-offers-industry-proposal-end-us-china-solar-dispute>

- In return, the U.S. anti-dumping and countervailing duties orders would be phased out.<sup>47</sup>

**Conclusion:**

Therefore in order to overcome the limitations of issues facing liberalisation of trade and environmental goods, it should be borne in mind that the tensions between environmental goods are temporary, in that they are a response to government policy changes and that they are only for a sub-category of environmental goods, that is, renewable energy goods. However if these recommendations are implemented in their true spirit it will not only take the agenda of liberalisation of trade in environmental goods forward but also help in overcoming these temporary roadblocks.

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<sup>47</sup>Draft Recommendation to Governments for the Establishment of a U.S.-China Solar Agreement, available at <http://www.seia.org/research-resources/draft-recommendation-governments-establishment-us-china-solar-agreement>; accessed 29 November 2013



**Table 2.<sup>48</sup> Recent Trade Remedies on Environmental Goods**

<b>Product</b>	<b>Country</b>	<b>Trade remedies</b>	<b>Initiation of investigation</b>	<b>Measures in force</b>
<b><u>EU</u></b>				
Biodiesel	U.S.	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	U.S.	AD+AS —	2011	2013
Glass fibres	China	AD	2009	2010
Solar panels	China	AD+AS	2012	2013
Solar glass	China	AD+AS	2013	[2013]
<b><u>Peru</u></b>				
Biodiesel	U.S.	AD	2009	2010

<sup>48</sup> Source: Kasteng, Jonas, (2013) “Trade Remedies on Clean Energy -A New Trend in Need of Multilateral Initiatives” available at [http://unctad.org/meetings/en/Contribution/ditc\\_ted\\_03042014e15.pdf](http://unctad.org/meetings/en/Contribution/ditc_ted_03042014e15.pdf)

<b><u>Australia</u></b>				
Biodiesel	U.S.	AD+AS	2010	2010
<b><u>U.S.</u></b>				
Wind towers	China	AD+AS	2011	2012
Wind towers	Vietnam	AD+AS	2011	2012
Solar panels	China	AD	2011	2012
<b><u>China</u></b>				
Polysilicon	U.S.	AD+AS	2012	2013
Polysilicon	EU	AD+AS	2012	2013
Polysilicon	South Korea	AD+AS	2012	2013
<b><u>India</u></b>				
Solar modules	China	AD	2012	[2013]
Solar modules	U.S.	AD	2012	[2013]
Solar modules	Malaysia	AD	2012	[2013]
Solar	Taiwan	AD	2012	[2013]

modules				
Solar modules	EU	AD	2013	[2014]
Solar modules	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: Trade Remedies on Clean Energy: A New Trend in Need of Multilateral Initiatives, Swedish National Board of Trade (2013)*

**Table 3. Renewable Energy Industry Support Measures and Countries Where Utilized<sup>49</sup>**

Support Measure	Countries Where Utilized
Feed-in Tariff	Australia; Austria; Canada; Croatia; Cyprus; Czech Republic; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Ireland; Israel; Italy; Japan; Luxembourg; Malta; Netherlands; Portugal; Slovakia; Slovenia; Spain; Switzerland; United Kingdom; Algeria; Argentina; Bosnia/Herzegovina; Bulgaria China; Dominican Republic. Ecuador; Iran; Jordan; Kazakhstan; Latvia; Lithuania; Macedonia; Malaysia; Mauritius; Montenegro; Panama; Peru; Serbia; Thailand; Turkey; Uruguay; Armenia; Ghana; Honduras; India; Indonesia; Lesotho; Moldova; Mongolia; Nicaragua; Nigeria; Pakistan; Palestinian Territories; Philippines; Senegal; Sri Lanka; Syria; Ukraine; Kenya; Rwanda; Tajikistan; Tanzania; Uganda
Direct capital subsidy, grant, rebate, or favorable loan	Australia; Austria; Canada; Croatia; Cyprus; Czech Republic; Denmark; Finland; France; Germany; Greece; Hungary; Italy; Japan; Luxembourg; Malta; Netherlands; Norway; Oman; Poland; Portugal; Slovakia; Slovenia; South Korea; Spain; Sweden; Switzerland; United Kingdom; United States; Argentina; Bosnia/Herzegovina; Botswana; Bulgaria; Chile; China; Dominican Republic; Russia; Turkey; Uruguay; Egypt; Ghana; India; Indonesia; Lesotho; Nigeria; Pakistan; Philippines; Sri Lanka; Vietnam; Bangladesh; Kyrgyzstan; Nepal; Tanzania; Uganda; Zambia
Local Content Requirement	China (Wind, 1997); Brazil (Wind, 2002); India (Solar, 2010); Canada (Wind, 2003; Wind/Solar, 2009); Ukraine (Wind/Solar, 2013); US (Wind/Solar/Others, 2009); Spain (Wind, 1994); Italy (Solar, 2011); France (Solar, 2012); Croatia (Wind/Solar/Others, 2012); South

<sup>49</sup> Source: Lewis, Joanna I., “The Rise of Renewable Energy Protectionism: Emerging Trade Conflicts and Implications for Low Carbon Development” , pg. 6 (Forthcoming in Global Environmental Politics Volume 14, Number 4, November 2014) available at: [https://blogs.commonsgorgetown.edu/jil9/files/2014/01/Lewis.RE\\_Intl\\_Trade\\_Draft\\_11.2013.pdf](https://blogs.commonsgorgetown.edu/jil9/files/2014/01/Lewis.RE_Intl_Trade_Draft_11.2013.pdf)

	Africa (Wind/Solar, 2011); Turkey (Wind/Solar/Others, 2011); Argentina (Wind, 2005); Malaysia (Wind/Solar/Others, 2010)
Financial or Tax Incentives for Local Manufacturing	UK (Green Products, 2009); Brazil (Wind, 2009); US (Wind/Solar/Others, 2009)
Use of Customs Duties/Import Tariffs to Favor Domestic Goods or Promote Domestic Manufacturing	Brazil (Wind, 2009); Russia, Belarus and Kazakhstan (Solar, 2010); China (Wind, multiple years); Venezuela (all electricity generation products, 2009)
Export Credit Assistance	Denmark (Wind, various years); United States (Green Products to Korea, 2009; RE to Abu Dhabi, 2013; Others); OECD (All RE, 2012)
Research, Development and Demonstration Support for Domestic Companies	China (Wind, Solar, various years); United States (Solar, Offshore Wind; 2011/2013); Denmark (Wind, various years); Germany (Wind, Solar, various years)

Sources: Lewis and Wiser 2005; Lewis 2007b; Lewis and Wiser 2006; Lewis 2012a; Center for Economic Policy Research 2013; REN21 2013.

## **Bibliography:**

### ***Journal Articles:***

Bahar, H., J. Egeland and R. Steenblik (2013), “Domestic Incentive Measures for Renewable Energy With Possible Trade Implications”, OECD Trade and Environment Working Papers, 2013/01, OECD Publishing, available at: <http://dx.doi.org/10.1787/5k44srlksr6f-en>

Kasteng, Jonas, (2013) “Trade Remedies on Clean Energy -A New Trend in Need of Multilateral Initiatives” available at [http://unctad.org/meetings/en/Contribution/ditc\\_ted\\_03042014e15.pdf](http://unctad.org/meetings/en/Contribution/ditc_ted_03042014e15.pdf)

Kasteng, Jonas, (2013) “Targeting the Environment: Exploring a New Trend in the EU's Trade Defence Investigations”, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2310564](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2310564)

Kotsiubska, Iktoriia, (2011) “Public Interest Consideration in Domestic and International Anti- dumping Disciplines” available at: [http://www.wti.org/fileadmin/user\\_upload/wti.org/1\\_master-programme/pdfs/Masters\\_thesis\\_Viktoriaa%20Kotsiubska.pdf](http://www.wti.org/fileadmin/user_upload/wti.org/1_master-programme/pdfs/Masters_thesis_Viktoriaa%20Kotsiubska.pdf)

Lewis, Joanna I.,(2013) “The Rise of Renewable Energy Protectionism: Emerging Trade Conflicts and Implications for Low Carbon Development” (Forthcoming in Global Environmental Politics Volume 14, Number 4, November 2014) available at: [https://blogs.commons.georgetown.edu/jil9/files/2014/01/Lewis.RE\\_.Intl\\_.Trade\\_.Draft\\_.11.2013.pdf](https://blogs.commons.georgetown.edu/jil9/files/2014/01/Lewis.RE_.Intl_.Trade_.Draft_.11.2013.pdf)

Rubini, Luca, (2012) “Ain’t Wastin’ Time No More: Subsidies For Renewable Energy, The SCM Agreement, Policy Space, and Law Reform” in Journal of International Economic Law, April 15 (2), pg.1.

Wu & Saltzman, (2013) “The Next Generation Of Trade And Environment Conflicts: The Rise Of Green Industrial Policy”, available at: <http://www.law.harvard.edu/faculty/faculty-workshops/wu.faculty.workshop.spring-2013.pdf>

***Trade remedy cases before domestic authorities:***

Crystalline Silicon Photovoltaic Cells and Modules from China, Inv. Nos. 701-TA-481 and 731-TA-1190 (Final), available at: [http://www.usitc.gov/publications/701\\_731/pub4360.pdf](http://www.usitc.gov/publications/701_731/pub4360.pdf).

Utility Scale Wind Towers from China and Vietnam, Inv Nos. 701-TA-486 and 731-TA-1195-1196 (Final) available at: [http://www.usitc.gov/publications/701\\_731/pub4372.pdf](http://www.usitc.gov/publications/701_731/pub4372.pdf)

EU provisional decision for anti-dumping duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers) from China, available at:<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:152:0005:0047:EN:PDF>.

EU Final decision for imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of crystalline silicon photovoltaic modules and cells from China available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0759:FIN:EN:PDF>

***Studies/Reports:***

Renewable Energy Policy Network “Key findings 2013” available at:  
[http://ren21.net/Portals/0/documents/activities/gsr/REN21\\_GSR2012\\_Key%20Findings.pdf](http://ren21.net/Portals/0/documents/activities/gsr/REN21_GSR2012_Key%20Findings.pdf)

Renewable Energy Policy Network “Renewable 2013- Global Status Report”, available at:  
<http://www.ren21.net/ren21activities/globalstatusreport.aspx>

WTO Annual Report (2013), available at:

[http://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/anrep13\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/anrep13_e.pdf)

***Web based news reports:***

Bradsher, Keith “U.S. Solar Panel Makers Say China Violated Trade Rules”, New York Times, 19 October, 2011 available at [http://www.nytimes.com/2011/10/20/business/global/us-solar-manufacturers-to-ask-for-duties-on-imports.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/10/20/business/global/us-solar-manufacturers-to-ask-for-duties-on-imports.html?pagewanted=all&_r=0);

Crooks, Ed & Hook, Leslie, “China’s rush into renewables: The way the world turns”, Financial Times, 28 November 2011, available at <http://www.ft.com/intl/cms/s/0/0502a28a-15c9-11e1-a691-00144feabdc0.html#axzz2kfPvAzbF>

Hook, Leslie, “China to probe US clean energy subsidies”, financial Times, 25 November, 2011, available at <http://www.ft.com/intl/cms/s/0/22d9033e-174b-11e1-b20e-00144feabdc0.html#axzz2kfPvAzbF>.

“IPVIC: Solar arbitration commencing today” (May, 2013), available at: <http://www.rananasolar.cz/2013/05/09/ipvic-solar-arbitration-commencing-today/>

“SEIA Offers Industry Proposal to End U.S-China Solar Dispute” (September, 2013) available at: <http://www.seia.org/news/seia-offers-industry-proposal-end-us-china-solar-dispute>