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Recent developments: international economic law and renewable energy policies

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Renewable energies – production on the rise, trade and investment disputes on the rise

- ▶ Support schemes for renewable energy production in 138 states of the world;
- ▶ 19% of final energy consumption globally from renewable energy (2012)
- ▶ 214 billion US\$ investment in 2013

Source, REN21, Status Report 2014, p. 7



Structure of presentation

I Overview: approaches to fostering renewable energies

II The law of the World Trade Organization (WTO) and support schemes for renewable energies

GATT

TRIMS

SCM

III Overview: International investment disputes relating to renewable energy support schemes



Actors in the energy market

- ▶ Energy producers (renewable/non-renewable)
- ▶ Grid/network operators (sometimes responsible for different parts of the network – transmission/distribution)
- ▶ Energy suppliers
- ▶ Consumers (private/business/state)



Overview of mechanisms to foster renewable energy generation

- ▶ **Feed-in tariffs** (widely used, e.g. Germany):
 - ▶ grid operators or energy suppliers are obliged to buy renewable energy from (domestic) producers at defined price guaranteed for a certain period of time which is above normal market price for energy;
 - ▶ grid operators can claim additional costs either from state or from energy suppliers/consumers
- ▶ **Auctioning** (increasingly used):
 - ▶ government defines amount of renewable energy to be produced in given time period
 - ▶ energy producers submit bids



Overview of mechanisms to foster renewable energy generation (II)

Quota system (widely used, e.g. Sweden):

- ▶ quota for energy from renewable sources imposed on certain actors (usually energy suppliers);
- ▶ quota fulfilled by buying renewable energy certificates from (domestic) energy producers
- ▶ energy producers are allocated renewable energy certificates by state
- ▶ penalties if quota not fulfilled

Variety of other mechanisms are discussed theoretically or exist in practice (e.g. tax incentives)



Effects of schemes

- ▶ Subsidize (in in a non-technical sense) renewable energy production to make it competitive
- ▶ Often involve discrimination against foreign energy producers as benefits normally limited to domestic energy producers



WTO law and renewable energy – relevant agreements

- ▶ General Agreement on Tariffs and Trade (GATT), relating to trade in goods
- ▶ General Agreement on Trade in Services (GATS)
- ▶ Agreement on Subsidies and Countervailing Measures (SCM)
- ▶ Agreement on Technical Barriers to Trade (TBT)
- ▶ Agreement on Trade-Related Investment Measures (TRIMS)



Types of support schemes discussed

- ▶ German Renewable Energy Law: defined feed-in tariff for renewable energy from various sources and facilities within Germany; cost ultimately paid by consumer (no public entity involved)
- ▶ Support scheme of the Canadian province of Ontario (WTO dispute): energy from renewable sources bought by state-controlled enterprise at guaranteed price; local content requirements as a precondition for companies to become part of the scheme
- ▶ Quota model: energy suppliers need to fulfill quota and for this purpose buy renewable energy certificates from domestic producers



Art. III:4 GATT

Imported products must not be treated less favourably than domestic like products

- Energy = product (+); technologies used to generate renewable energy = product (+)
- Like products? Yes for technologies and renewable energy, open for renewable/non-renewable energy
- Treatment less favourable (including *de facto* discrimination)?
 - German model: Yes (for energy) as only domestically produced energy is bought at feed-in tariff that is higher than market price
 - Canadian model: Yes (for technologies), as energy producers are given incentive to use domestic technologies
 - Quota model: Yes, if renewable energy certificates only provided to domestic renewable energy producers



Art. III:5 GATT

“No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of ... which requires ... that any specified amount or proportion of any product ... must be supplied from domestic sources.”

German and quota model: no quantitative regulation on use of domestic products

Canadian model:

- quantitative regulation exists
- “must be supplied from domestic sources” – unclear, producers are not forced to use domestic goods, but decide to do so to get financial benefits



Art. XX GATT: text

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:”

- „necessary to protect human, animal, plant life or health“ (Art. XX (b))
- „relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption (Art. XX (g))



Art. XX GATT: justification of measures (I)

▶ Art. XX (b) GATT

- ▶ „Protect human, animal, plant life or health“: overall measure yes, but local content requirement (as in Canadian model) no
- ▶ „Necessary“? No alternative less trade-restrictive measure available?

Support schemes without restriction to domestic producers could be considered less trade-restrictive measure

BUT: Equally effective in making sure that renewable energy is produced in a given country?

Technically feasible?



Art. XX GATT: justification of measures (I)

▶ Art. XX (g) GATT

- ▶ “relating to exhaustible natural resources”? overall measure yes, but local content requirement (as in Canadian model) no
- ▶ “restrictions on domestic consumption and production”

Not really very suitable for renewable energy context, as measures are not about restricting consumption or production in renewable energy, but only of conventional energy

But domestic production of conventional energy restricted in same way as non-domestic renewable energy (German model, quote model) – so yes

- ▶ Chapeau of Art. XX GATT: very difficult to predict



TRIMS Agreement

Trade-related investment measure (+)

Art. 2.1 TRIMS iVM Art. III GATT (+)

In addition: Nr. 1 Illustrative List in combination with Art. 2.2, 2.1 TRIMS
- requirements that make obtaining an advantage conditional upon
use of domestic components – violated in Canadian case



SCM Agreement: overview (I)

- ▶ Art. 1.1 Definitions of subsidies:
 - ▶ Financial contribution (with four different sub-definitions)
 - ▶ By a government public body within territory of a WTO Member
 - ▶ Conferring benefit (compared with situation in market without contribution)

- ▶ Art. 3 SCM: Prohibited subsidies
 - ▶ Export subsidies
 - ▶ Subsidies depending on fulfillment of local content requirements



SCM Agreement: overview (II)

- ▶ Art. 5-7 SCM: Actionable subsidies
 - ▶ Specific
 - ▶ Adverse effect on another WTO Member



SCM Agreement: the Canadian case

- ▶ Complaint by EU/Japan, mainly over LCRs in feed-in (FIT) scheme
- ▶ FIT scheme involves payment of guaranteed tariff by energy authority; economically higher price is borne by consumers
- ▶ Panel: Canadian feed-in scheme involves financial contribution in the form of a government purchasing goods, but no benefit (hence no subsidy)
- ▶ Appellate Body: appeared reluctant to make finding on subsidy with regard to benefit conferred; stated it could not make finding due to lack of factual evidence, but stated that
 - ▶ Relevant market to assess whether there is benefit is renewable energy market
 - ▶ Fact that governments create markets for renewable energy is not as such subsidy



SCM Agreement: other constellations

- ▶ A lot depends on details of measure, no case law yet on the issue
- ▶ With regard to German model, no payments of governments involved, but clause in SCM indicating that where private actors are entrusted with financial support, there would be a subsidy, too
- ▶ In quota models, allocation of renewable energy certificates could be subsidy
- ▶ But: is economy of other WTO Member negatively affected? With local content requirements probably yes, but with mere feed-in scheme likely difficult so show, because energy is often not exported



Other aspects

- ▶ Discussion in literature on relevance of GATS for renewable energy certificates (in quota model)
- ▶ Compatibility of EU sustainability criteria with WTO law:
 - ▶ EU renewable energy directive provides that biofuels can only be taken into account when measuring compliance with the targets of the EU Member States in the field of renewable energy when complying with sustainability criteria
 - ▶ Criteria include greenhouse gas reductions achieved as well as land used
 - ▶ Potential issues with GATT (treating products from different origins differently) and TBT Agreement
 - ▶ Complaint brought by Argentina in consultation stage at WTO (WT/DS459)



Practical relevance for WTO dispute settlement

- ▶ Claims are likely to be brought because of discrimination against importers of technologies or fuels, not because of discrimination against energy producers – some cross-border trade in energy, but usually between neighbouring countries only - transboundary grids are missing



Practical relevance for WTO dispute settlement

- ▶ Cases on support schemes for renewable energy

WT/DS459: Argentina vs. EU regarding sustainability criteria for biofuels

WT/DS456: US vs. India over India's solar programme, notably local content requirements (Panel established)

WT/DS452: China vs. EU regarding renewable energy schemes of Italy and Greece, notably local content requirements

WT/DS419: China – Measures Concerning Wind Power Equipment (amicably settled)

- ▶ Cases also relating to renewable energy:

WT/DS437 – China vs. US over anti-dumping measures on renewable energy equipment (Appellate Body report, finding violations of the US)



Investment disputes and renewable energy support: Energy Charter Treaty

- ▶ Important agreement for investment disputes relating to renewable energy – but other bilateral investment treaties could be used as well
- ▶ In force 1998, more than 40 parties (mainly countries from the EU and Eastern Europe, but also e.g. Japan)
- ▶ Contains section on investment protection
 - ▶ Fair and equitable treatment of investors (Art. 10.1)
 - ▶ Most-favoured nation treatment (Art. 10.2, 10.3)
 - ▶ Prohibition of expropriation without compensation (Art. 13)
- ▶ Provides for investor-state dispute settlement (Art. 26)



Current disputes

- ▶ About 10 claims brought by investors under ECT against **Spain**, because of modifications in Spanish support scheme for renewable energy as well as tax on revenue of power generators
- ▶ Several claims brought by investors under ECT against **Czech Republic**, because of 2011 measure introducing levy on electricity generated from solar power plants; argument that viability of the investments is undercut
- ▶ Submissions not public, but likely violation of fair and equitable treatment clause and/or clause prohibiting expropriation is claimed



Thank you for listening!

Questions & comments?

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Want to read more?

Study on international legal framework for renewable energy support

(2014): <http://www.ecologic.eu/node/10952>