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Renewable Energy Subsidies: Reigniting the Clean Energy Trade Debate

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ABSTRACT The goals of sustainable development have taken root in policy discourse worldwide. No less than three key international conferences in 2015 further set in motion concerted efforts from all stakeholders to attempt to forge an integrated agenda for sustainable development. For one, nations are employing innovative industrial policies to foster the transition to a more sustainable economy. Indeed, renewable energy subsidies remain vital for such transition to make the sector economically viable, particularly in developing countries with nascent industries. Governments have intensified support measures to increase the cost-competitiveness of renewable energy with respect to the heavily subsidised fossil fuel industry. However, the current WTO legal architecture effectively shrinks the policy space for governments of developing nations through its archaic subsidy regime. This paper examines how the international trade law regime can accelerate the search for solutions to climate change vis-à-vis maximisation of renewable energy.

INTRODUCTION

The old energy economy, dependent on fossil fuels, is undergoing a global transition to alternative and environmentally cleaner options such as solar, wind, and geothermal energy. As the global energy demand rises due to increasing consumption in the emerging and developing economies, the role that free trade plays in the energy sector has become all the more important. Higher stress on sustainable development in national policies of governments worldwide is driving this transition. The year 2015 saw three major international conferences organised around these themes: the post-2015 Sustainable Development Summit in New York, the Tenth World Trade Organization in Nairobi, and the United Nations Climate Change Conference (COP-21) in Paris. These high-level conferences helped offer a conducive political climate for the States to collaborate with civil society, NGOs, and the private sector to attempt to forge an integrated agenda for all

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three dimensions of sustainable development—social, economic and environmental—and steer the world economy towards a low-carbon, more sustainable future.

The goals of both the COP-21 and Sustainable Development Summit put renewable energy at the heart of the global climate mitigation strategy. As for India, while its energy landscape continues to be dominated by conventional energy sources, mainly fossil fuels, it has been setting ambitious goals for a shift towards renewable energy. Its Climate Action Plan¹ pledges a commitment to derive 40 percent of the country's total power capacity (about 850 GW) from renewable sources by 2030, out of which solar energy will account for nearly three-fourths (100 GW) and wind power at 60 GW by 2022. These targets would help India meet its intended nationally determined contributions (20-25 percent reduction below the 2005 levels by 2020) under the COP-21 Global Climate Agreement (the 2015 Paris Agreement). India has called its Jawaharlal Nehru National Solar Mission (JNNSM) a core component of its commitment to abide by the Paris Agreement.

Nevertheless, the February 2016 ruling by the WTO's Dispute Settlement Body (WTO DSB) in the India Solar Panels case² has come at a time when the country has just signed the Paris Agreement. The Panel held that the mandatory domestic content requirements (DCR) clause in India's solar power generation programme violated trade rules under General Agreement on Tariffs and Trade (GATT) of 1994, and the Agreement on Trade-Related Investment Measures (TRIMs).

While India is not the first country (and, by all means, will not be the last one, either) to

adopt a protectionist approach to its renewable energy policy, its well-documented and transparent DCR clause made an appealing target for a WTO case. The practice of governments covertly protecting their industries beyond traditional tariff barriers that contravene WTO rules is rampant. Yet, in this case, two factors seem to be at work. One, that the global market for renewable energy is getting bigger, triggering fierce competition as a result. Two, most markets, irrespective of their economic size and strength, are still dependent on some or the other form of governmental support. One unfavourable outcome of this trend has been a rise in traderelated renewable energy disputes at the WTO.

An analysis of these disputes shows how domestic efforts to promote the renewable energy sector are colliding with the basic principles of free trade. Interestingly, though, fossil fuel subsidies - which continue to undercut efforts to mitigate climate change have never been disputed at the WTO. Therefore, it is imperative that the larger debate about the innate conflict between trade and climate objectives is redefined in the post-Sustainable Development Goals and COP-21 era to gain coherence and compatibility between the trade and environment regimes. Redefining the debate is crucial to sustainable development as the current WTO laws - GATT, 1994 and Agreement on Subsidies and Countervailing Measures (SCM) — make incentives for deployment of renewable energy, including production and research in related equipment and technologies, tremendously difficult.

This paper looks into the current ambivalence on renewable energy subsidies—a common thread that runs through all recent trade-related clean energy disputes. The paper examines how the international trade law regime can accelerate the search for solutions to climate change visà-vis maximisation of renewable energy, rather than serving as a stumbling block.

The recent India Solar Panels case, which represents a recurring theme, is discussed in Section II which probes renewable energy subsidies in both developed and developing countries. Section III analyses how, despite the recognition of sustainable development as its goal, the current WTO legal architecture effectively shrinks the policy space for governments of developing nations to stimulate the transition to green economy. It discusses the emerging climate policy of developing countries prompted by the inequitable distribution of technological wealth between developed and developing countries, and the inadequacy of the current global system to deal with the concerns of the developing world. Section IV examines how governments use ambiguities in global trade rules to formulate uncoordinated national policies that circumvent WTO's archaic rules on subsidies and build new barriers to the deployment of renewable energy in developing countries. The section concludes that some subsidies, regardless of their market-distorting nature, might be good for maximisation of renewable energy, and attempts to find answers to legal hurdles posed by the WTO trade architecture.

THE CLEAN ENERGY TRADE WAR

Subsidies is the dominant policy instrument of governments worldwide to not only promote the use of renewable energy but also to incentivise its production locally by assuring the producers— often with conditions such as procurement of certain percentage of production inputs locally—that clean energy will be bought at costs comparable to conventional sources.

The shift to clean energy cannot happen overnight; it is expensive and requires advanced technology, often a missing element in the nascent clean-energy industries of developing countries. However, both developed and developing countries have been making liberal use of subsidies, often ending up being dragged to the WTO DSB. The last five years, in particular, have seen a spurt in trade disputes related to renewable energy, with the DSB often ruling against industrial policies of States for the promotion of green energy.

India Solar Panels Case

The JNNSM, ambitious in its long-term policy of reducing the cost of solar power generation in India and promoting domestic production of solar components, was subjected to intense scrutiny recently at the WTO. The contentious requirement that did not find favour with the WTO was the DCR clause under which all investors are compelled to use solar modules produced locally and source 30 percent of input locally.

The US challenged the DCR at the WTO, arguing that it was protectionist in nature and discriminated against imports and against American firms, basing it on the 90-percent fall in its solar exports to India from 2011 when India imposed the clause.

India's incentive to the local industry was to enter into long-term contracts of buying solar power at rates to sustain solar power, which would incentivise private players to set up plants and invest more in the required technology. The DCR clause mandated solar companies to source 30 percent of panel components from local manufacturers. Then the government would sell the purchased power to distribution companies (discoms) at a price comparable to electricity bought from thermal power plants. The goal was to prod private players to set up more power plants and research and development units to produce affordable solar generated electricity.

The WTO Panel, however, ruled against the DCR clause, calling it trade-related investment measures inconsistent with the national treatment obligation of memberstates under Article III: 4 GATT, 1994. It rejected India's plea to exempt the DCR clause, considering the country's "lack of domestic manufacturing capacity in solar cells and modules, and/or the risk of a disruption in imports, makes these 'products in general or local short supply' within the meaning of that provision."³

India argued that its DCR clause was exempted from Article III: 4 GATT, as it falls under the government procurement clause of Article III: 8 (a). This, too, was rejected by the WTO DSB, which observed that the product discriminated against (solar panels) was not in a competitive relationship with the product procured by the government (electricity).

Other Renewable Energy Cases in WTO

In the case, the WTO panel also made a reference to the Appellate Body's ruling in the Canada Renewable Energy/Feed-In Tariff Program. Clearly, countries across the globe have been incentivising their renewable energy sector through measures such as domestic clause requirements, feed-in-tariff (FIT) rules and other forms of subsidies to pursue multiple policy objectives, from promoting clean energy to sustaining local industry and generating clean energy jobs.

While similar measures of Canada and China were challenged, respectively, in the cases of the Canada-Renewable Energy and US-China Wind Power, the policies of Brazil and Indonesia were also contested. History has been strangely repeating itself in the battle for global supremacy in renewable energy. The complainant European Union (EU) in the Canada case was challenged by China on FIT solar subsidies of some of the EU's own member-states. China's Special Fund for Wind Power Equipment Manufacturing, which subsidised the country's wind turbine manufacturers for using locally manufactured inputs, was challenged by the US in 2010. Interestingly, with its huge support measures, China has displaced the US as the global leader in wind energy production capacity.

The US itself has local content requirements in renewable energy programmes in states such as Texas, Michigan, Pennsylvania and California, which offer subsidies to businesses that install locally manufactured technologies. Its own high energy subsidies and governmental support exposes the US doublespeak on India's subsidies. According to the US Energy Information Administration, federal subsidies for renewable energy averaged \$39 billion a year in the last five years.⁴ It would appear that India has the right to make a retaliatory complaint against the US.

Even as India appeals against the WTO ruling, any positive outcome would only offer a temporary solution insofar as the illegality of renewable energy subsidies in the trade law regime is concerned. Local subsidy programmes and government support for clean energy initiatives—whether in the form of India's DCR, or Canada's FIT or China's Special Fund for Wind Power Equipment Manufacturing — will continue to be deemed trade-discriminatory under the existing trade law structure.

Unless an international consensus is reached on defining the legitimate types of government intervention and support, any tacit agreement between countries to not challenge each other's clean energy subsidies will only offer a piecemeal solution. In the absence of a multilateral understanding, governments would continue to fill the policy void through prohibited subsidies.

CLEAN ENERGY SUBSIDIES UNDER WTO: Constricting Regulatory Space for Sustainable Development

The Paris climate deal signalled the beginning of the end of fossil fuels. But if the existing trade laws are anything to go by, the promises made at the COP21 run the risk of being stillborn.

It is true that environment, and in particular, the interconnectedness between trade and environment, was originally not part of the multilateral trade negotiations. At the conclusion of the Uruguay Round, however, environment protection and sustainable development did figure in the Preamble to the Marrakesh Agreement establishing the WTO. Regardless of its inherent bias against non-trade objectives, the WTO has identified sustainable development as one of its goals, even if only on paper. The question, then, is how successful has the WTO been in achieving this goal, if at all?

Under the existing WTO law, renewable policy measures are prone to intense scrutiny, with adverse consequences for the regulatory space afforded to national governments. The general exceptions under Article XX provide enabling clauses for achieving special policy objectives, including derogation from the general principles of GATT, 1994 to "conserve exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." The exceptions neither make a reference to the promotion of renewable energy nor provide a carve-out for climate change subsidies supporting renewable energy. Thus the GATT rules take an evasive approach to clean energy.

Under the WTO's Subsidies and Countervailing Measures Agreement (SCM Agreement), two kinds of subsidies are expressly prohibited: export subsidies and local content subsidies. The Agreement makes no exception based on public policy objectives (on environment, health, labour, among others). An important feature of the existing WTO- mandated subsidy framework is that energy subsidies, in addition to agriculture and fisheries, remain the most heavily subsidised sectors in the world.⁵ But while special rules apply to agricultural subsidies, and similar rules are under negotiation for fisheries subsidies, energy subsidies are subjected to the general rules of the SCM Agreement. Despite the fact that no distinction is made between fossil fuel subsidies and renewable energy subsidies, only the latter have been disputed at the WTO DSB, understandable given the pace of green energy innovations and the fact that the nascent nature of the renewable energy industry in developing countries offers a

lucrative market for established manufacturers of industrialised countries.

A major concern of developing countries is the lopsided nature of the WTO's subsidy regime. Developed countries provide huge subsidies for research and development in clean technologies, which until 2000 fell under 'non-actionable subsidies', putting the financially less-endowed developing countries at a clear disadvantage. Production subsidies, largely allowed unless they have adverse trade effects, were liberally used by rich countries when they were in their development phase until these subsidies became restricted in character ('actionable subsidies').

At the same time, local content subsidies — a favourite of developing countries driven by the job-creation imperative⁶—are prohibited, though they produce the same adverse effects as production subsidies.

The existing WTO architecture thus fails to recognise that not all kinds of subsidies are bad. Certain government support that stimulates investment in clean energy sources is "good" and desirable insofar as the objective is to buttress the transition to clean energy, contribute to a decline in global carbon emissions and national value creation. There is no empirical evidence, however, to show that specific subsidy programmes such as FIT and DCR are absolutely essential to achieve economic benefits like job creation and renewable energy innovation.

Trade-Climate-Energy Nexus

The innumerable ways in which trade, climate change and energy (sustainable energy) interact with one another have been discussed in the joint report by the WTO and the United Nations Environment Programme (UNEP).⁷ This trade-climate change-energy nexus is, however, yet to translate into a legal text that will take into account sensitivities of all sovereign states corresponding to their levels of economic development. Both the COP21 and the WTO Ministerial Conference in Nairobi failed to address any of these concerns. While the COP-21 was held to chart out a plan for greenhouse gas reduction, the Nairobi conference met to advance global trade rules without acknowledging the inseparability of trade and climate change.

Emerging Climate Policy of Developing Countries

The transition to clean economy involves technological revolution. Most advanced technologies today are possessed by industrially developed countries, which are also the hub of environmental goods and services. This has prompted developing countries to formulate an investment-led industrial policy, stimulating manufacturing activity in the renewable energy sector that aligns with their developmental priorities. The existing trade rules, however, have not caught up with this urgency with which these countries are attending to their environment protection goals.⁸ The much-needed policy space for these countries to develop their nascent clean energy industries as a viable sector that produces tangible economic benefits remains absent.

REDEFINING THE RENEWABLE ENERGY SUBSIDIES REGIME

Trade and investment are not ends in and of themselves but a means to an end—that of inclusive global prosperity not at the expense of preservation of natural resources and environment for future generations. Climate change remains the singlemost significant challenge to sustainable development goals, and its global nature necessitates a partnership among various institutions and organisations in the UN system, including the WTO. This partnership requires a rules-based system with equitable, effective and mutually acceptable principles⁹ of free trade and nondiscrimination, among others. The desirable end-point of it all must be sustainable development, the one that integrates its three dimensions- social, economic and environmental — and balances trade openness with opportunities for poor and developing countries to offer their people an acceptable quality of life.

Disputes like the India Solar Panels case (2016), Canada Renewable Energy case (2014) and the US-China Wind Power case (WTO 2011), far from inspiring confidence in the WTO's regulation of multilateral trade, erode it. Every time a legitimate measure reinforcing a member-state's commitment to clean energy is challenged at the WTO DSB, the inappropriateness of the WTO rules in forging a global consensus on renewable energy support repeatedly comes to light.

The recent disputes highlight that the absence of a fair mechanism to help poor developing countries build viable clean industries has led to governments aggressively basing their renewable energy programmes on uncoordinated industrial policies. The impasse at the Doha Development Round on environmental goods and services further proves it.

The controversial component of India's solar mission that mandated certain percentage of local sourcing is an instance of this uncoordinated national plan to fill the policy gaps. The twin objectives of the solar mission—promotion of renewable energy and job creation-may be interlinked from the perspective of a developing country like India with a nascent clean energy industry, justifying the local content requirement clause. However, while letting the political exigencies —namely, local renewable energy job creation—take precedence in the general discourse on renewable energy in India, the government has failed to drive home the point. That is, while the WTO legal jurisprudence has gradually come to accommodate environment protection and sustainable development, a parallel paradigm is missing in the area of clean-energy jobcreation, which is an essential component of this transition. The only incentive for governments to integrate the use of renewable energy in their mainstream development plans is the creation of clean energy jobs and promotion of indigenous clean energy technologies.

The argument that government subsidies generally distort market by making local industry artificially competent while compromising innovation and quality cannot be disregarded. Nonetheless, renewable energy subsidies are absolutely necessary to compete with the conventional energy industry, which continues to be heavily subsidised. A newly competitive marketplace like India serves as the perfect avenue for industrial nations with their mature clean energy industry to have first-mover advantages. The current subsidy regime of the GATT and SCM Agreement, therefore, protects industrial interests of developed nations at the expense of infant industries in developing countries. This calls for a constructive dialogue on incorporating a carve-out in the SCM Agreement—of course with sun-setting clause—for green job creation and green industrial growth in developing countries. Environment protection through the promotion of renewable energy must be wedded to the political rationale for any long-term potential climate change solution.

The most important argument for renewable energy subsidies in the form of DCR and FIT is that the domestic measures to help create a competitive market for local players would enhance international cooperation on transfer of knowledge and technology, thus generating more innovations in a sector which is inherently risky and requires long-term investments.¹⁰ It is argued that preconditions like mandatory local sourcing compel foreign businesses to transfer technology so that the end-quality of their product—which is now using local inputs—is sustained.¹¹

The WTO does not recognise that certain subsidies might be good for the promotion of renewable energy. This leaves the question of how the current global trade architecture will invigorate the search for solutions to climate change vis-à-vis maximisation of renewable energy.

The current legal framework through the WTO DSM only offers a temporary solution. Energy governance is fragmented, with no international organisation having special rules to govern this sector. The Energy Charter Treaty (ECT), though it specifically deals with the trade in goods in the energy sector, does not hold the same authority as the WTO. Not all ECT members are WTO members. Besides, the ECT framework itself follows the WTO rules.

Further, a look at the recent trade-related renewable energy disputes shows that these are not new. While certain countries have been repeatedly targeted primarily because of their transparent rules, some others continue to use the same controversial support measures by virtue of their technological leadership in this sector. What it means is that the sheer size of the domestic market, along with the required technical prowess, has been determining the outcome of potential traderelated clean energy disputes. For instance, US solar subsidy programmes were identified by India and China to be trade-discriminatory long before the WTO decided the fate of India's solar subsidies. However, no request for consultations with the US has been made so far, and no retaliatory measure has been initiated. This is likely to repeat in case of any potential trade disputes with China as far as the wind energy industry is concerned. By the time China agreed to retreat on their controversial Fund programme, their wind turbine industry had overtaken America's.

A Case for Legalisation of Renewable EnergySubsidies

The legal uncertainty and inconsistency on renewable energy subsidies further constricts the policy space. Against this scenario of uncertainty, an overhaul of the subsidy regime that would redefine the types of governmental support that are in conformity with multilateral trade rules appears to be the only answer. A reformed subsidy regime must specifically accommodate climate-change subsidies supporting renewable energy, which allows restricted and time-bound use of measures with a clearly-defined ceiling clause.

There could be two ways to bring about this overhaul. The first could be to negotiate a new sustainable energy policy framework under the WTO, considering the world trade body has the best existing dispute settlement system. To this effect, a global agreement that explicitly recognises common support measures like FIT, local content requirements and tax incentives could offer a prosustainable energy policy framework, as suggested by the International Centre for Trade and Sustainable Development.¹²

The second, and a feasible alternative to a whole new agreement, would be to amend Article XX and extend the 'environmental protection' exception to the WTO's Agreement on SCM. The Agreement makes no exception based on public policy objectives (environment, health, labour, among others). Regardless of how noble the idea of supporting renewable energy is for the international community as a whole, subsidies for renewable energy are subjected to the same rules as subsidies for any other sector. Interestingly, the erstwhile Tokyo Round Subsidies Code made a provision for domestic content requirements, forbidding only trade-distorting subsidies. The presentday developed/industrialised countries made use of the Code for their development. One way to prevent the abuse of these subsidies could be to make it mandatory on countries to provide an assessment of subsidies they desire to impose and their impact on trade and environment. Further, to ensure genuineness of government support for infant renewable energy industries, there must be a sunset clause for subsidies.

A renegotiation of the non-actionable subsidies that expired in 2000, starting with a dialogue on FITs, could be initiated. However, the North-South divide is likely to re-emerge, as there is a fundamental difference in what the two blocs perceive as "good subsidies".

CONCLUSION

Major multilateral agreements acknowledge sustainable development goals. In recent times, regional trade agreements and investment treaties, including bilateral treaties, have become important tools to deepen global economic integration, and they too reaffirm key environmental sustainability aspects. Therefore, it is essential that greater global economic integration fosters, rather than impedes, the shift to greener economies.

The paper is premised on the notion that the global climate change policy cannot work in isolation, and a greater coherence and reciprocity between trade and environment regimes is critical to its success. Still, it must be said that even under the best of scenarios, it is difficult to expect the WTO to bring out a radical transformation in the way the world pursues a transition to greener energy resources today.

The complex issue of 'sustainability in trade' demands a rigorous debate on wider issues than have been dealt with in this paper. But the case for a re-examination of the WTO's subsidy regime is compelling. That a shift to clean energy is one of the most efficient solutions to climate change has been recognised in the COP-21 Agreement as well as the 2030 Agenda for Sustainable Development. As is conspicuous in its nature, the multilateral trading body has an inherent bias towards trade as against non-trade issues like environment. Regardless, the Organization has taken on some of the persistent issues in its efforts to contribute to the global climate change mitigation efforts.

Insulating renewable energy measures from the archaic WTO subsidy laws is not the single point solution, and the WTO is not the exclusive forum to redesign the global economic architecture. However, the multilateral trade body governs the energy sector by default with rules on subsidies that often withhold countries from actively advancing their green goals. Therefore, redefining the rules of the subsidy game with a focus on renewable energy is critical for a longterm action for sustainable development. There are no specific rules to address issues—often repetitive, such as FIT and tax incentives—in a sector beset by a surge in application of WTO subsidy rules, impairing the world body's credibility to formulate an

environmentally-sustainable jurisprudence on trade-energy discourse, even as governments worldwide continue to fill this policy gap.

The expansive growth of the green economy must trigger a reform of the governing international trade rules. If renewable energy is to be made an integral part of developmental policies of governments, it must come with incentives to make it a viable option for local industries as well as end-consumers. Legal hurdles for supporting renewable energy subsidies are manifest in the SCM Agreement, which disregards the environmental protection argument. The incidence of trade-related renewable energy disputes is likely to rise in the years to come as governments continue to devise new policies to support their clean energy industries. While individual countries may win or lose trade disputes, the objective of clean environment should no longer suffer a regulatory void. **ORF**

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ENDNOTES

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Note : The Panel found that India failed to demonstrate Article XX(j) of the GATT 1994 that the products in question were in short supply. The Panel held that, anyway, the product procured by the government is electricity, while the product discriminated against was solar panel components. (paras 58-61)

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