

**INSIGHT INTO THE LAW AND POLITICS OF THE TRADE
IN RENEWABLE ENERGY EQUIPMENT. LOCAL CONTENT
REQUIREMENT RECONSIDERED: THE CASE OF
DEVELOPING COUNTRIES**

By

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Résumé

Dès 2010, plusieurs mesures de soutien de la production de l'énergie à partir de sources renouvelables ont fait l'objet de différends à l'OMC. Quelques idées ont été avancées récemment afin de réconcilier les règles de l'OMC avec des objectifs environnementaux qui visent à augmenter le nombre d'installations productrices des énergies renouvelables et de l'équipement, telles que le *Sustainable Energy Trade Agreement (SETA)*. A cet égard, il convient de s'interroger sur l'idée d'un traitement spécial et plus favorable qui devrait être accordé aux pays en développement dans le cadre du *SETA*.

Abstract

Starting from 2010, different support policies for production of equipment of renewable generators became sources of controversies at the WTO. A few ideas of reconciliation of the WTO rules with environmental objective of increasing renewable energy installations and equipment production, such as a Sustainable Energy Trade Agreement (SETA), have been proposed recently. In this regard, it should be explored if there is a case for a special treatment of developing countries under the SETA.

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Until recently, electricity has been produced essentially from conventional sources (i.e. fossil fuels and nuclear power). However, the idea of increasing the share of renewable energy in countries' energy mix has increasingly been gaining ground.

The United Nations has declared 2012 as the International Year of Sustainable Energy for All, and its Advisory Group on Energy and Climate Change has recommended universal access and a 40 percent increase in energy efficiency in the next 20 years.

According to *the Renewables 2013 Global Status Report*¹, 138 countries have defined renewable energy targets (an increase in the renewable share of electricity production) and set in place renewable energy policies.

The feed-in tariff ("FIT"), or in other words, a preferential guaranteed price, is the most widely adopted renewable power generation policy employed at the national and state/provincial levels. It is applicable to electricity produced by electric power generators which use alternative energy sources.

At the same time, the application of the FIT is subject to certain conditions and limitations, one of which is a minimum required domestic content level with regards to works and materials used for construction of the power plant (e.g. "local content requirement" or "LCR") which determines eligibility to the FIT.

Around 71 countries, states and provinces around the world now use FITs to pay for new renewable generation. However, when coupled with a local content requirement, they have a clear subsidizing effect aimed at encouraging local development of equipment production.

On the one hand, access to the FIT is crucial to increasing the share of renewable energy production and attracting investments in this field. It is common knowledge, that renewable energy generating equipment is by far more expensive than their conventional equivalent, which makes investments in renewable energy installations less competitive. In addition, production of electricity from

¹ REN21 (2013), *Renewables 2013 Global Status Report*, Paris, REN21 Secretariat, p. 79.

conventional sources is highly subsidized. In fact, subsidies and financial support for renewable energy amounted to only around one-sixth of fossil fuel subsidies.²

On the other hand, it is highly debatable whether LCRs are capable of promoting domestic renewable energy industry. The literature about advantages and disadvantages of LCRs in the renewables sector is divided on this point. It can be argued that LCRs are trade restrictive *per se*. However, analysis of LCRs in the renewables sector is usually carried out from the perspective of positive effects for the environment. Authors tend to evaluate the effects of LCRs on deployment of installations which produce electricity from renewable sources whereas analysis of LCRs in sectors other than renewable energy is directed toward evaluation of effects on trade and investments, development needs. Indeed, if LCRs in sector of renewable energy are necessary to maintain public financial support (like FIT) without which renewable installations wouldn't be competitive in comparison with conventional ones, the mere existence of such LCR's could be justified from the environmentalist point of view. In other words, better fewer renewable energy installations than nothing. Still, such conclusion may appear simplistic, if the effects of LCRs are evaluated in the mid-term and long-term, as well as from the perspective of their impact on innovation, cost of technologies etc.

Numerous economic factors can influence the likeliness of renewable energy installations deployment in the presence of LCRs, such as given market size, exact percentage of LCR, different financing mechanisms which are coupled with LCRs, effect on competition and innovation etc. To put it in a nutshell, each case is individual, there is no unique explanation which fits all economies. Usually it's a combination of factors that has to be taken into account for a definite policy mix.

Political considerations make analysis even more nuanced. The creation of "green jobs", especially in developed countries, is put forward as justification for the use of LCRs as far as high FITs may lead to increase in retail prices for end-consumers. From the perspective of developing countries, whose public resources are limited, LCRs are deemed to be protecting infant industries and promoting technologies transfer.

Given the foregoing, classical restrictive approach to LCRs which is implemented in the rules of the WTO is likely to trigger tensions concerning LCRs in the renewable energy sector. Assuming that a certain critical mass of such tensions would give rise to trade disputes, there might be a case for reconsidering the WTO's rules in this domain.

In order to prepare certain pathways for such reconsideration, we will analyze in the first place general overview of measures, if they are likely to raise tensions at the WTO. In the second place, we will see what the potential solutions are and, in particular, if there is a case for a special treatment of developing countries, given the history of North-South relations ?

I - WTO RULES AS POTENTIAL IMPEDIMENT TO DEPLOYMENT OF RENEWABLE ENERGY SECTOR. GENERAL OVERVIEW OF WTO'S PRACTICE

² IEA (2012), *World Energy Outlook 2012*, OECD Publishing, p. 69.

Starting from 2009, different support policies for production of equipment of renewable generators became sources of controversies at the WTO. For example, China has been found to be in violation of WTO rules for export restrictions applied to rare earths (e.g. containing rare materials, in particular used in production of renewable energy equipment). Later, its allegedly subsidized wind towers and solar cells became subject to countervailing and anti-dumping duties in EU and US. China, in turn, accused the US and EU of subsidizing their renewable sectors of economy, and finally requested consultations with the EU about feed-in tariff programs in Italy and Greece because of their domestic content restrictions³.

In parallel, long standing discussions in the TRIMS Committee⁴ of the Indian Jawaharlal Nehru National Solar Mission, resulted in a complaint filed by the United States on 6 February 2013⁵. In particular, the United States contend that certain measures by India relating to domestic content requirements for solar cells and solar modules are contrary to WTO rules.

With regards to other potential disputes, Ukraine's legislation on the "green" tariff (e.g. analogue of FIT) is repeatedly under the scrutiny of the TRIMS Committee⁶.

Activation of diplomatic and dispute settlement mechanisms was done on the heels of the Canada's feed-in tariff program being found inconsistent with WTO rules, a dispute which is now serving as a precedent to outlaw many other similar schemes.

In that dispute, Japan⁷, and one year later the EU⁸, brought similar complaints against certain measures relating to domestic content requirements in the FIT program, established by the Canadian Province of Ontario (requests of consultations brought on 13 September 2010 and 11 August 2011 respectively).

Japan and the EU claimed that Ontario's FIT program unfairly discriminates against foreign companies, as it mandates the use of domestic over foreign products to qualify for financial support offered by the program. Thus, it violated national treatment rules in the General Agreement on Tariffs and Trade (GATT) and the Agreement on Trade-Related Investment Measures (TRIMS), and constituted a prohibited subsidy under the WTO's Subsidy and Countervailing Duty Agreement (SCMA).

The local content requirement in Ontario varies depending on the technology being used and the scale being promoted, but ranges from a minimum of 25 percent (wind) to a maximum of 60 percent (solar) domestic content required to be eligible for FIT support.

³ *European Union and certain Member States — Certain Measures Affecting the Renewable Energy Generation Sector*, case DS 452, request for consultations filed on 5 November 2012.

⁴ Meetings held on 3 October 2011, 4 May 2012 and 1 October 2012, see respectively WTO documents G/TRIMS/M/31, G/TRIMS/M/32, G/TRIMS/M/33.

⁵ *India — Certain Measures Relating to Solar Cells and Solar Modules*, case DS 456, request for consultations filed on 6 February 2013.

⁶ Meetings held on 1 October 2012 and 30 April 2013, see respectively WTO documents G/TRIMS/M/33, G/TRIMS/M/34.

⁷ *Canada — Certain Measures Affecting the Renewable Energy Generation Sector*, case DS 412, Panel Report circulated of 19 December 2012, Appellate Body Report of 6 May 2013.

⁸ *Canada — Measures Relating to the Feed-in Tariff Program*, case DS426, Panel Report of 19 December 2012, Appellate Body Report of 6 May 2013.

The report of the WTO Special group (e.g. Panel composed of 3 members, deciding disputes in the first instance) was circulated on 19 December 2012 with a substantial delay due to a complexity of the case. Of the three WTO agreements cited in complaints, Canada was found to be in breach with two, the GATT and the TRIMS. Appeal Report has confirmed main conclusions of the Panel.

The Ontario case has been widely discussed in the relevant academic literature and has become emblematic, due to the importance of the subject matter at stake in that dispute⁹. Hence, the following subsections will give advantage to a comparative approach whereas Ukraine's legislation will be analyzed from the perspective of Ontario's case. Thus, it will demonstrate possible effects of the Ontario precedent, in cases which have not yet been brought before the dispute settlement body.

1. Evaluation of local content requirement with regards to the principle of national treatment

In order to establish a possible violation of GATT and TRIMS Agreement, it is necessary to establish that i) the Ukraine's local content requirement requires purchase of goods of Ukrainian origin or from Ukrainian source, ii) compliance with this requirement is necessary to obtain an advantage¹⁰.

Another criteria which was discussed by the Panel related to whether FIT program is a government procurement measure for governmental purposes or, potentially, for commercial resale. Indeed, Canada invoked this exception foreseen by Article III:8(a) of the GATT 1994 as far as it would provide defense should its FIT program be considered as government procurement not for commercial resale. In its ruling, the Panel has rejected this argument, considering that the measure in question is not for governmental purposes but for commercial resale.

The Appellate Body reversed Panel's ruling by considering that this question is not pertinent in the dispute as far as the Ontario's FIT program is not a governmental procurement subject to derogation provided by Article III:8(a) of the GATT 1994 from the principle of national treatment. Indeed, the Appeal Body ruled that Article III:8(a) does not cover discriminatory treatment of the equipment used to generate the electricity that is procured by the Government of Ontario¹¹. The

⁹ Marie Wilke, *Feed-in Tariffs for Renewable Energy and WTO Subsidy Rules*, Trade and Sustainable Energy Series Issue Paper No. 4, 2011, International Centre for Trade and Sustainable Development, Geneva, p. 3, available at: [<http://ictsd.org/downloads/2011/11/feed-in-tariffs-for-renewable-energy-and-wto-subsidy-rules.pdf>]. See also "Canada Defends Renewable Energy Support at WTO", *Bridges Trade BioRes*, Vol. 12, No. 6, 28 March 2012, available at: [<http://ictsd.org/i/news/biores/130305>]; Liesbeth Casier and Tom Moerenhout, "WTO Members, not the Appellate Body, need to clarify boundaries in renewable energy support", IISD, July 2013.

¹⁰ The Illustrative List referred to in Article 2.2 of the TRIMS Agreement provides: "1. *TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require: (a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production; (...)*".

¹¹ Appellate Body Report, document WT/DS412/AB/R and WT/DS426/AB/R (6 May 2013), § 5.84.

product of foreign origin must be in a competitive relationship with the product purchased¹². Hence, equipment subject to LCRs is not in such relationship with the electricity later purchased by the government under the FIT program. In other words, Article III:8(a) could be applied in case government procurement measures concerned purchase of equipment treated in a discriminatory way, whereas the measures in question refer to purchase of electricity.

1.1. Whether the local content requirement requires the purchase or use of products of Ukrainian origin or from a Ukrainian source

Following amendments introduced by the Law of Ukraine No 5485-VI of 20.11.2012 to the Law on the "Electric Energy", Ukrainian domestic content level clearly requires purchase or use of *products* of Ukrainian origin or from Ukrainian source. The previous version of the Law on "Electric Energy" set the obligatory content with regards to the products only for solar facilities. Starting from 1 of January 2013, solar modules must be produced at 30 % from Ukrainian components or raw materials. The percentage of local content requirement for other renewable energy facilities had until recently been rather low and, in addition, the entry in force of the requirement has been postponed several times.

Now that the amendments have become effective, it is clear that purely service activities related to generating facility construction are not sufficient in order to meet the minimum required domestic content levels. For power generating facilities (wind, solar, biomass) which will be commissioned after 1 July 2013, the new Law No 5485-VI sets the minimum local content requirement of 30%. Furthermore, it provides the obligatory percentage of different parts of equipment of Ukrainian origin, and defines the percentage which can be attributed to construction and works. In case no such equipment is produced in Ukraine, at least in sufficient quantity and quality, development of any project in the renewable energy field would be subject to prior investments and technology transfers into the national economy in order to create a sector for such equipment production.

Not surprisingly, the Ukrainian LCRs have become subject to additional scrutiny at the WTO now that they have become more stringent. Indeed, the first version of the law on the "green" tariff and LCRs was voted as early as in 2008. Furthermore, it is possible to conclude that percentage of the LCR matters.

1.2. Whether compliance with the local content requirement is necessary in order to obtain an advantage

It is evident that compliance with the local content requirement is a necessary condition and prerequisite for electricity generators to benefit from the "green" tariff. The "green" tariff guarantees a fixed price for every kWh of electricity delivered into the Ukraine's electricity system over a period until 2030. The law sets coefficients, applied to a basic (consumers) rate in order to establish the "green" tariff for specific renewable energy sources. For example, the current price for electricity from solar power plants is 4,8 times the base tariff. In addition, the

¹² *Id.*, § 5.74.

tariff may not be lower than a minimum amount defined in 2009. In this case, the amount of the tariff in hryvnias is linked to the euro and may be recalculated in case of fluctuations in exchange rates. Thus, *mere granting* of the "green" tariff may be viewed as obtaining an "advantage" within the meaning of the TRIMS Agreement.

2. Evaluation of the “green” tariff payment and financial incentives as prohibited subsidy

According to WTO SCM Agreement, subsidy contingent upon the use of domestic over imported goods, is deemed to be prohibited. It is however important to qualify Ukrainian measures as "subsidy", for which two criteria must be met, e.g. that the "green" tariff payments constitute a financial contribution and that the payments also confer a benefit. While the first criterion is easily met, as government purchase is one of the forms of financial contribution, it can be difficult to establish the benefit.

According to WTO jurisprudence in similar matters, "benefit" must be established by determining whether the financial contribution makes the recipient better off *vis-à-vis* the market than it would have been absent the financial contribution.

The Canadian case shows the evidentiary problems that may arise in seeking to establish "benefit" by reference to the market, particularly where no "market" benchmark exists. Like in Ukraine, in Ontario electricity is first sold on the wholesale electricity market which is not competitive. The WTO Panel considered that the Hourly Ontario Electricity Price (which can be compared to the Ukrainian "consumer's retail price") that was at the centre of complainants' main benefit arguments could not serve as an appropriate benchmark against which to determine whether the challenged measures conferred a "benefit" as the wholesale electricity market is not competitive.

Even though the Appellate Body did not agree with the approach adopted by the Panel, its reasoning confirms that establishing "benefit" for the renewable energy sector needs a nuanced and laborious argumentation with regard to a renewable energy "marketplace". According to the Appellate Body, an appropriate benchmark should first be sought in the windpower and solar PV generation markets in Ontario. If no suitable benchmark is available in Ontario, an appropriate benchmark outside Ontario or a proxy may also be considered¹³.

Reciting Japan's statement in Ontario's FIT case, a sustainable policy using LCR's is a *de jure* discriminatory measure that is designed to promote the production of renewable energy generation equipment rather than to promote the generation of renewable energy.

The Ukrainian example shows that LCRs are contested at the WTO once they become stringent (e.g. are established beyond certain cap making use of domestic products unavoidable).

To sum up, the disputes, such as they are presented at the WTO, are not about "trade and environment" but about "trade and investment". The WTO's judge is not likely to make an exception for sustainable development policies using local

¹³ *Id.*, § 5.227.

content requirements. WTO rules, in particular TRIMS Agreement, if not revised, could have negative impact on deployment of the renewable energy sector. Taking into account the fact that tensions around LCRs escalate and tend to have a general character involving numerous stakeholders, solutions within the negotiation mechanism of the WTO should be envisaged.

II - POSSIBLE SOLUTIONS: AN ARGUMENT FOR SPECIAL AND DIFFERENTIAL TREATMENT OF DEVELOPING COUNTRIES

Both developed and developing countries use trade restrictive policies such as LCRs and subsidize the renewables sector. According to the *Renewables 2013 Global Status Report*¹⁴, support policies are in place in 127 countries whereas two-thirds of these are in developing and emerging economies.

First disputes concerning LCRs have been brought against countries from the North, and this was initially a North-North issue. However, there is already one dispute brought against a developing country. In February 2013, the US filed a complaint over a local content requirement in India's national solar programme, which Washington claims discriminates against foreign equipment manufacturers relative to their domestic counterparts.

Developing countries in turn reacted to defend their support policies and the issue became South-North one. China challenged EU's support policies and India threatens to take recourse against support subsidy schemes using LCRs which are in place in some states of the USA.

Overall, WTO members that were plaintiffs became or may become defendants for policies which are similar in substance. The previous three years show that the issue of LCRs in the renewable sector has become very controversial on a global level and is of concern for countries of North as well as of South. This means that support policies in the renewable sector using LCRs are likely to be reconsidered in the medium term whereas a political solution has to be found should they be maintained in the long-term.

Authors defended the idea of treating LCRs together with other trade related policies in a separate forum. Indeed, such trade related issues which may have impact on renewable sector development include liberalization of trade in environmental goods which was negotiated under the Doha Development Agenda. As far as the latter is in stalemate, there might be a case to tackle this issue under a separate mandate.

In 2011, such idea of so called Sustainable Energy Trade Agreement (SETA) has been set forth by the International Centre for Trade and Sustainable Development¹⁵. At that time, it was not directly related to LCRs and was conceived to tackle numerous market and trade-related issues in the renewable energy sector. Besides environmental goods, they include liberalization of energy services and diverse non-tariff trade-related barriers. Essentially, any issue which may foster

¹⁴ REN21 (2013), *Renewables 2013 Global...*, *op.cit.*, p. 79.

¹⁵ *Fostering Low Carbon Growth: The Case for a Sustainable Energy Trade Agreement*, ICTSD, Geneva, November 2011, available at: [<http://ictsd.org/downloads/2012/05/fostering-low-carbon-growth-the-case-for-a-sustainable-energy-trade-agreement1.pdf>].

development of sustainable energy sector could be potentially included. Indeed, proponents of a SETA claim that it would allow for a holistic and integrated view of the sustainable energy sector, while simultaneously addressing a variety of market and trade-related barriers.

There are three possible designs of a SETA such as a stand-alone plurilateral agreement similar to the Government Procurement Agreement or to the Information Technology Agreement, as well as a stand-alone plurilateral agreement but outside the WTO. Thus, a SETA will differ from any existing regional and international frameworks (i.e. the United Nations Framework Convention on Climate Change and the Energy Charter Treaty).

Sherry M. Stephenson, in a recent publication, suggests that LCRs should also be treated under a SETA framework¹⁶. Whereas 2011's publication had a clear argument for the "development dimension" to be included in a SETA (e.g. special and differential treatment provision)¹⁷, Stephenson admits that there might be a case for a *general transitional period* of 10 years for phasing out LCRs of developed and developing countries. Indeed, it is an open question whether LCRs are an appropriate policy tool to achieve local economic or employment benefits on the one hand and renewable energy innovation on the other¹⁸. Furthermore, there is relatively little empirical analysis of the potential of LCRs¹⁹. Thus, since further research is required to support a meaningful debate on this issue, LCRs may be maintained until a final conclusion on their economic effects (positive or negative) is made.

When writing about the "development dimension", the only more or less clear provisions which authors mention refer to facilitating access to climate-related technologies, technical assistance and capacity building. Yet, implementation of WTO agreements uncovers that such provisions are deemed to be "soft" law and not effective, unless drafted as binding commitments on behalf of developed countries. Unlike technical assistance and capacity building provisions, transitional periods and exceptions are SDT clauses which are generally considered to be effective. Since in the past developing countries had already benefited from transitional periods for their LCRs for sectors other than renewable energy, there is a case to provide for new transitional periods for LCRs in the renewable energy sector to make the "development dimension" meaningful.

The main argument which is omitted in the current debate on LCRs but which is likely to be raised by developing countries to strengthen their bargaining position on transitional periods is linked to considerations of *justice*. Putting aside economic pros and cons regarding LCRs in the sustainable energy sector of developing countries, as far as they are arguably not persuasive and definitive, there is a strong argument for authorization of LCRs in developing countries in

¹⁶ Sherry Stephenson, *Addressing Local Content Requirements in a Sustainable Energy Trade Agreement*, ICTSD, June 2013, Geneva, available at: [http://ictsd.org/downloads/2013/06/addressing-local-content-requirements_opt.pdf].

¹⁷ *Fostering Low Carbon Growth: The Case for...*, *op.cit.*, p. xiii.

¹⁸ Jan-Christoph Kuntze and Tom Moerenhout, *Local Content Requirements And The Renewable Energy Industry - A Good Match ?*, ICTSD, May 2013, Geneva, p. 2, available at: [http://unctad.org/meetings/en/Contribution/DITC_TED_13062013_Study_ICTSD.pdf].

¹⁹ *Id.*, p. 44.

accordance with the special and differential treatment principle based on considerations of justice.

Historically, development policies using local content requirements are prohibited at the WTO, and a special agreement, TRIMS, is dedicated to that effect. At the moment of creation of the WTO, in 1995, the TRIMS established a longer transitional period for developing countries in order to phase out their local content requirement policies. Developing countries benefited from a 5 year (in the contrast to 2 years for developed countries) transitional period for eliminating their trade-related investment measures (including LCRs) which were duly notified.

The first difficulty which developing countries faced was related to notification requirements. In accordance with the TRIMS Agreement, all existing TRIMS had to be notified during 90 days period starting from entry in force of the Agreement. Developing countries requested possibility to notify LCRs after the 90 days period. In the first place, this issue has been debated at the Committee on TRIMS of the WTO and then put on the agenda of the Ministerial Conference in Seattle. It is worth mentioning the Seattle Draft ministerial declaration included a proposal which aimed at giving another possibility for developing countries to notify existing LCRs. They would have had the right to maintain them until expiration of a new transitional period²⁰. In the second place, after the failure of the Seattle Ministerial Conference in 1999, this issue was debated without success at the General Council's sessions dedicated to the implementation problems²¹.

An attempt by developing countries to obtain extension of transitional periods, as far as such possibility is explicitly foreseen by the TRIMS Agreement, is another TRIMS issue which triggered tensions at the WTO. Such initiatives met fierce opposition on behalf of the North as well as critics from some developing countries²² which had already abolished their TRIMS in timely manner and feared protectionism by neighboring countries. Indeed, on the eve of the Seattle Ministerial Conference, many developing countries requested an extension of the transitional period. In general, the requests mentioned the time which would be necessary to achieve certain development and industrial goals²³. Shortly after the Seattle Conference, ten developing countries reiterated their requests of extension ranging from one year (Chili) to seven years (Pakistan). The demands concerned TRIMS in such sectors as automotive industry (Argentina, Mexico, Chili, Malaysia, Romania, Philippines) and food manufacturing industry (Colombia and Thailand). Pakistan was the only country which requested the extension for its whole program of industrial development.

Extension was arranged in 2001 in accordance with the formula "2+2" which was far less from what developing countries had expected. The formula foresaw an extension of two years with possibility of supplementary two years under procedure which was burdensome, as far as being similar to a waiver. No developing country was allowed to maintain its TRIMS beyond this period. This

²⁰ Préparation de la Conférence ministérielle de 1999, document JOB(99)/5868/Rev.1, § 2, tiret « f ».

²¹ Annexe II "TRIMS Transition Period Issues", document WT/GC/M/55 (16 June 2000).

²² Indonesia and Singapour.

²³ Communication de Cuba, de l'Égypte, d'El Salvador, du Honduras, de l'Inde, de l'Indonésie, de la Malaisie, du Nigéria, de l'Ouganda, du Pakistan, de la République dominicaine et du Sri Lanka, WT/GC/W/354 (11 octobre 1999).

corresponds to a general approach by developed countries which consisted in promoting gradual but imminent integration of developing countries into the general regime of WTO rules.

Furthermore, TRIMs transition period issues were included by developing countries on the Doha Development Agenda²⁴. They were dropped off the agenda after several years of negotiations. Indeed, negotiators concluded that these issues are not likely to lead to consensus²⁵. Only the least developed countries received, in accordance with the Hong Kong Ministerial Declaration, the right to extend existing TRIMs for additional 7 years and to adopt new ones for 5 years, with possibilities of their prolongation. Hence it also provided for survey procedures which limited any discretionary recourse to such opportunities²⁶.

Overall, developed countries are actively using LCRs for RES whereas they made a strong case for banning DCs using the same measures in sectors which were of interest for them, such as automotive and food manufacturing. At the time TRIMS agreement was being negotiated and later became unavoidable for developing countries, development of the renewable energy sector was yet to begin. While lobbying for a more flexible position, developing countries argued at that time, that developed countries had in the past used LCRs to promote their infant industries which now no longer receive such support insofar as they have become competitive. On the other hand, developing countries have committed themselves to phase out all their existing LCRs and not to put in place new ones even though their industries haven't achieved the same level of development and competitiveness as in developed countries. Ironically, or even hypocritically, as soon as a new sweet spot appeared in the "economic pie" in the form of the renewable energy sector, some developed countries resorted to policy instruments they had once fought hard to abolish.

Arguably, should LCRs be allowed under a SETA or within the existing framework of WTO rules, this should be done in accordance with special and

²⁴ See tirets 37-40 of the document "Compilation des questions de mise en œuvre en suspens soulevées par les Membres", document JOB(01)152/Rev. 1 (27 October 2001). See in the same direction proposals of the African Group in documents TN/CTD/W/3/Rev.1 and Rev. ss.

²⁵ Proposals referred to in the category III of the document *General council chairman's proposal on an approach for special and differential treatment. Agreement specific S&D proposals*, JOB(03)/68 (7 April 2003).

²⁶ Paragraph 84 of Annex F of the Hong Kong Ministerial Declaration of 22 December 2005 (WT/MIN(05)/DEC) reads as follows: "*LDCs shall be allowed to maintain on a temporary basis existing measures that deviate from their obligations under the TRIMs Agreement. For this purpose, LDCs shall notify the Council for Trade in Goods (CTG) of such measures within two years, starting 30 days after the date of this declaration. LDCs will be allowed to maintain these existing measures until the end of a new transition period, lasting seven years. This transition period may be extended by the CTG under the existing procedures set out in the TRIMs Agreement, taking into account the individual financial, trade, and development needs of the Member in question. LDCs shall also be allowed to introduce new measures that deviate from their obligations under the TRIMs Agreement. These new TRIMs shall be notified to the CTG no later than six months after their adoption. The CTG shall give positive consideration to such notifications, taking into account the individual financial, trade, and development needs of the Member in question. The duration of these measures will not exceed five years, renewable subject to review and decision by the CTG. Any measures incompatible with the TRIMs Agreement and adopted under this decision shall be phased out by year 2020*".

differential treatment. Thus, either they will have to be phased out gradually by DCs in contrast to a shorter transitional period for the developed countries if any (for example 2 years for developed countries and 5-7 years for developing countries), or a "peace clause" should be established in favor of DCs exclusively. Possibly, DCs ought to be allowed to establish new LCRs during this transitional period until there is a clear conclusion on LCR's (negative) effects as an economic and industrial policy. Overall, they should be allowed to establish a higher percentage of LCRs and, ideally, LCR percentages in developed countries could be kept at a rather small level in order to not unduly restrict international trade which would otherwise be harmful for innovation and the renewables sector overall.