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Promoting Renewable Energy Through FTAs? The Legal Implications of a New Generation of Trade Agreements

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This article addresses the relationship between international trade law and renewable energy focusing on the role played by free trade agreements (FTAs). The analysis of the legal implications of the diverse and evolving techniques used by FTAs to incorporate renewable energy within their texts is framed within a broader theory of the evolution of the narrative underlying the trade and environment nexus. The article argues that the space devoted to environmental and renewable energy considerations in trade agreements has not only expanded but, more importantly, it has significantly changed, reflecting the evolution of trade agreements which are less and less simply trying to accommodate environmental concerns but rather becoming important instruments to ensure the effective advancement of environmental goals.

1 INTRODUCTION

The multilateral trading system, embodied by the World Trade Organization (WTO), has experienced a certain difficulty in the integration of provisions dealing with renewable energy and, more broadly, environmental protection into its substantive rulemaking. The same difficulties do not seem to characterize bilateral and regional trade negotiations: while an 'environmental' clause, in one form or another, did not find its way into the General Agreement on Tariffs and Trade (GATT) in 1947 nor in the WTO in 1994, free trade agreements (FTAs) devote an ever growing space to environmental and renewable energy concerns within their texts. Yet, the scholarly debate is mostly focused on the relevance and applicability of WTO rules to the renewable energy sector,[1] neglecting, with

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1 *See* e.g. *International Trade Regulation and the Mitigation of Climate Change: World Trade Forum* (Thomas Cottier et al. eds, Cambridge University Press 2009); Yulia Selivanova, *Regulation of Energy in International Trade Law: WTO, NAFTA, and Energy Charter* (Kluwer Law International 2011); Rafael Leal-Arcas et al., *International Energy Governance: Selected Legal Issues* (Edward Elgar Publishing 2014).

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only a few exceptions, the role played by FTAs in integrating renewable energy provisions.[2]

This article seeks to remedy this gap by providing a taxonomy of the different techniques used to incorporate renewable energy provisions in the text of FTAs, and exploring their relevance from an international law standpoint. In doing so, it identifies a precise evolution in the way trade agreements have addressed renewable energy, as well as environmental concerns, which mirrors the evolution of the narrative underlying the trade and environment nexus more broadly. While the GATT 1947 was based on the idea of free trade as the ultimate goal, over time this idea has been adjusted to allow for sufficient space for other goals. Free trade has slowly started to be seen as a goal among others, including environmental protection. The post-1995 WTO jurisprudence on trade and the environment and the introduction of environmental provisions in the text of FTAs are evidence of this evolution and have informed the literature on this topic. This article contends that this dominant narrative has become outdated, as the analysis of the most recent agreements shows that a further shift is occurring in the nature of trade agreements, which are slowly becoming *vehicles* for the advancement of environmental goals. This evolution is captured by three models – *exception-based, prevention-based*, and *promotion-based* – which serve as the framework to explain the evolution of the legal techniques used by different generations of trade agreements to 'link' the two issue areas. Against this backdrop, and without claiming to be exhaustive, this study will explore two areas where the difference in legal techniques is visible: the shift from the sole use of environmental exceptions to the introduction of actual environmental obligations in trade agreements, and the use of different clauses to identify situations where trade rules do not apply or prevail in order to accommodate domestic environmental or renewable energy policies (excluding clauses).

Accordingly, this article is articulated in six sections. Section 2 presents the dataset of FTAs that have been the object of this study and develops a taxonomy of renewable energy provisions based on the different techniques used by trade agreements. Section 3 presents the evolution of the narrative behind the trade/environment nexus, which frames the whole discussion, while sections 4 and 5 address two aspects of this evolution that are particularly relevant from an international law perspective. Finally, section 6 concludes.

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[2] *See* Rafael Leal-Arcas, *Climate Change Mitigation from the Bottom Up: Preferential Trade Agreements to Promote Climate Change Mitigation*, 7 Carbon & Climate L. Rev. 34 (2013); Markus W. Gehring et al., *Climate Change and Sustainable Energy Measures in Regional Trade Agreements (RTAs). An Overview* (ICTSD Issue Paper No. 3, Aug. 2013).

2 A TAXONOMY OF RENEWABLE ENERGY PROVISIONS

2.1 Scope of the research: the dataset of FTAs and relevant provisions

The present study draws on a dataset of thirty-seven FTAs, namely all the agreements signed by the European Union and the United States with other WTO Members as of June 2017, including those which have not yet entered into force, as well as the Trans-Pacific Partnership (TPP), despite the recent US withdrawal. The focus on the European Union and the United States is motivated by the leading role they play in the global landscape of FTAs, having become the two main hubs in the pattern of such agreements. As a matter of clarification, the term 'free trade agreements' is used throughout the article to refer to all trade agreements negotiated by two or more countries outside of the WTO, often also described as 'regional trade agreements', regardless of their particular designation.[3]

For the purpose of this research, three broad categories of provisions have been analysed: (1) 'renewable energy-specific', (2) 'renewable energy-related', and (3) 'renewable energy-affecting' provisions:

- *'Renewable Energy-Specific' Provisions*. Such are the provisions that expressly mention the terms 'renewable energy' or 'sources', or even the broader expressions 'cleaner', 'alternative', or 'sustainable fuels'. Unlike WTO Agreements, a number of recent FTAs do mention renewable energy in their text, and do contain provisions aimed at promoting its development and dissemination.[4]
- *'Renewable Energy-Related' Provisions*. Renewable energy policies represent one component of the broader category of measures aimed at protecting the environment and promoting sustainable development. It follows that provisions that pursue environmental or sustainable development objectives are related and often applicable to renewable energy as well, in particular when they focus on specific environmental issues that are directly relevant to renewable energy, such as climate change mitigation.
- *'Renewable Energy-Affecting' Provisions*. This third and final category encompasses all those provisions that, although not explicitly related to renewable energy or even to environmental or sustainable

[3] Some agreements use more general terms in their title, such as 'economic partnership agreement' or 'association agreement'.

[4] FTAs that expressly refer to renewable energy include the TPP, as well as those signed by the European Union with Chile, South Korea, Colombia and Peru, Moldova, Georgia, Ukraine, Singapore, and Canada.

development objectives, may indirectly impact trade in renewable energy, as they apply horizontally to all sectors. These might include *inter alia* provisions on intellectual property, investment, or trade facilitation.[5]

2.2 Preliminary results of the research: seven techniques to integrate renewable energy in FTAs

There are several ways to classify FTA provisions, including location in the agreement, reasons for the inclusion, objective, scope, degree of specificity, and level of enforcement. This article classifies renewable energy provisions according to the technique used to incorporate them in the text of the agreements. Seven techniques have been identified: (1) general language in key statements; (2) reservation of policy space for renewable energy or environmental regulation; (3) identification of renewable energy or environmental protection as priority areas of cooperation among the parties; (4) recognition of environmental regulatory sovereignty; (5) facilitation and enhancement of trade in environmentally friendly goods, services, and technologies; (6) clarification of the relationship with multilateral environmental agreements (MEAs); and (7) regulation of institutions and dispute resolution mechanisms (Figure 1).

The first two techniques – key statements and reservation of policy space – can be found in WTO Agreements as well as FTAs, although the latter tend to go beyond WTO provisions with regard to both their content and scope. Techniques (3) through (6) are instead entirely new to FTAs. Yet, current WTO negotiations on trade and the environment within the framework of the Doha Development Agenda have focused on three of these additional techniques, namely the relationship between WTO rules and MEAs, future collaboration between the WTO and MEA secretariats, and the elimination of tariff and non-tariff barriers on environmental goods and services.[6]

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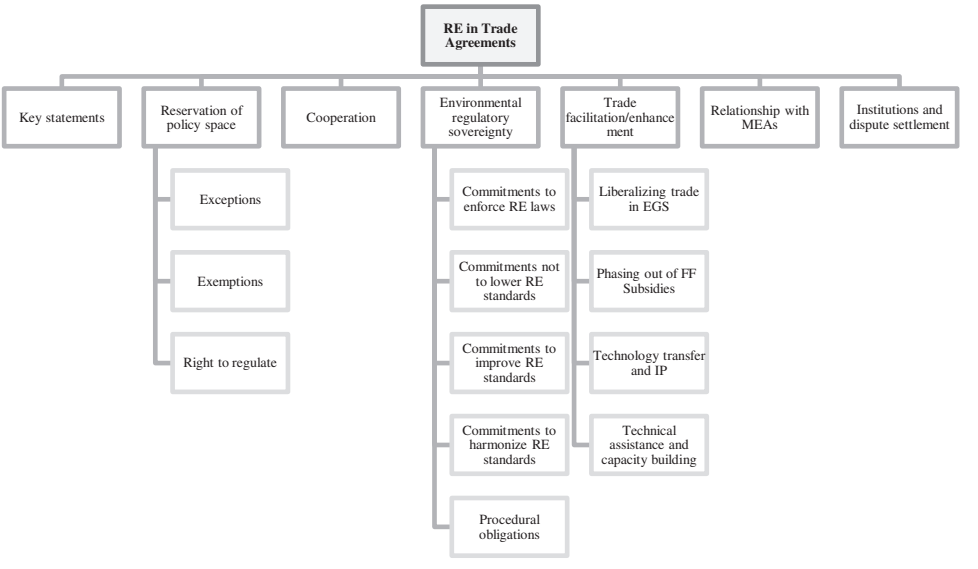
[5] Another example of 'renewable energy-affecting' provisions is provided by GATT Art. XX, subparas (d) and (j), which cover measures 'necessary to secure compliance with laws or regulations' and 'essential to the acquisition or distribution of products in general or local short supply'. *See* Appellate Body Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/AB/R (adopted 14 Oct. 2016) [hereinafter India – Solar Cells].

[6] On this topic, in Jan. 2014, the European Union started negotiations with other thirteen WTO Members (now sixteen) to draft a plurilateral Environmental Goods Agreement. *See* http://trade.ec.europa.eu/doclib/press/index.cfm?id=1116 (accessed 28 Oct. 2017).

Figure 1 Taxonomy of Renewable Energy Provisions in FTAs



Source: Compiled by the author
Note: RE stands for 'renewable energy', EGS for 'environmental goods and services', FF for 'fossil fuels', MEAs for 'multilateral environmental agreements', and IP for 'intellectual property'.

2.2[a] *Key Statements*

Virtually all the FTAs analysed contain broad key statements referring to sustainable development, the environment, or even renewable energy.[7] Such key statements are characterized by a broad, non-mandatory language, in the form of declarations of intent ('DESIRING … to promote sustainable development')[8] or stating the interdependence and cross-fertilization of trade and environmental rules and objectives ('Recognizing that economic development, social development, and environmental protection are interdependent and mutually reinforcing components of sustainable development').[9] Statements of this kind are usually found in the Agreements' preamble or among its objectives.[10] Although it does not provide

[7] One notable exception is the twenty-page *US-Israel* FTA (entered into force in 1985), as well as the agreements signed between the European Union and Turkey (1996), Tunisia (1998), Israel (2000), Morocco (2000), FYRom (2001), Egypt (2004), Albania (2006), and Montenegro (2008).
[8] *EU-South Korea*, Preamble.
[9] *US-Singapore*, Preamble.
[10] In particular, in the chapters on sustainable development, the environment, or sanitary and phytosanitary measures.

for legally binding obligations, this general language reflects the value parties give to environmental concerns and contributes to inform the interpretation of substantive provisions within trade agreements.[11]

2.2[b] *Reservation of Policy Space*

WTO Agreements do not expressly recognize the Members' right to regulate the environment. Rather, they do so only indirectly, through exception clauses. Many FTAs, on the other hand, feature a broader range of provisions that contribute to reserving such policy space: they explicitly acknowledge the parties' environmental regulatory sovereignty, their commitments under MEAs, and, in addition to the use of GATT-like exceptions, they increasingly phrase such clauses as exemptions or carve-outs instead. Exceptions and exemptions within trade agreements have a similar function, as they both allow countries to pursue certain 'legitimate' policy objectives by identifying situations where trade disciplines will not prevail or be applied. Yet, they operate in a very different manner and carry different legal implications, which will be addressed in greater detail in section 5.

2.2[b][i] General and Specific Exceptions

Although only one among many, the WTO exception *par excellence* is GATT Article XX.[12] This provision allows Members to apply measures inconsistent with GATT obligations as long as they fit into one of the cases provided for in the subparagraphs and do not constitute an 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'.[13] From an environmental standpoint, this provision suffers from two main shortcomings. First, it does not explicitly refer to 'renewable energy' and does not even mention the 'environment', although two of its subparagraphs (letters b and g) have frequently been cited in disputes involving environmental measures,[14] and are now generally treated as environmental norms.

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[11] The WTO trade and environment case law is illustrative of this role of the preamble's language. *See* e.g. Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (adopted 20 May 1996) [hereinafter US – Gasoline]; Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (adopted 6 Nov. 1998) [hereinafter US – Shrimps]; Appellate Body Report, *European Communities – Measures Affecting the Prohibition of Asbestos and Asbestos Products*, WT/DS135/AB/R (adopted 5 Apr. 2001).

[12] Other examples include GATS Art. XIV; TBT Arts 2.2 and 2.3, SPS Arts 2.3 and 2.4, and TRIPS Arts 27.2 and 27.3.

[13] GATT Art. XX, *chapeau*.

[14] *See supra* n. 11. Among GATT disputes, *see* e.g. GATT Panel Report, *United States – Prohibition of Imports of Tuna and Tuna Products from Canada*, BISD/29S/91 (adopted 22 Feb. 1982); *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, BISD/35S/98 (adopted 22

Second, it is limited in scope, as it can only be used to justify alleged violations of *GATT provisions*. While all the scrutinized FTAs reproduce GATT-like exceptions, a growing number of them address these shortcomings, providing for greater policy space for environmental regulations. For example, a number of FTAs expressly refer to the environment in their exception clauses, thus making the interpretation given by the panels and the Appellate Body explicit.[15] Second, some agreements omit the word 'necessary' when reproducing GATT Article XX(b), eliminating the 'necessity test' required by the GATT and broadening the coverage of the provision.[16] A third way in which FTAs increase countries' policy freedom is through the applicability of the general exceptions beyond the chapters on trade in goods and services, so as to include domestic measures in other areas, such as, investment, technical standards, and public procurement.[17]

2.2[b][ii] Exemptions or Carve-Outs

Several FTAs provide for exemptions or carve-outs that are relevant for trade and investment in renewable energy.[18] The most recent example can be found in the text of the TPP. The 'Investment' chapter contains an environmental carve-out when regulating expropriation. Annex 9-B of the TPP explicitly excludes from the definition of *indirect expropriation* 'non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment' except in rare circumstances.[19] Similar

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Mar. 1988) [hereinafter Canada – Salmon and Herring]; and *Thailand – Restrictions on the Importation of and Internal Taxes on Cigarettes*, BISD/37S/200 (adopted 7 Nov. 1990) [hereinafter Thailand – Cigarettes].

15 *See* e.g. *EU-Colombia-Peru*, Art. 106, *US-Jordan*, Art. 12.

16 *See* e.g. *EU-South Africa*, Art. 27. It should be noted with regard to the 'necessity test', which initially represented a severe obstacle to any affirmative defence under Art. XX(b), that its interpretation has evolved over time, starting from being treated as a 'least trade-restrictive' requirement, to become a more flexible requirement, which takes into account the aim of the contested measure and includes a proportionality test within the necessity analysis. *See* for a more restrictive approach, Thailand – Cigarettes, *supra* n. 14. For a more flexible approach, *see* Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (adopted 17 Dec. 2007) [hereinafter Brazil – Tyres] and *European Communities – Measures Concerning Meat and Meat Products*, WT/DS48/AB/R (adopted 13 Feb. 1998) [hereinafter EC – Hormones].

17 *See* e.g. *US-Singapore*, Art. 21.1. One of the limits of the exception clauses in the text of both the GATT and GATS is precisely their limited scope of application to the agreements they belong to.

18 Some WTO Agreements feature similar exemptions, although they are not directly relevant for renewable energy. *See infra* s. 5.

19 *TPP*, Annex 9-B. Other examples include *CETA* (Art. 8.12 and Annex 8-A), *US-Chile* (Annex 10-D), *US-Australia* (Annex 11-B), *US-Morocco* (Annex 10-B), and *US-CAFTA-DR* (Annex 10-C) *US-Oman* (Annex 10-B.4.b). This carve-out has been invoked in a number of recent disputes, which clearly show the legal implications of using carve-outs rather than exceptions (*see infra* s. 5). *See* e.g. *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award (3 Nov. 2015) [hereinafter *Al Tamimi v. Oman*], para. 346.

environmental carve-outs can be found in other investment provisions, such as those on the prohibition of performance requirements,[20] as well as with regard to marking and labelling, government procurement, and trade facilitation.[21] In the context of government procurement, Article 19.9 of CETA forbids parties from preparing, adopting, or applying technical specifications that could create obstacles to trade, *unless* such specifications are aimed at promoting the conservation of natural resources or protecting the environment (provided that the conditions set out in the remaining paragraphs of the provision are respected).[22] This type of carve-out has also found its way in the revised text of the Agreement on Government Procurement (GPA) within the framework of the WTO.[23] Finally, the *EU-Singapore* FTA provides for an exemption within its subsidies discipline when it allows parties to provide for subsidies that *do* have trade effects on the other party – as long as such effects are contained and the subsidy is limited to the minimum needed to achieve the objective – when such subsidies are necessary to achieve an objective of public interest, explicitly including subsidies 'for environmental purposes'.[24]

2.2[c] *Cooperation*

Most FTAs contain provisions on bilateral or regional cooperation on several matters, including environmental protection and (renewable) energy. These provisions vary greatly, and can be classified according to the areas covered by cooperation and the depth of the cooperation commitments. As far as the areas covered by cooperation are concerned, some provisions show the parties' resolution to cooperate on matters related to trade and sustainable development broadly,[25] while others identify specific areas of 'environmental' cooperation, such as negotiations on trade-related environmental issues of mutual interest,[26] or the need to pursue

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[20] More precisely, the prohibition to impose or enforce the requirement to achieve a given level or percentage of domestic content, to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory, or to transfer a particular technology, production process, or other proprietary knowledge to a person in its territory, does not apply to measures '(ii) necessary to protect human, animal, or plant life or health; or (iii) related to the conservation of living or non-living exhaustible natural resources'. *TPP*, Art. 9.10. *See also NAFTA*, Art. 1106, *US-Peru*, Art. 10.9, *US-Chile*, Art. 10.5, and *US-Singapore*, Art. 15.8.

[21] According to the *EU-Colombia-Peru* FTA, Parties that require mandatory marking or labelling or products shall not require the approval, registration, or certification of labels or marking as a precondition for sale in their respective markets 'd) unless necessary in view of the risk of the products to human, animal or plant health or life, the environment or national safety'. Art. 81. *See also* TPP, Art. 15.3. *EU-Chile*, Art. 161. *EU-Colombia-Peru*, Art. 174; *EU-South Korea*, Art. 61(g).

[22] *CETA*, Art. 19.9.6. *See also EU-Singapore*, Art. 19.9(6) and *EU-Colombia-Peru*, Art. 181.6.

[23] 2012 GPA, Art. X.

[24] *EU-Singapore*, Art. 12.8, Annex 12-A(e). *See* also *EU-South Africa*, Annex IX, and *EEA*, Art. 61.

[25] *EU-South Korea*, Art. 13.1.

[26] *EU-Singapore*, Arts 13.6 and 13.10; *EU-South Korea*, Art. 13.5; *EU-Colombia-Peru*, Art. 270; *CETA*, Art. 24.4.

cooperative environmental activities and strengthen environmental performance.[27] A third set of provisions deals specifically with cooperation regarding renewable energy development and trade.[28] A second distinction, which crosscuts the former, can be drawn on the basis of whether such cooperation provisions provide for relatively generic statements or clearly specify the obligations of the parties. Some provisions simply state the will of the parties to cooperate with each other, without any further explanation or clarification,[29] while others take an additional step, by listing different activities through which cooperation in the environmental/renewable energy sector shall be carried out. Said activities can be limited to exchanging and sharing information,[30] or involve deeper commitments, such as joint activities to be conducted by the parties, ranging from working together on issues of regional interest to conducting joint scientific research.[31]

2.2[d] *Environmental Regulatory Sovereignty*

When signing FTAs, countries maintain regulatory sovereignty, which is the prerogative to establish their own levels of (environmental) protection as well as to modify their (environmental) laws and policies accordingly. The explicit recognition of the parties' regulatory sovereignty (at least in the area of environmental regulation) is entirely new to FTAs. These provisions are generally not limited to the recognition of the parties' right to establish their own levels of environmental protection but they further require the parties not to lower environmental standards and not to fail to enforce environmental laws. Along these lines, they recognize the parties' commitment 'to implement the multilateral environmental agreements to which [they are parties]'.[32] Moreover, they often provide for specific obligations that countries need to comply with in the laws, standards, and policies they adopt domestically. These might include the obligation to use scientific knowledge when designing environmental measures, to ensure public

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[27] *See* e.g. *EU-Singapore*, Art. 13.10, *EU-South Africa*, Art. 57, *CETA*, Art. 22.3, and *US-Singapore*, Art. 18.6.

[28] *See also EU-Israel*, Art. 51, *EU-Morocco*, Art. 57, *EU-South Africa*, Art. 57, *EU-Mexico*, Art. 23, *EU-Egypt*, Art. 53, *EU-Chile*, Art. 22, *EU-CARIFORUM*, Art. 138. Other examples include *EU-Georgia, EU-Moldova, EU-Ukraine*, and *CETA*.

[29] *See* e.g. *EU-Egypt*, Art. 35.

[30] *EU-Mexico*, Arts 23 and 34; *EU-Chile*, Art. 22; *EU-CARIFORUM*, Art. 138; *EU-Singapore*, Art. 13.10; *EU-Ukraine*, Art. 338; *CETA*, Art. 24.12; *US-Peru*, Art. 18.10; *US-Singapore*, Art. 18.6; *US-Chile*, Art. 19.5.

[31] *NAAEC*, Preamble; *EU-Tunisia*, Art. 47; *EU-Morocco*, Art. 47; *EU-Mexico*, Arts 23 and 34; *EU-Chile*, Art. 22; *EU-CARIFORUM*, Art. 138; *US-Singapore*, Art. 18.6; *US-Chile*, Art. 19.5; *US-Australia*, Art. 19.6; *US-CAFTA-DR*, Art. 17.9. Other examples include *EU-Georgia, EU-Moldova, EU-Ukraine*, and *CETA* Arts 22.3 and 24.12.

[32] *TPP* Art. 20.4. *See also EU-South Korea*, Art. 13.5(2); *EU-Colombia-Peru*, Art. 270; and *EU-Singapore*, Art. 13.6.

participation in their adoption, to publish the measures once adopted, and to monitor the state of the environment while conducting environmental assessments.[33] Sometimes, countries decide to go beyond the *status quo* and commit to achieve high levels of environmental protection, further clarifying that they 'shall strive to continue to improve those laws' over time.[34] However, despite the use of the word 'shall', such important objective is circumscribed in terms of the parties' obligation to merely 'strive to' improve their laws, thus ending up couched in hortatory rather than mandatory language.[35]

2.2[e] *Trade Facilitation/Enhancement*

Most FTAs deal broadly with removing barriers to trade in environmental goods and services, which are considered to include renewable energy as well,[36] while a few of them contain provisions that explicitly mention renewable energy. Either way, these provisions represent key statements that constitute mere declarations of intent rather than providing for legally binding obligations.[37] Some of the most recent FTAs try to tackle specific obstacles, such as the massive subsidization of fossil fuels.[38] Although fossil fuel subsidies constitute one of the main obstacles to renewable energy diffusion and their gradual phase-out could significantly contribute to making renewable energy more competitive, a commitment in this sense can only be found in the agreement between the European Union and Singapore.[39] Moreover, such commitment is followed by a caveat clarifying that such a reduction should 'be accompanied by measures to alleviate the social consequences associated with the transition to low carbon fuels' and balancing the need to phase out fossil fuels with the need to 'limit distortions of trade as much as possible'.[40] Other barriers are specific to developing and least-developed

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[33] For an analysis of the legal implications following the introduction of these positive obligations, *see infra* s. 4.

[34] *See* e.g. *EU-South Korea*, Art. 13.3; *US-Jordan*, Art. 5; *US-Singapore*, Art. 18.1; *TPP*, Art. 20.3(3).

[35] Other provisions that contain similar language are those stating that the parties 'shall endeavour to address any potential barrier to trade in environmental goods and services' or that 'shall strive to facilitate and promote trade and foreign direct investment in environmental goods and services'. *See TPP*, Art. 20.18(3) and *EU-Colombia-Peru*, Art. 271.

[36] *See* e.g. *TPP*, Art. 20.18.

[37] *See* e.g. *CETA*, Art. 24.9, *EU-Colombia-Peru*, Art. 275. *EU-Singapore*, Art. 13.11. *See also EU-South Korea*, Art. 13.6; *EU-Georgia*, Art. 231; *EU-Moldova*, Art. 367; *EU-Ukraine*, Art. 293. Similarly, para. 31(iii) of the Doha Ministerial Declaration calls for 'the reduction or, as appropriate, elimination of tariffs and non-tariff barriers to environmental goods and services'.

[38] In 2015, fossil fuel subsidies amounted to USD 325 billion, more than twice the amount of subsidies received by renewable energy. *International Energy Agency, World Energy Outlook 2016* (IEA, 2016).

[39] *See* Joel P. Trachtman, *Fossil Fuel Subsidies Reduction and the World Trade Organization* 9 (International Centre for Trade and Sustainable Development (ICTSD) 2017).

[40] *EU-Singapore*, Arts 7.3 and 13.11(3).

countries. Most renewable energy technologies are developed in industrialized nations and a few economies in transition, and a number of factors constitute almost insuperable obstacles for many less developed countries. In these circumstances, technology transfer and technical assistance can play a key role, and trade agreements between industrialized and developing/least-developed countries could help speed up and facilitate this process with provisions on promotion and disclosure of technological innovations, as well as facilitation of dissemination of technology.[41] In this spirit, many FTAs include provisions on technical assistance and capacity building as part of the cooperative efforts undertaken by the parties,[42] while most provisions dealing with technology transfer are included in chapters on intellectual property.

2.2[f] *Relationship with MEAs*

In the text of WTO Agreements, there is no reference to the Members' commitments under MEAs. To the contrary, a number of FTAs, beside acknowledging such commitments, spell out the relationship between the provisions in the FTA and those contained in MEAs. The earliest example of such efforts is Article 104 of NAFTA, whose practical relevance, however, is limited for at least two reasons. First, this provision only applies to 'normative' conflicts, which are extremely rare in the interaction between trade and environmental regulation.[43] Second, even if MEAs were to set out specific trade obligations, not all measures adopted by the parties pursuant to such obligations would trigger Article 104, as the parties would still have to choose 'the alternative that is the least inconsistent with the other provisions of this Agreement'. In other words, a requirement very similar to the 'necessity test' of GATT Article XX (b).[44] Despite these considerations, the

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41 *See* e.g. Keith E. Maskus, *Private Rights and Public Problems: The Global Economic of Intellectual Property in the 21st Century* (Peterson Institution for International Economics 2012); Keith E. Maskus & Ruth L. Okediji, *Intellectual Property Rights and International Technology Transfer to Address Climate Change: Risks, Opportunities, and Policy Options* (ICTSD Issue Paper No. 32, 2010); UNEP & ICTSD, *Patents and Clean Energy: Bridging the Gap Between Evidence and Policy* (2010).

42 *See* e.g. *EU-CARIFORUM*, Art. 138.2(e) and (f); *EU-Colombia-Peru*, Arts 286(e) and 324.

43 'Normative' conflicts, which might arise between international obligations stemming from different areas of international law, need to be kept separate from 'legitimacy' conflicts, which arise between norms belonging to different legal systems (i.e. international and domestic). *See* Jorge E. Viñuales, *Foreign Investment and the Environment in International Law* 28–38 (Cambridge University Press 2012). It is very unlikely that a trade-related provision of a MEA will contradict trade provisions contained in NAFTA. MEAs usually identify certain environmental objectives and then authorize the parties to adopt the measures they deem necessary to achieve such objectives. In these cases, the inconsistency is not to be found between the trade provision in a FTA and the environmental provision of a MEA but rather between the former and the specific trade measures adopted by one of the parties ('legitimacy' conflict).

44 Jeffrey L. Dunoff, *Institutional Misfits: The GATT, the ICJ & Trade-Environment Dispute*, 15 Mich. J. Int'l L. 1044, 1073–1074 (1994).

intention of the parties to clarify the relationship between FTAs and MEAs mirrors an evolution in the way environmental concerns are channelled into trade agreements, stemming from the recognition that trade and environmental rules should be mutually supportive and aiming at reducing potential conflicts between them.

2.2[g] *Institutions and Dispute Settlement*

Many recent FTAs set up a number of national and bilateral bodies invested with monitoring and enforcement powers, to ensure the correct implementation of the renewable energy and environmental provisions of the agreement by the parties. One of the first examples of institutional setting created to serve the agreement's environmental objectives is provided by the North American Agreement on Environmental Cooperation (NAAEC), which established a 'framework […] to facilitate effective cooperation on the conservation, protection and enhancement of the environment'[45] setting up the Commission for Environmental Cooperation (CEC) to facilitate joint activities.[46] Moreover, FTAs allow for 'environmental voices' to be heard, as they allow the parties to challenge the other party's violation of any environmental provisions of the agreement. It should be noted, however, that, while environmental expertise is required for the composition of arbitration panels with competence over the environmental/sustainable development chapters of the agreements, no such requirement exists for the composition of the panel competent to apply the other chapters. As a result, FTAs would be susceptible to the same critique advanced against WTO panels and Appellate Body – with reference to their lack of environmental expertise when faced with trade and environment disputes.

3 THE BIG PICTURE: THE EVOLUTION OF THE TRADE/ ENVIRONMENT NEXUS

The analysis of the thirty-seven FTAs included in this study has shown a steady increase in the number of renewable energy provisions, an increase in the variety of techniques used, and higher levels of specificity and commitment, which the author has addressed at length elsewhere.[47] This article argues that not only more space is being devoted to renewable energy and environmental considerations in the text of trade agreements but, more importantly, that such considerations are

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[45] *NAAEC*, preamble.

[46] Gary Clyde Hufbauer et al., *NAFTA and the Environment: Seven Years Later* 18, 20, 21 (Institute for International Economics 2000).

[47] Elena Cima, *Promoting Renewables Through Free Trade Agreements? An Assessment of the Relevant Provisions*, C-EENRG *Working Papers, 2016*-7 (2016).

treated differently compared to the past, reflecting a change in the narrative underlying the trade/environment nexus. As mentioned in the introduction, this evolution can be illustrated with reference to three models: an *exception-based*, a *prevention-based*, and a *promotion-based* model.

3.1 Trade liberalization first: the exception-based model

In the *exception-based* model, embodied by the GATT and by some of the earlier FTAs, trade liberalization represents the primary goal of the agreements and trade rules simply proscribe government actions that could disrupt the free flow of commerce while environmental protection is mostly seen as a potential obstacle to smooth trade flows. As a result, environmental concerns enter trade agreements through narrow exceptions, interpreted restrictively and with the defendant bearing the entire burden of proof. Environmental standards are addressed only to the extent that they are 'too high' and therefore deemed unacceptable trade barriers, while no mechanism exists to address standards that would qualify as 'too low'.[48] Similarly, the legitimacy of environmental regulations depends solely on what is produced rather than how it is produced, while the environmental footprint of processes and production methods (PPMs) is not taken into account.

3.2 Reducing conflicts between values: the prevention-based model

The *prevention-based* model, which is a development of the *exception-based* model, approaches the trade and environment nexus asking how to ensure that trade rules are not used to override environmental regulations, without, at the same time, allowing protectionist measures disguised as environmental policies and how to reduce or avoid potential and existing conflicts between the trade and environmental regimes. This model reveals an underlying tension: on the one hand, both the trade and environmental communities have acknowledged the need to balance free trade and environmental protection as two conflicting yet complementary values, while on the other they both seem to have adopted a trade-centred stance, framing these questions as 'trade and' issues. This model presents a number of elements that distinguish it from the *exception-based* model. Sustainability is no longer assumed but explicitly provided for, and countries' environmental regulatory sovereignty is explicitly acknowledged, along with negative exhortations or obligations concerning the environment. In order to avoid that trade rules are used to override environmental regulations, and to reduce the potential conflict

[48] Daniel C. Esty, *Greening the GATT* 80 (Institute for International Economics 1994).

between the trade and environmental regimes, clauses that allow for environmental policy space are clarified and balanced, whether through the drafting of new provisions, sometimes in the form of exemptions rather than exceptions, or through a more flexible interpretation of the already existing rules.

3.3 Advancing environmental goals: the promotion-based model

Under the *promotion-based* model, which is still in its infancy, trade rules and agreements are used as point of leverage to advance environmental goals. The tide is turning: trade liberalization and regulation are moving from being preeminent over environmental protection to becoming instrumental to it. Under this model, the trade regime would be true to the preamble of the WTO, which clearly identifies raising standards of living, full employment, *sustainable development, and the protection and preservation of the environment* as the Organization's priorities, while expanding trade should simply constitute a means towards those ends rather than and end in itself.[49] However, for a long time, as reflected in the *prevention-based* model, ends and means have been confused, and trade has become the lens through which environmental protection is perceived rather than the other way around.[50]

The one just described is a complex and multifaceted evolution. The following sections will focus on two of these facets: the rise of environmental rights and obligations next to exceptions in trade agreements in section 4, and the increasing use of exemptions vis-à-vis exceptions, as alternative types of excluding clauses in section 5.

4 FROM THE EXCEPTION TO THE RULE

The *exception-based* model treats environmental measures mostly as potentially trade-distorting and therefore as an obstacle to free trade. Only when they pursue genuine environmental objectives, they might be tolerated. As a result, narrowly constructed exceptions represent the only space devoted to environmental – and other non-trade – concerns under this model. This approach is self-evident in the

[49] In the 2030 Agenda for Development (UN/A/RES/70/1), several Sustainable Development Goals (SDGs) are related to the environment and, in this context, free trade and trade rules are clearly framed as 'means of implementation' of the SDGs.

[50] This statement was made by Dani Rodrik with regard to development. Dani Rodrik, *The Global Governance of Trade as if Development Really Mattered*, UNDP (2001). Rodrik correctly points out that this slippage is evident in the WTO's promotional material available on the Organization's website, where its main function is stated to be ensuring that 'trade flows as smoothly, predictably and freely as possible'. https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm (accessed 28 Oct. 2017).

text of the GATT 1947 (in particular with reference to Article XX), as well as in the earliest examples of FTAs, which contain several GATT-like provisions.[51]

Modern FTAs have mostly adopted a different approach, which contributes to placing them under the scope of what the author has defined *prevention-based* and *promotion-based* models. This new approach significantly expands the space devoted to environmental protection, in the attempt to reconcile the latter with free trade. As a result, in addition to exception clauses, recent FTAs increasingly include different kinds of obligations concerning the environment. This approach was pioneered by NAFTA negotiators as part of the so-called 'Pollution-Haven Package',[52] which contained a number of provisions that directly addressed the risks of pollution haven and race to the bottom by introducing environmental obligations for the parties.[53]

Many of the most recent FTAs have adopted a similar approach, including in their text provisions that confer rights and impose obligations on the parties' environmental law-making and policy-making activities. First, most FTAs explicitly recognize the parties' sovereignty over environmental regulation. Unlike in the context of WTO agreements, these provisions do not represent exceptions but rather the recognition of the parties' right to determine the level of environmental protection they deem suitable considering their national priorities, and their sovereignty over the enforcement of environmental measures. Next to regulatory sovereignty, parties have two core negative obligations to fulfil concerning the environment, namely the obligation not to lower environmental standards and not to fail to enforce environmental laws. These provisions started off as mere exhortations ('it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures')[54] and later started being phrased as binding obligations. According to Article 13.7(2) of the *EU-South Korea* FTA, for example, this very same behaviour is no longer simply inappropriate but plain prohibited: 'a Party *shall* not weaken or reduce the environmental or labor protections afforded in its laws to encourage trade or investment'.[55] The inclusion of environmental rules in trade agreements marks a clear departure from the GATT's approach, where mandatory obligations only refer to trade liberalization and the elimination of protectionist behaviours.

Around these core environmental commitments, FTAs generally specify further additional, and often instrumental, obligations. According to CETA, the

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51 *See* e.g. the agreements between the US and Israel and between the EU and Turkey.

52 John H. Knox, *The Neglected Lessons of the NAFTA Environmental Regime*, 45 Wake Forest L. Rev. 391, 395–396 (2010). Samuel Barkin, *Trade and Environment Institution,* in *Handbook on Trade and the Environment* 318 (Kevin P. Gallagher ed., Edward Elgar 2010).

53 *NAAEC*, Arts 1–8.

54 *NAFTA*, Art. 1114(2).

55 *EU-South Korea*, Art. 13.7(2) (emphasis added).

parties are required to 'take into account relevant scientific and technical information … .when preparing and implementing measure aimed at environmental protection that may affect trade or investment between the Parties'.[56] Moreover, they have committed to ensure public awareness of the respective environmental laws and enforcement compliance procedure, and to promote public participation with respect to the development and definition of new environmental laws and policies.[57] Similarly, parties often commit to monitor, assess, and review the environmental impact of the implementation of the agreement (Table 1).[58]

Table 1 Environmental Obligations in FTAs

Core Obligations	
Not lowering of levels of environmental protection	
Not failing to enforce environmental laws	
Additional Obligations	
Scientific knowledge	Relying on scientific knowledge when designing environmental measures
	Relying on scientific knowledge when conducting environmental risk assessment
Public awareness and participation	Publication of environmental laws and regulations
	Public participation in the development of environmental laws and policies
	Public participation in environmental impact assessment
Environmental impact	Monitor the state of the environment
	Conduct and review environmental impact assessments
	Exchange information on assessment methodologies
Investing in environmental research and science	

Source: Compiled by the author

[56] *CETA*, Art. 24.8.
[57] *CETA*, Art. 24.7.
[58] *EU-Singapore*, Art. 13.14.

4.1 Interpretation in WTO disputes: environmental rules as (limited) interpretative tools

Under the first approach described above, the only environmental provisions are exception clauses, such as GATT Article XX. As a consequence, the possibility to strike a balance between free trade and the sovereign right of governments to protect the environment depends entirely on the eligibility of the respondent under such exceptions. A question that emerged as soon as the first 'trade and environment' disputes were filed was whether the adjudicative bodies of the GATT had the competence to deal with non-GATT norms, such as provisions in MEAs, when interpreting *inter alia* GATT Article XX.[59] A key rule of both the GATT and later the WTO dispute settlement system requires the adjudicatory bodies to *only* apply the provisions contained in the covered agreements,[60] while they lack the authority to apply provisions contained in other legal instruments, and GATT panels have often stressed the limits of their mandate. An early example is provided by the 1986 *US – Trade Measures Affecting Nicaragua* dispute, where the panel, while agreeing with Nicaragua that GATT provisions had to be interpreted within the context of the general principles of international law, stressed that its task was to examine the case before it 'in the light of the relevant GATT provisions', although they might be inadequate and incomplete for the purpose.[61] Similarly, in *Canada – Salmon and Herring*, the panel held that, despite the relevance of other legal instruments, such as the United Nations Convention on the Law of the Sea, 'its mandate was limited to the examination of Canada's measures in the light of the relevant [GATT] provisions'.[62] Because the covered agreements do not feature any environmental – let alone renewable energy-related – rules, it follows that, whenever a dispute arises, it is decided almost solely on the basis of trade norms and principles.

It was only after the establishment of the WTO and the introduction of a reference to sustainable development and environmental protection and preservation in the text of the preamble to the Marrakesh Agreement that international environmental norms have started playing a role in the interpretation of trade provisions whenever an environmental measure was at stake. The Dispute

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[59] The only expertise that is required of members of both the panels and Appellate Body is in 'international trade and the subject matter of the covered agreements'. Art. 8(1) and (4) of the DSU with regards to the composition of the panels, and Art. 17(3) with reference to that of the Appellate Body.

[60] Understanding on Rules and Procedures Governing the Settlement of Disputes, Arts 1 and 11, 15 Apr. 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

[61] GATT Panel Report, *US – Trade Measures Affecting Nicaragua*, para. 5.15, L/6053 (circulated 13 Oct. 1986).

[62] Canada – Salmon and Herring, *supra* n. 14, para. 5.3.

Settlement Understanding (DSU), at Article 3(2), requires the panels and Appellate Body to clarify the existing provisions of the covered agreements 'in accordance with customary rules of interpretation of public international law', which are reflected in Article 31 of the VCLT.[63] According to the latter, treaties shall be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose'.[64] Moreover, 'any relevant rules of international law applicable in the relations between the parties' should also be taken into account.[65] It follows that environmental norms and principles can be used to interpret trade provisions as 'relevant rule[s] of international law applicable between the Parties',[66] while the principle of sustainable development and the objective of preserving and protecting the environment are now part of the 'context, object and purpose' of the covered agreements and should inform the interpretation of any other GATT/WTO rule.[67]

The interpretation of the notion of 'exhaustible natural resources' under GATT Article XX(g) in the *US – Shrimps* case is illustrative of this new approach. This notion had traditionally been deemed to be limited to 'mineral' and 'non-living' resources. In the context of *US – Shrimps*, the question was raised as to whether sea turtles could qualify as 'exhaustible natural resources' and, in its report, the Appellate Body stressed the need to interpret the term 'exhaustible' 'in the light of contemporary concerns of the community of nations about the protection and conservation of the environment' and justified this statement noting that 'while Article XX was not modified in the Uruguay Round, the preamble attached to the WTO Agreement shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy'.[68]

Despite these developments, the actual space recognized to environmental concerns even as interpretative tools is more limited than it may seem. Once again, *US – Shrimps* can provide some guidance in this regard. In the context of the very same dispute where the Appellate Body stressed the importance of taking into account environmental concerns when interpreting trade provisions, the panel had

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63 *See* e.g. *Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad)*, 1994 ICJ Rep 6; *Golder v. United Kingdom*, 18 Eur. Ct. H.R. (ser. A) (1995); *Oppenheim's International Law*, vol. I, 1271–1275 (Sir Robert Jennings & Sir Arthur Watts eds, 9th ed., Oxford 2008).

64 VCLT, Art. 31.1.

65 *Ibid*., Art. 31.3(c).

66 *Ibid*., Art. 31.3(c).

67 Art. 31.2 of the VCLT states that, for the purpose of the interpretation of a treaty, the context comprises, among other elements, the preamble. In *US – Shrimps*, the Appellate Body further clarified that the preamble of the WTO Agreement 'informs not only the GATT 1994, but also the other covered agreements'. US – Shrimps, *supra* n. 11, para. 129. *See* Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge University Press 2003).

68 *Ibid*.

previously clarified that the *chapeau* of GATT Article XX 'only allows Members to derogate from GATT provisions so long as, in doing so, they do not undermine the WTO multilateral trading system'.[69] The panel continued:

> In our view, if an interpretation of the chapeau of Article XX were to be followed which would allow a Member to adopt measures conditioning access to its market for a given product upon the adoption by the exporting Members of certain policies, including conservation policies, GATT 1994 and the WTO Agreement could no longer serve as a multilateral framework for trade among Members as security and predictability of trade relations under those agreements would be threatened.[70]

As this statement suggests, not only are WTO panels and Appellate Body allowed to apply only the covered agreements, but even their use of non-WTO law to interpret said agreements is rather limited and constrained by the narrow lines of their mandate. The latter reflects the overall objective and purpose of the international trade regime, which, despite the indisputable expansion of scope, remains very much rooted in the 'substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce', as spelled out in the preamble to the GATT 1947.[71]

4.2 FTAs and interpretation: environmental rules as applicable rules

Under the second, more recent approach, most FTAs include environmental provisions right next to norms regulating trade, thus affecting the balancing between free trade and environmental protection at the level of dispute settlement. Before delving in the core of the argument, however, it should be clarified that the role played by environmental provisions in the context of a dispute will vary according to their location within the text of the relevant trade agreement. As the first part of this contribution has showed, some environmental provisions are gathered in an 'environment' or 'sustainable development' chapter, while others can be found sparsely in a number of different chapters. In most FTAs, the general dispute settlement procedures set out in the final sections of the text cover all the chapters of the agreement, including the one on the environment (or sustainable development). This is the case of the TPP, as well as all trade agreements signed by the United States after 2007. In these cases, the panel established to solve a dispute

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69 Panel Report, US – Shrimps, *supra* n. 11, para. 7.44.

70 *Ibid*., para. 7.45. *See also* the Report of the Appellate Body, para. 157.

71 GATT 1947, Preamble. For a discussion on the objective(s) of the GATT/WTO, *see* e.g. John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 Wash. & Lee L. Rev 1227, 1231 (1992); Kenneth W. Abbott, *The Trading Nation's Dilemma: The Functions of the Law of International Trade*, 26 Harv. Int'l. L.J. 501 (1985); and John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36(02) Int'l Org. 379–415 (1982).

will be allowed to apply any provision of the chapters falling within its jurisdiction, including the ones related to the environment. Other agreements, such as those signed by the European Union, establish different dispute settlement mechanisms depending on the chapter involved, and often only the panel established under the 'sustainable development' chapter will be able to directly apply the provisions contained therein. Similarly, the 'investment' chapter is generally excluded from the operation of the dispute settlement mechanism established by the FTA, as it requires the parties to settle their disputes through the traditional methods of investor-state arbitration.

To understand to what extent the coexistence of environmental and trade rules in the same instrument has potentially far-reaching implications on the interpretative process in case an environmental measure is challenged, one can look at several investment disputes under FTAs. In fact, while trade provisions in FTAs have not been invoked yet in an environment-related dispute,[72] an increasing number of disputes brought under the *investment* chapter show an environmental component.[73] A particularly good example is provided by the interpretation of the minimum standard of treatment by the tribunal in *Al Tamimi v. Oman*, an investment dispute raised under the *US-Oman* FTA.[74] The dispute, which arose with respect to the enforcement of environmental laws against a limestone quarry project, required the definition by the arbitral tribunal of the exact content of the minimum standard of treatment, as set out in Article 10.5 of the FTA.[75] In doing so, the tribunal referred to both Article 10.10 and Chapter 17 of the agreement.

Article 10.10 is an environmental provision within the investment chapter of the *US-Oman* FTA, which provides for the protection of the right of both parties to adopt, maintain, and enforce any measure to ensure that 'investment activity in [their] territory is undertaken in a manner sensitive to environmental concerns'.[76]

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[72] The lack of trade disputes under the dispute settlement mechanisms established by FTAs can sometimes be explained with the decision of the complainant to bring the dispute at the WTO. This can happen in any case of overlapping jurisdiction, which may occur whenever trade disputes arise between the Parties to an FTA, who are also WTO Members regarding obligations that are the same or similar to those of a covered agreement. *See* Gabrielle Marceau, *The Primacy of the WTO Dispute Settlement System*, Questions of International Law (23 Dec. 2015), http://www.qil-qdi.org/the-primacy-of-the-wto-dispute-settlement-system/ (accessed 28 Oct. 2017).

[73] *See* Jorge E. Viñuales, *Foreign Investment and the Environment in International Law: The Current State of Play,* in *Research Handbook on Environment and Investment Law* (Kate Miles ed., Edward Elgar forthcoming).

[74] *Al Tamimi v. Oman*, *supra* n. 19. *See* Viñuales, *supra* n. 73.

[75] According to Art. 10.5: '1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security [and] 2. For greater certainty, para. 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments.'

[76] *US-Oman*, Art. 10.10.

As part of the investment chapter, Article 10.10 falls under the jurisdiction of the tribunal, who relied upon it to construct Article 10.5.[77] Chapter 17, entitled 'Environment', on the other hand, does not fall directly within the tribunal's jurisdiction.[78] Nevertheless, the tribunal gave substantial weight to this chapter in interpreting the content of the minimum standard of treatment, as it 'provides further relevant context in which the provisions of Chapter 10 must be interpreted'.[79] In the exact words of the tribunal:

> the very existence of Chapter 17 exemplifies the importance attached by the US and Oman to the enforcement of their respective environmental laws. … . When it comes to determining any breach of the minimum standard of treatment under Article 10.5, the Tribunal must be guided by the forceful defense of environmental regulation and protection provided in the express language of the Treaty.[80]

This reasoning is perfectly in line with Article 10.21 of the *US-Oman* FTA, entitled 'Governing Law', which states in the relevant part that 'the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law'.[81] Thus, while the tribunal's jurisdiction is limited to the provisions within Chapter 10, it must read them in the context and purpose of the Agreement as a whole.[82]

This interpretation of the minimum standard of treatment offers a meaningful example of the way in which environmental provisions are applied and used in the context of FTAs. Here, environmental norms can have two different roles: those that are part of the chapter(s) of the agreements which fall under the jurisdiction of relevant tribunal or panel are directly applied, while those that belong to different chapters of the FTA – such as in the case of the environmental chapter in investment disputes – although not directly applicable, nevertheless constitute part of the context and purpose of the agreement and need to be given adequate weight *vis-à-vis* the core principles/standards of the agreement. Unlike WTO panels and Appellate Body, panels established under an FTA – just as arbitral tribunals – will not be constrained in their mandate by an underlying purely economic rationale when performing their function. It follows that, in case of disputes administered under an FTA, free trade principles and obligations on the one hand, and environmental

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77 *Al Tamimi v. Oman*, *supra* n. 19, para. 387.
78 *Al Tamimi v. Oman*, *supra* n. 19, para. 388. According to Art. 17.8.5, which provides for a consultation mechanism, '[n]either Party may have recourse to dispute settlement under this Agreement for any matter arising under any provision of this Chapter.'
79 *Ibid.*, para. 388.
80 *Ibid.*, para. 389.
81 *US-Oman*, Art. 10.21.
82 *Ibid.*, fn. 776.

principles and obligations on the other will have to be balanced against one another in each individual dispute.

5 THE (NOT SO) THIN LINE BETWEEN EXCEPTIONS AND EXEMPTIONS

A common technique to both approaches described in the previous section is the use of clauses that identify situations where trade rules do not apply or prevail in order to accommodate domestic environmental or renewable energy policies. These clauses are generally referred to as 'exceptions', a term which is often used – misleadingly – in a very broad and over-comprehensive fashion, to encompass similar, yet different, kinds of provisions. The reason why using this term interchangeably may be misleading is that several techniques exist to achieve such exclusion, and each of them carries different legal implications. Viñuales, for example, identifies up to seven techniques that can be employed in treaties to 'escape a rule'.[83] From the very beginning, this contribution has distinguished between two of these techniques – exceptions *stricto sensu*, and exemptions or carve-outs.

In this area, the GATT employs an exception *stricto sensu*, Article XX (and in particular paragraphs b and g),[84] and so does the GATS (Article XIV). As shown in section 2, recent FTAs, besides reproducing these exceptions, increasingly employ environmental carve-outs. Hence, this section aims at shedding some light on the distinction between the use of 'exceptions' and 'exemptions' in trade agreements, which is an important distinction as these conceptual categories are not merely descriptive, but rather normative, in that they influence the operation of the relevant provisions and carry different legal implications.[85] With this context in mind, this section will first clarify the characteristics that allow for a distinction between the two techniques; it will then analyse the legal implications of using one technique rather than the other, and finally, it will apply them in one area that is especially relevant for renewable energy, that of renewable energy subsidies.

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[83] The seven techniques identified are: (1) delimitation of the scope of a norm or set of norms; (2) specific carve-outs or exemptions; (3) flexibilities; (4) derogations; (5) exceptions *stricto sensu*; (6) excuses; and (7) circumstances precluding wrongfulness. Jorge E. Viñuales, *Seven Ways of Escaping a Rule: Of Exceptions and Their Avatars in International Law*, in *Exceptions in International Law* (Lorand Bartels & Federica Paddeu eds, Oxford University Press forthcoming 2018).

[84] *See* e.g. Lorand Bartels, *The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction*, 109 AJIL 95 (2015).

[85] The distinction between different techniques is not a prerogative of trade agreements but applies to international treaties broadly. *See* Viñuales, *supra* n. 83.

5.1 Different conceptual categories

Although sometimes articulated in very similar terms, exemptions and exemption operate in a very different manner. Exceptions, whether general or specific, identify circumstances in which the breach of other provisions of an agreement is justified. On the other hand, exemptions do not assume the breach of any provision, as they function as a removal of a given measure from the scope of a rule or set of rules, with the effect that said rule (or set of rules) will not apply to the carved-out measure. With respect to the former, the drafters have identified specific domestic interests (e.g. the protection of the environment, health, national security) that might justify departing from the primary norms of a trade agreement; in the case of the latter, such domestic interests are seen as so important that they override the goals pursued by the primary norms, to the extent that the primary norms in question do not apply at all.[86]

The Appellate Body has clarified this distinction on several occasions. In *US – Shrimps*, it defined GATT Article XX as a 'limited and conditional *exception* from the substantive obligations contained in the other provisions of the GATT 1994',[87] following the approach of earlier GATT panels.[88] By contrast, in *Canada – Periodicals*, referring to GATT Article III:8, it stated that this provision exemplifies 'the kinds of programs which are *exempted* from the obligations of Articles III:2 and III:4'.[89] In subsequent cases, it was further clarified that the measures falling under Article III:8 'do not violate Article III'[90] and are not subject to the national treatment obligations set out therein.[91] The distinction between the two categories of provisions was made even clearer in cases arisen under the Agreements on Technical Barriers to Trade (TBT) and on Sanitary and Phytosanitary Measures (SPS). In *EC – Hormones*, discussing the scope of Article 3.3 of the SPS Agreement, the Appellate Body reversed the panel's finding that a 'general rule – exception' relationship existed between Articles 3.1 and 3.3 of the SPS Agreements, to explain that there is a qualitative difference between this relationship and the

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86 Viñuales, *supra* n. 83.

87 US – Shrimps, *supra* n. 11, para. 157 (emphasis added).

88 GATT Panel Report, *United States – Section 337 of the United States Tariff Act of 1930*, L/6439 – 36S/345 (adopted 7 Nov. 1989) [hereinafter US – Section 337 Tariff Act].

89 Appellate Body Report, *Canada – Certain Measures Concerning Periodicals* 33–34, WT/DS31/AB/R (adopted 30 July 1997) (emphasis added).

90 Report of the Panel, *Indonesia – Certain Measures Affecting the Automobile Industry* para. 14.43, WT/DS54/R (adopted 23 July 1998).

91 Joint Appellate Body Report, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector; Canada – Measures Relating to the Feed-In Tariff Program* para. 5.56, WT/DS412/AB/R, WT/DS426/AB/R (adopted 24 May 2013) [hereinafter Canada – FIT Program].

one between Articles I and III and Article XX of the GATT, precisely because Article 3.1 'simply excludes from its scope of application the kinds of situations covered by Article 3.3'.[92] Similarly, no such 'general rule – exception' relationship exists between the first and the second part of Article 2.4 of the TBT Agreement.[93]

However, the fine line between these techniques is not always easy to pinpoint with precision. This would explain why both adjudicatory bodies and international legal scholars have struggled with these categories for a long time, as exemplified by the way in which GATT Article XI:2(a) has been interpreted for many years.[94] Article XI:2 states, in the relevant part, that '[t]he provisions of paragraph 1 of this article shall not extend to the following: (a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party.' In the GATT era, this paragraph was considered an exception to the general prohibition of quantitative restrictions set out in Article XI:1.[95] Even after the establishment of the WTO, in *US – Shirts and Blouses*, the Appellate Body compared Articles XX and XI:2 referring to both as 'exceptions'.[96] It was only in 2012, in *China – Raw Materials*, that the Appellate Body acknowledged an inherent difference between Articles XX and XI:2, stating that 'the general elimination of quantitative restrictions shall not extend to the items listed under subparagraphs (a) to (c) of that provision'.[97]

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92 EC – Hormones, *supra* n. 16, paras 104 and 172.

93 Appellate Body Report, *European Communities – Trade Description of Sardines* para. 275, WT/DS231/AB/R (adopted 23 Oct. 2002) [hereinafter EC – Sardines].

94 Another example is provided by the interpretation of SPS Art. 5.7. This provision was initially categorized as an 'exemption' by the Appellate Body in *Japan – Agricultural Products II*. Later, in *Japan – Apples*, it was treated as an exception, as the burden of proof was imposed on the respondent, while in *EC – Biotech* the nature of Art. 5.7 as an exemption was reinstated. For an analysis of this interpretative evolution, *see* Caroline E. Foster, *Science and the Precautionary Principles in International Courts and Tribunals* 217 (Cambridge University Press 2011). *See* Appellate Body Report, *Japan – Measures Affecting Agricultural Products* para. 80, WT/DS76/AB/R (adopted 19 Mar. 1999); Panel Report, *Japan – Measures Affecting the Importation of Apples* paras 7.26, 8.212, and 8.222, WT/DS245/R (adopted 10 Dec. 2003); Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* para. 7.3254, WT/DS/291, 292, 293/R (adopted 21 Nov. 2006).

95 GATT Panel Report, *Japan – Restrictions on Imports of Certain Agricultural Products* para. 5.1.3.7, BISD 35S/163 (adopted 2 Mar. 1988); GATT Panel Report, *EEC – Restrictions on Imports of Dessert Apples, Complaint by Chile* para. 12.3, BISD 36S/93 (2 June 1989) and GATT Panel Report, *Canada – Import Restrictions on Ice Cream and Yoghurt* para. 59, BISD 36S/68 (adopted 5 Dec. 1989).

96 Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* 16, WT/DS33/AB/R (adopted 23 May 1997) [hereinafter US – Shirts and Blouses].

97 Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials* para. 334, WT/DS395/AB/R (adopted 22 Feb. 2012). *See also* Appellate Body Report, *Argentina – Measures*

5.2 Why bother? The legal implications of using exceptions vis-à-vis exemptions

The distinction between exceptions and exemptions is the product of a conceptual elaboration. Yet, these conceptual categories are not merely descriptive but they are rather of normative nature and carry different legal implications. Such implications are especially relevant in case a dispute arises but, even beyond litigation, they deeply affect the functioning of the norms involved. In the specific case of renewable energy and environmental protection, as with other non-trade concerns, choosing between different techniques can lead to diametrically opposed results. This paragraph will lay out two of the legal implications[98] that these different categories carry – allocation of the burden of proof and interpretation – while the next one will situate them in the specific context of trade in renewable energy, showing the relevance and timing of this discussion.

5.2[a] *The Allocation of the Burden of Proof: Who Bears the Risk of Non-Persuasion?*

The allocation of the burden of proof is particularly important and controversial in trade disputes for a number of reasons.[99] First, the content of many WTO obligations is not entirely clear, and the parties may not know what degree of proof is required for the burden of proof to be successfully discharged (and the same applies to FTAs, which often borrow the language of their multilateral counterparts). Second, this lack of precision can influence the outcome of a dispute, given that when the evidence is not sufficient or the arguments of the parties are in equipoise, the panel or Appellate Body have to find against the party bearing the burden of proof. Finally, in international law more broadly, procedural rules are not as detailed and precise as in domestic law, contributing to the general confusion surrounding this concept.

The burden of proof can be further broken down in different duties or burdens: the 'burden of raising', which refers to the duty to raise a specific claim, the 'burden of production', meaning the duty to produce evidence, and the 'burden of persuasion', which is the burden of proving or disproving a claim

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Affecting the Importation of Goods para. 5.219, WT/DS438/AB/R, WT/DS444/AB/R, WT/DS445/AB/R (adopted 26 Jan. 2015).

98 For an analysis of other legal implications, such as the degree of deference to State authorities and the interaction with referral clauses, *see* Viñuales, *supra* n. 83.

99 The subject of the burden of proof in WTO disputes has been taken up and addressed in a comprehensive manner in Michelle T. Grando, *Evidence, Proof, and Fact-Finding in WTO Dispute Settlement* (Oxford University Press 2009). *See also* Joost Pauwelyn, *Evidence, proof and Persuasion in WTO Dispute Settlement. Who Bears the Burden?*, 1 J. Int'l Econ. L. 227 (1998) and, more generally, Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study of Evidence Before International Tribunals* (Martinus Nijhoff Publishers 1996).

and ultimately convince the trier. Whether a provision is framed as an exception or an exemption has direct consequences as to what party will bear each of these burdens (see Table 2).

Table 2 Allocation of the Burden of Proof in Case of Exceptions vis-à-vis Exemptions

	Burden of Production	*Burden of Persuasion*
Exception (affirmative defence)	Both parties (duty of cooperation)	Respondent
Exemption (carve-out)		Complainant

Source: Compiled by the author

The burden of production rests on both parties, as they share the duty to cooperate in the fact-finding process (the burden may fall on the claimant first, and then shift to the respondent after the claimant makes a *prima facie* case). Qualifying a norm as an exception or as an exemption may have an impact on the allocation of the burden of production, but such impact is relevant only to the extent that it affects the burden of persuasion. The latter imposes upon one party the duty to persuade the trier, as well as the related 'risk of non-persuasion', given that the party will lose if is unable to affirmatively discharge its burden.[100] The burden of persuasion may fall on one party with regard to some issues and on the other party as to other issues, and what is important is to determine who bears the burden on each issue.[101]

The general rule with respect to the allocation of the burden of proof (of persuasion), applied consistently by international courts and tribunals, is the rule *actori incumbit probatio*, according to which 'the party who asserts a fact, whether claimant or respondent, is responsible for providing proof thereof'.[102] Accordingly, the party claiming the breach of a WTO rule bears the burden of proving that such breach took place.[103] On the other hand, the respondent

[100] Charles V. Laughlin, *The Location of the Burden of Persuasion*, 18 U. Pittsburgh L. Rev. 3 (1956).

[101] It is commonly accepted in public international law that the burden does not shift, but rather that there is a different burden on each operative fact. *See* Grando, *supra* n. 99, at 83–84 and Pauwelyn, *supra* n. 99, at 230, 232.

[102] Kazazi, *supra* n. 99, at 117.

[103] Report of the Panel, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/R (adopted 1 Nov. 1996) [hereinafter Japan – Alcoholic Beverages II]. [Addressing the claim under Art. II:2, first and second sentence, the panel found that 'complainants have the burden of proof to show … that products are like and … that foreign products are taxed in excess of domestic ones' with reference to the former, and that 'the products concerned are directly competitive or substitutable and that foreign products are taxed in such a way so as to afford protection to domestic production.' paras 6.14 and 6.28]. US – Shirts and Blouses, *supra* n. 96, at 14–16.

who invokes an exception to the general rule carries the burden of demonstrating the compliance with the conditions reflected in the exception (*quicumque exceptio invocat eiusdem probare debet*). The Appellate Body introduced these two guiding rules in the WTO legal order in its report on *US – Shirts and Blouses* when it stated that 'the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence'.[104] It follows that while the party invoking the violation of a primary norm will have to prove that such norm has been violated, the party invoking an exception will have to prove that the exception applies. GATT panels have stressed this rule in several cases with specific reference to GATT Article XX,[105] and the Appellate Body has later extended this interpretation to other provisions deemed to constitute 'affirmative defences', besides Article XX.[106]

The Appellate Body in *US – Gasoline* has provided further guidance with regard to GATS Article XIV. In particular, it clarified that, once the respondent makes a *prima facie* case[107] that the measure adopted was necessary under GATS Article XIV, the burden of proving the existence of less trade-restrictive (yet equally efficient) alternatives shifts to the complainant, and then back to the respondent to prove that such alternatives were not reasonably available.[108] What shifts here, however, is only the burden of production

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[104] US – Shirts and Blouses, *supra* n. 96, at 14. *See* Henrik Horn & Petros C. Mavroidis, *Burden of Proof in Environmental Disputes in the WTO: Legal Aspects* 11 (Research Institute for Industrial Economics, IFN Working Paper No. 793, 2009).

[105] GATT Panel Report, *Canada – Administration of Foreign Investment Review Act*, BISD 305/140, para. 5.20 (adopted 7 Feb. 1984). *See* also US – Section 337 Tariff Act, *supra* n. 88, para. 5.27 and *US – Measures Affecting Alcoholic and Malt Beverages* paras 5.41 and 5.52, BISD 39S/206 (adopted 19 June 1992). Later, the AB continued on this track: *see* Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, para. 176, WT/DS371/AB/R (adopted 15 July 2011); Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* para. 157, WT/DS161/AB/R (adopted 10 Jan. 2001); US – Shirts and Blouses, *supra* n. 96, at 14–16; US – Gasoline, *supra* n. 11, at 22–23.

[106] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* para. 309, WT/DS285/AB/R (adopted 20 Apr. 2005) [with regard to GATS Art. XIV(a)] [hereinafter US – Gambling]. Appellate Body Report, *United States – Tax Treatment for 'Foreign Sales Corporations' – Recourse to Art. 21.5 of the DSU by the European Communities* para. 133, WT/DS108/SB/RW (adopted 29 Jan. 2002) [with regard to fn. 59 of the SCM Agreement].

[107] The expression is used in this contribution to refer to a duty to provide 'evidence sufficient to raise a presumption that what is claimed is true', as in the AB report in *US – Shirts and Blouses* (at 14). It is not to be confused with the use of this expression in common law, where it is used to refer to the 'duty of passing the judge'. The latter is a procedural component of the burden of proof – which only exists in common law – requiring the complainant to produce enough evidence to convince the judge to leave the decision to the jury or, when there is no jury, to allow the hearing to continue. Similarly, this contribution does not intend to take part in the debate on the standard of proof applied by the WTO panels and AB (preponderance of the evidence standard or *prima facie* case standard).

[108] The approach advocated in *US-Gambling* with regards to Art. XIV of the GATS can be applied in the context of the GATT as well. *See* Brazil – Tyres, *supra* n. 16, paras 171 ff.

and not that of persuasion, which rests upon the respondent the whole time.[109]

The maxim that the respondent bears the burden of proving the exception only applies to exceptions *stricto sensu* and not to exemptions or carve-outs. In this case, in fact, the burden will not be on the respondent but rather on the complainant to prove (1) that a general rule has been violated by the respondent and (2) that the respondent does not fall under the situation foreseen by the excluding provision.[110] In *EC – Hormones*, the Appellate Body reversed the panel's finding that the burden of proof regarding SPS Article 3.3 had to be assigned to the respondent and clarified that it was for the United States and Canada (the complainants) to prove that the norm did not apply.[111]

Defining the allocation of the burden of proof and, in particular, of persuasion, does not necessarily affect the outcome of a dispute whenever there are strong grounds to rule in favour of one party or the other. On the other hand, it becomes a crucial question when the evidence is not sufficient or the arguments are in equipoise, as the panel or Appellate Body will have to find against the party bearing the burden of proof. It follows that framing an excluding provision as an exception *stricto sensu* or an exemption, when such provision is aimed at recognizing a state's freedom to protect the environment and favour trade in renewable energy goods and services, can produce far-reaching effects.

An element that further proves this point is the standard of proof required to prove the violation of a primary norm vis-à-vis the applicability of an exception. The burden of persuasion imposed on the complainant to prove the violation of a WTO obligation is generally rather 'light' when compared to that borne by the respondent under an exception. For example, with regard to both Articles III and XI of the GATT, no adverse effects need to be shown to establish a violation.[112] Similarly, with regard to Article III, when determining whether a product has been taxed 'in excess', even a minimal tax differential is sufficient.[113] Horn and Mavroidis argue that precisely this 'light' burden imposed on the complainant has contributed towards some (type II) errors, where a measure that should have been allowed is found inconsistent with one or more WTO rules.[114] One could then argue that framing excluding provisions as exemptions, rather than

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[109] Joost Pauwelyn, *Defenses and the Burden of Proof in International Law*, in *Exceptions in International Law* (Lorand Bartels & Federica Paddeu eds, Oxford University Press forthcoming 2018).

[110] Grando, *supra* n. 99, at 154.

[111] EC – Hormones, *supra* n. 16, paras 107–109.

[112] According to come scholars, this standard has been inherited from the GATT *Superfund* jurisprudence. *See* Horn & Mavroidis, *supra* n. 104, at 14.

[113] Japan – Alcoholic Beverages II, *supra* n. 103, at 23.

[114] Based on the distinction between *Type I* errors, where a truly guilty defendant escapes liability, and *Type II* errors, where a truly innocent defendant is found liable. Horn & Mavroidis, *supra* n. 104, at 41.

exceptions, increases the chances of environmental measures to be allowed under the trade regime even when trade restrictive.

5.2[b] *Exceptions, Exemptions, and the Principle of Strict Interpretation*

Another factor contributing to tipping the scale in favour of the claimant in environment-related trade disputes is the way in which these provisions are interpreted by the adjudicating bodies. The traditional approach in international practice has been to give primary norms an expansive interpretation, and to interpret exception clauses restrictively.

The authoritative source governing treaties' interpretation, the VCLT, does not contain any explicit rules regarding the interpretation of exceptions. The principle that exceptions should be interpreted restrictively has been drawn from the domestic practice of interpreting exceptions in statutes, as well as from the Latin maxim *exceptio est strictissimae applicationis* which is part of general international law and is consistently referred to by international tribunals. In its dissenting opinion in the *North Sea* case in relation to Article 6 of the 1958 Continental Shelf Convention, Judge Tanaka suggested that the 'special circumstances' clause, because of its exceptional nature, should have been subject to a strict interpretation.[115] Likewise, in *Qatar v. Bahrain*, the International Court of Justice observed that 'the method of straight baselines, which is an exception to the normal rules for the determination of baselines … must be applied restrictively'.[116] Similar pronouncements have been made by arbitral tribunals as well as by the European Court of Justice.[117]

The practice of GATT panels has mirrored these pronouncements. In *US – Tuna II*, the panel observed that 'Article XX provides for an exception to obligations under the General Agreement [and that] the long-standing practice of panels has accordingly been to interpret this provision narrowly, in a manner that preserves the basic objectives and principles of the General Agreement.'[118]

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[115] North Sea Continental Shelf (*Ger. v. Den.*), 1969 I.C.J. Rep. 3 (Feb. 1969) (dissenting opinion of Judge Tanaka, at 186).

[116] Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (*Qatar v. Bahr.*) Merits 2001 I.C.J. 40 (Mar. 2001).

[117] NAFTA Arbitral Panel Established Pursuant to Chapter Twenty: In the Matter of Cross-Border Trucking Services (Secretariat File no. USA-MEX-98–2008–01). [in this case, however, the reference to the principle *exceptio est strictissimae applicationis* was made with respect to a reservation, and not an exception]. *See* Asif H. Qureshi, *Interpreting WTO Agreements. Problems and Perspectives* 105 (Cambridge University Press 2006). Case C-169/00, *Commission of the European Communities v. Republic of Finland*, 2002 ECR I-02433.

[118] GATT Panel Report, *United States – Restrictions on Imports of Tuna (EEC)* para. 5.26, DS29/R (circulated 16 June 1994). *See also* GATT Panel Reports, *United States – Restrictions on Imports of Tuna (Mexico)* para. 5.22, DS21/R (circulated 3 Sept. 1991); *United States – Countervailing Duties on Fresh, Chilled, and Frozen Pork from Canada* para. 4.4, DS7/R (adopted 11 July 1991); US – Section 337 Tariff Act, *supra* n. 88, para. 5.27.

Despite this long-standing practice, the more recent Appellate Body reports seem to have re-interpreted the principle of strict interpretation to deny that it constitutes a mandatory principle to be followed by adjudicative bodies. In *EC-Hormones*, the Appellate Body suggested that there existed no mandatory requirement to automatically interpret a provision restrictively simply because of its exceptional nature.[119] Rather, exceptions – as all other provisions – should be interpreted according to the rules of interpretation set out in the VCLT.

With these pronouncements, the WTO jurisprudence seems to part ways with the prevailing practice of international courts and tribunals. However, the difference in practice may not be as great as it may initially seem. As it has been suggested, the Appellate Body has simply clarified that qualifying a provision as an exception does not automatically trigger a strict interpretation, not that exceptions should not be interpreted restrictively.[120] Several other elements lead to the same conclusion. First, the Appellate Body has often emphasized that exceptions operate in a limited and conditional way. In *US – Shrimps*, for instance, the Appellate Body has stressed the 'limited ambit of such exceptions because the lack of their determinacy could otherwise endanger the integrity of the primary obligations under the relevant treaty'.[121] The *chapeau* of Article XX, in addition, puts further limitations on the operability of the exceptions under its subparagraphs.

Exemptions have not been addressed as thoroughly as exceptions with respect to their interpretation. If one were to follow the principle according to which 'the more exceptional the clause the more restrictive the interpretation', being exemptions less exceptional than exceptions, it would follow that their interpretation should be less restrictive.[122] The investment dispute *Mesa v. Canada* is illustrative of such an approach.[123] The claimant (Mesa) suggested that 'Article 1108(7)(a) [of NAFTA] must be interpreted restrictively because it is an exception',[124] while the tribunal qualified the provision as a carve-out, whose function is 'to exclude all procurement activities from the scope of some of the obligations of Chapter 11',[125] and sided with the Appellate Body in *Canada – Renewables* in interpreting the term 'procurement' broadly.[126]

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119 EC – Hormones, *supra* n. 16, para. 104. Qureshi, *supra* n. 117, at 109.
120 Qureshi, *supra* n. 117, at 109.
121 US – Shrimps, *supra* n. 11, para. 157.
122 Viñuales, *supra* n. 83.
123 Mesa Power Group, *LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17 [hereinafter *Mesa v. Canada*]. *See* Viñuales, *supra* n. 83.
124 *Mesa v. Canada*, *supra* n. 123, para. 405.
125 *Ibid*., para. 427.
126 *Ibid*., paras 411–413. Canada – FIT Program, *supra* n. 91, para. 5.59, where the AB understood 'the word "procurement" to refer to the process pursuant to which a government acquires products'. Viñuales, *supra* n. 83.

Similar to what has been argued with respect to the degree of standard of proof required, the expansive interpretation given to WTO obligations and the *de facto* restrictive interpretation given to exceptions risk leading to *Type II* errors. Providing the respondent with a 'way out' through an exception *stricto sensu* might lead certain environmental measures to be found in violation of WTO Agreements, while, had the same provision be phrased as an exemption – and therefore given a more expansive reading – the very same measure could be found to be WTO-consistent instead.

5.3 Where the distinction matters: the case for 'green' subsidies

The legal implications identified in the previous paragraphs might make a difference in the way renewable energy is handled in trade agreements. As a matter of fact, one might wonder whether the use of exceptions *stricto sensu*, largely employed in WTO Agreements, is the most suitable approach to accommodate environmental protection and renewable energy promotion within trade law. Two areas where framing a provision as an exemption rather than an exception could have far-reaching effects include the treatment of PPMs and the discipline of renewable energy subsidies. This section will focus on the latter.

The recent years have witnessed a steep increase in the number of disputes related to the renewable energy sector. Most of these disputes, including the requests for consultation, involve renewable energy subsidies.[127] The WTO regime regulates subsidies in the SCM Agreement.[128] The latter originally included a temporary exemption for, among others, 'environmental' subsidies, which, after elapsing in 2000, was not renewed by WTO Members due to internal disagreements. As a result of the expiration of this green-light subsidies category, the SCM Agreement now contains no exemptions nor exceptions able to account for the economic, environmental, and social objectives of certain subsidies. Yet, there may be legitimate rationales behind their use. In fact, although subsidies can distort

[127] Canada – FIT Program, *supra* n. 91. India – Solar Cells, *supra* n. 5. Other disputes have not gone beyond the consultation stage yet: Request for Consultations by the United States, *China – Measures Concerning Wind Power Equipment*, WT/DS419 (22 Dec. 2010); *Request for Consultations by China, European Union and Certain Member States – Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS452 (5 Nov. 2012); *Request for Consultations by Argentina, European Union and Certain Member States – Certain Measures on the Importation and Marketing of Biodiesel and Measures Supporting the Biodiesel Industry*, WT/DS459 (15 May 2013); *Request for Consultations by the Russian Federation, European Union and Its Member States – Certain Measures Relating to the Energy Sector*, WT/DS476 (30 Apr. 2014); *Request for Consultations by India, United States – Certain Measures Relating to the Renewable Energy Sector*, WT/DS510 (9 Sept. 2016).

[128] For a comprehensive analysis of the SCM Agreement in general, *see* e.g. Dominic Coppens, *WTO Disciplines on Subsidies and Countervailing Measures. Balancing Policy Space and Legal Constraints* (Cambridge University Press 2014). Other rules on subsidies can be found in the Agreement on Agriculture (AoA), with reference to agricultural products, and in the GATT (i.e. Art. XVI).

resource allocation, undermine market access commitments by importing nations, and divert customers from one exporting nation to another, on the other hand they can be used constructively to correct market failures and address negative externalities, as it is often the case with renewable energy subsidies.[129] One of the main shortcomings of the SCM Agreement, as pointed out by a number of scholars, is precisely the inability to distinguish 'undesirable' subsidies from those that address legitimate interests and concerns.[130]

The vast majority of the scholarship has centred around the possible extensive application of GATT Article XX to the SCM Agreement, or rather to the need to draft a similar exception within the text of the subsidies agreements itself.[131] The need for an excluding clause that would allow the agreement to distinguish 'undesirable' subsidies from those that address legitimate interests and concerns is in no way contested here. However, the choice of the most suitable technique to achieve this goal deserves some thought. Although the immediate temptation might be to look at GATT Article XX, an exception *stricto sensu* might not necessarily be the only or even the best solution and, more importantly, is not the choice that new FTAs seem to be making. Instead, some of the most recent agreements, as shown in the first part of this contribution, have introduced exemptions within their subsidies disciplines. The *EU-Singapore* FTA allows parties to provide for subsidies that *do* have trade effects on the other party – as long as such effects are contained and the subsidy is limited to the minimum needed to achieve the objective – when such subsidies are necessary to achieve an objective of public interest, explicitly including subsidies *for environmental purposes*.[132] Other examples are offered by the *EU-South Africa* FTA as well as the EEA.

The use of exemptions rather than exceptions in the subsidies discipline of trade agreements is viewed here as a concrete example of the departure from an *exception-based* model, where exceptions were seen as the only possible technique to incorporate environmental concerns, towards models that try to achieve a better balance between free trade and environmental protection.

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[129] Kyle Bagwell & Robert W. Staiger, *Will International Rules on Subsidies Disrupt the World Trading System?*, 96(3) Am. Econ. Rev. 877–895 (2006).

[130] Alan O. Sykes, *The Economics of WTO Rules on Subsidies and Countervailing Measures* (U. Chicago Law & Economics, Olin Working Paper No. 186, June 2003); Luca Rubini, *The Subsidization of Renewable Energy in the WTO: Issues and Perspectives* (Working Paper No. 2011/321, 2011); Petros C. Mavroidis & Aaron Cosbey, *A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO* (EUI Working Paper RSCAS 2014/17, 2014); Steve Charnovitz & Carolyn Fischer, *Canada-Renewable Energy: Implications for WTO Law on Green and Not-So-Green Subsidies*, 14(2) World Trade Rev. 177 (2015).

[131] *Supra* n. 130.

[132] Art. 12.8, Annex 12-A(e).

6 CONCLUDING REMARKS

Since the adoption of the GATT in 1947, the space devoted to environmental and renewable energy considerations in trade agreements has significantly expanded. This study has revealed an increase in the number of provisions applicable to renewable energy, as well as in the number and variety of techniques used. Moreover, recent provisions show a broader scope of application, as well as a higher level of commitment than could be found in the text of earlier agreements.

Even more importantly, however, this 'space' has considerably changed, and this article has argued that such changes can be explained with reference to the evolution of the underlying framework – the narrative behind the trade and environment nexus – from an *exception-based* to a *promotion-based* model. The two specific aspects addressed in this contribution – the shift from the sole use of environmental exceptions to the introduction of actual environmental obligations in trade agreements, and the use of different excluding clauses – far from providing a fully comprehensive picture of the legal value of FTAs' renewable energy provisions, are a clear evidence of this evolution. Trade agreements are no longer the 'temple' of free trade, and less and less a place to simply 'accommodate' environmental concerns. Rather, they are becoming important instruments to ensure the effective advancement of environmental goals.