Conflict of Norms in International Law: How to Seek Coexistence Between States’ Right to Renewable Energy and States’ Trade Obligations?

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# List of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>AAP</td>
<td>Ambient Air Pollution</td>
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<tr>
<td>AQG</td>
<td>Air Quality Guidelines</td>
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<td>ASEAN</td>
<td>Association of Southeast Asian Nations</td>
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<td>CRC</td>
<td>Convention on the Rights of the Child</td>
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<td>DCRs</td>
<td>Domestic Content Requirements</td>
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<td>DSB</td>
<td>Dispute Settlement Body</td>
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<td>DSU</td>
<td>Understanding on Rules and Procedures Governing the Settlement of Disputes</td>
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<td>e.g.</td>
<td>for example (exempli gratia)</td>
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<tr>
<td>EEA</td>
<td>European Environment Agency</td>
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<tr>
<td>et al.</td>
<td>and others (et alii)</td>
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<td>EU</td>
<td>European Union</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>GHGs</td>
<td>Greenhouse Gases</td>
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<td>HAP</td>
<td>Household Air Pollution</td>
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<td>i.e.</td>
<td>that is (id est)</td>
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<td>ibid.</td>
<td>in the same place (ibidem)</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>IPCC</td>
<td>Intergovernmental Panel on Climate Change</td>
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<td>LMICs</td>
<td>Low-and Middle-income Countries</td>
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<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>NDCs</td>
<td>Nationally Determined Contributions</td>
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<td>para./paras.</td>
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<tr>
<td>PCIJ</td>
<td>Permanent Court of International Justice</td>
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<td>PM</td>
<td>Particulate Matter</td>
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<td>SCM Agreement</td>
<td>Agreement on Subsidies and Countervailing Measures</td>
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<td>TRIMs Agreement</td>
<td>Agreement on Trade-Related Investment Measures</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNFCCC</td>
<td>United Nations Framework Convention on Climate Change</td>
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<td>UNGA</td>
<td>United Nations General Assembly</td>
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<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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<td>WHO</td>
<td>World Health Organization</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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1 Introduction

States are often called upon in international conferences and assemblies to take measures to promote the development and utilization of renewable energy for environmental protection purposes.\(^1\) Over the past decade, most States have mobilized to increase the share of renewable energy in their national energy mix, through designing and implementing various regulatory policies and fiscal incentives.\(^2\) State practice, as well as opinio juris, may indicate the advent of a new legal norm in international relations, namely a States’ right to renewable energy for environmental protection. Meanwhile, in recent years, trade issues in relation to renewable energy measures have sharply increased in the adjudications of World Trade Organization (WTO). More than ten cases have been filed with the WTO dispute settlement bodies (DSBs) since 2010.\(^3\) The recently decided WTO cases, inter alia, Canada – Renewable Energy (2013) and India – Solar Cells (2016), have given rise to much discussion among scholars and experts in the fields of trade, environment as well as human rights.\(^4\) The WTO practice shows that the exercise of the assumptive States’ right to renewable energy may result in violation of the States’ economic obligations under international trade law.\(^5\) A balance between the interest and value of environment and the goal of trade liberation needs to be struck under this context.

This paper intends to demonstrate a new legal norm of States’ right to renewable energy for environmental protection in international law, and to discuss the potential normative conflict between this right and the WTO obligations. The paper also attempts to seek ways to prevent this normative conflict. Accordingly, the research questions of the paper are threefold: (1) do States have a right to develop and use renewable energy for environmental protection in inter-

\(^3\) See WTO list of disputes cases. (https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm)
\(^5\) The arguments regarding the conflict of norms in the paper are based on an inclusive definition of “conflict”. Accordingly, not only the contradiction between two legal obligations, but also the contradiction between a legal obligation and a legal right, would give rise to the conflict of norms. See Joost Pauwelyn, Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law (Cambridge: Cambridge University Press, 2003), 197-199.
national law? If so, what is the legal basis of this right? (2) does the exercise of this right conflict with States’ obligations under WTO law? If so, (3) how to prevent such a conflict of norms by applying conflict-avoidance approaches in international law? The following three chapters deal with these questions respectively. Chapter Two investigates the legal regimes with regard to the principle of sustainable development, international climate change law, and human rights law, so as to establish the legal linkage between the States’ right to renewable energy and the formal sources of international law. Chapter Three tests whether the implementation of renewable energy measures is consistent with WTO obligations, particularly by examining the typical feed-in tariff (FIT) measure within the realm of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). Based on the findings in the former two chapters, Chapter Four resorts to conflict-avoidance techniques, namely treaty interpretation and political negotiation, so as to prevent the potential normative conflict at issue. The targeted treaty rule for interpretation is Article XX of the General Agreement on Tariffs and Trade (GATT) and the treaty interpretation follows the regulations of the Vienna Convention on the Law of Treaties (VCLT).\(^6\)

As to the methodology of the paper, the arguments are constructed mainly by referring back to the formal sources of international law, i.e. treaties, rules of customary international law and general principles of law within the meaning of Article 38(1) of the Statute of the International Court of Justice (ICJ Statute).\(^7\)

\(^6\) Article 31 and 32 of VCLT.

\(^7\) Article 38(1) of ICJ Statute.
2 States’ Right to Renewable Energy as A Legal Norm

As the primary subject of international law, States have obligations as well as rights. This chapter intends to demonstrate that a right of State to develop and use renewable energy is legally grounded in international law. The establishment of such a right is the first step to identifying and solving the normative conflict discussed in this paper. The following three sections examine the relevant rules within the general principle of sustainable development, pertinent regulations of the international climate change regime, and the human right to life and health.

2.1 A Legal Right Inherent in the General Principle of Sustainable Development

This section is divided into two parts. The first part aims to establish a general principle of sustainable development in international law, by going through the international legal regime as well as the municipal legal systems. The second part discusses the legal linkage between the principle of sustainable development and the States’ right to renewable energy.

2.1.1 Sustainable Development as General Principle in International Law

The identification of the general principles of law under Article 38(1)(c) of the ICJ Statute is generally subjected to two possible approaches in light of international jurisprudence. The first approach is by resorting to municipal legal systems. The other is by referring to international legal regime. This subsection looks into both the international legal regime and the municipal legal systems in establishing a principle of sustainable development in international law.

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2.1.1.1 International Legal Regime

The term “sustainable development” is referred to in the formal texts of more than 300 bilateral and multilateral treaties. At the international level, the 1992 United Nations Framework Convention on Climate Change (UNFCCC) and its protocols are the most conspicuous hard-law instruments to be mentioned. The concept, objectives, measures and principle of sustainable development have been incorporated in these instruments. Moreover, State parties to the WTO Agreement also recognize that their trade and economic activities should be conducted pursuant to the objectives of sustainable development by seeking both to protect and preserve the environment and to promote economic development. In addition, the concept of sustainable development has been incorporated into several significant regional conventions as well.

In practice, the principle of sustainable development and its executive measures have been extensively elaborated by non-binding international instruments, particularly the UNGA resolutions and the declarations of the international conferences. At the 1992 United Nations Conference on Environment and Development, 170 States approved the outcome documents of the conference, namely the Rio Declaration and Agenda 21. The Rio Declaration delineates the principal rights and responsibilities of States for sustainable development. Agenda 21 provides a comprehensive action plan for the enforcement of the Rio Declaration. It analyzes the existing problems for sustainable development and specifies various actions as possible solutions. The outcome documents of the follow-up international conferences on sustainable development largely reaffirm Agenda 21 and recommend actions and measures to take under new circumstances for achieving the sustainable development goals. In 2015, the UNGA adopted the 2030 Agenda for Sustainable Development in which a set of development goals was set out.

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10 Article 2 and 3(4) of the UNFCCC, Article 2 of the Kyoto Protocol to UNFCCC, and Article 2 and 4 of Paris Agreement.
11 Preamble of Agreement Establishing the World Trade Organization.
12 See Article 3(3) of the Treaty on European Union, Article 3 of the Constitutive Act of the African Union, Article 3 of the Convention Establishing the Association of Caribbean States, Article 3 of the Constitutive Treaty of the Union of South American Nations, and Article 1 of the ASEAN Charter.
The concept of sustainable development has also been used in the international decisions made by courts and tribunals. The ICJ emphasized the importance of sustainable development as a new legal norm regarding environmental protection in *Gabcíkovo-Nagymaros Project*.\(^{15}\) In the recent *Pulp Mills* case, the ICJ, in the provisional measures phase, highlighted “the importance of the need to ensure environmental protection of shared natural resources while allowing for sustainable economic development.”\(^{16}\) While the Court did not directly rely on a general principle of sustainable development in its legal reasoning, the legal significance of the concept and objective of sustainable development has been explicitly confirmed by the Court.

In light of the foregoing treaty-law and case-law, we see that the concept and objectives of sustainable development are widely used. It might be argued that the reference only to the “concept” or the “objectives” of “sustainable development”, without explicitly prescribing a “principle”, may, to a certain degree, indicate that sustainable development has not been recognized as a principle in international relations. This argument would impose undue limitation on the meaning of the term “principle” under Article 38(1)(c) of the ICJ Statute. In the *Factory at Chorzów* case, the PCIJ stated that, “it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.”\(^{17}\) This jurisprudence implies that there might be significant overlap between the term “principle” and “conception”. As Crawford noted, the general principles within the meaning of Article 38(1)(c) are mainly abstractions.\(^{18}\) It might be inappropriate to give a rigid definition to the term “principle”. Instead, the concept and objectives form necessary elements of a general principle of law.

### 2.1.1.2 Municipal Legal Systems

At the national level, by investigating the constitutions of States, we see that around fifty States have committed themselves to complying with the principle of sustainable development and achieving the objectives of this principle.\(^{19}\) This number includes developed countries (e.g. Belgium, France and Switzerland), developing countries (e.g. Colombia, Mexico and Thailand), as well as the least developed countries (e.g. Nepal, Uganda and Rwanda). For

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15 ICJ, *Gabcíkovo-Nagymaros Project*, para.140.
17 *Factory at Chorzów*, Merits (1928) PCIJ Ser A, No.17, p.29.
19 This data is based on the research results of the keywords “sustainable development” and “sustainable” at the website of the Constitute Project. ([https://www.constituteproject.org/?lang=en](https://www.constituteproject.org/?lang=en))
instance, France introduced the concept of sustainable development into its constitutional Charter for the Environment in 2004, by setting out that “[p]ublic policies shall promote sustainable development. To this end they shall reconcile the protection and enhancement of the environment with economic development and social progress.”\textsuperscript{20} Noteworthy, in Nepal’s 2015 Constitution, in addition to the rules on sustainable development, it especially lays down that “[t]he State shall pursue a policy of developing and producing renewable energy, ensuring cheap, easily available and dependable supply of energy, and making an appropriate use of it to meet the basic needs of the citizens.”\textsuperscript{21} A consonance can also been found in the Switzerland 2014 revised Constitution.\textsuperscript{22}

Other States have also set the goals of, and elaborated measures for, sustainable development in their economic or environmental legislations and policies. By way of example, in the amended Environmental Protection Law of the People's Republic of China, which entered into force in 2015, it states that one primary objective and purpose of this legislation is to promote the economic and social sustainable development under the newly constructed Article 1. In particular, it explicitly formulates government sectors’ obligation to adopt measures to promote the production and use of clean energy, as a necessary measure to control pollution.\textsuperscript{23}

\textbf{2.1.1.3 Summary}

In light of the foregoing analysis, we see that, over the past several decades, a wide range of States have made binding commitments to the concept and the objectives of sustainable development in international and regional treaties. The legal significance of sustainable development and its objectives has also been emphasized in the decisions of international courts. As discussed above, the concept and objectives of sustainable development constitute elements of a general principle of sustainable development. This principle has been elaborated comprehensively in a range of soft-law international instruments. Even with no legally binding force on States, these instruments contain the good-faith commitments of a wide range of States. The binding as well as the non-binding international instruments make it evident that States have generally applied a principle of sustainable development in their international relations. Furthermore, the comparative study of municipal legal systems also shows that this principle widely exists in municipal laws. An affirmative conclusion in respect of the exist-

\begin{itemize}
\item[\textsuperscript{20}] Constitution of France (revised 2008), Charter for the Environment, Article 6.
\item[\textsuperscript{21}] Constitution of Nepal 2015, Article 50 and 51.
\item[\textsuperscript{22}] Federal Constitution of the Swiss Confederation (revised 2014), Article 89(2).
\item[\textsuperscript{23}] Article 40 of the Environmental Protection Law of the People's Republic of China.
\end{itemize}
ence of a general principle of sustainable development within the meaning of ICJ Statute can be hereby arrived at.\textsuperscript{24}

2.1.2 The Principle of Sustainable Development and the States’ Right to Renewable Energy

The principle of sustainable development imposes obligations of means, rather than obligations of result on States.\textsuperscript{25} An obligation of result refers to a duty of State to reach a certain result. Sustainable development does not require an immediate realization of its goals. It rather recognizes the intrinsically evolutive nature of the objectives, which are changeable under different circumstances.\textsuperscript{26} The principle of sustainable development nevertheless requires a progressive process, in which States should make their best efforts towards their goal of sustainability, by taking all necessary measures in accordance with their economic and technical conditions. Multiple international and national instruments suggest the development and use of renewable energy as an essential measure for achieving the objectives of the principle of sustainable development. States would then be conferred a legal right to adopt crucial measures to promote the renewable energy based on this formal source of international law.

The Brundtland Report of 1987, titled “Our Common Future”, placed renewable energy on the political agenda of States. The Report recognizes a safe and sustainable energy pathway itself as a crucial dimension of sustainable development. It calls for research and funding projects necessary to the rapid development of renewable energy, for the purpose of conserving and efficiently using energy. The Report does not emphasize the environmental benefits of renewable energy, but only focuses on its contribution to energy security and energy efficiency. The wording referring to renewable energy has changed in Agenda 21, in which the use of renewable sources of energy serves as a necessary and prior measure for alleviating the environmental stress as well as for promoting economic and industrial productivity and competitiveness.\textsuperscript{27} The need to promote renewable energy technologies for achieving the sustainable development goals from both economic and environmental perspectives is repeatedly mentioned in follow-up Conference reports.\textsuperscript{28} Noteworthy, the 2030 Agenda for Sustainable Development considers the access to “affordable, reliable, sustainable and modern energy” a

\textsuperscript{24} Some scholars also view sustainable development as a rule of customary international law. See Barral, “Sustainable Development in International Law,” 385–88.

\textsuperscript{25} Ibid., 385.

\textsuperscript{26} Ibid., 390-391.

\textsuperscript{27} UN, 1992. “Results of the World Conference on Environment and Development: Agenda 21”, paras.4.18, 7.46, and 7.51

\textsuperscript{28} See UN, “Johannesburg Plan of Implementation,” paras.9 and 20. UN, “The future We Want,” paras.127 and 128.
goal of sustainable development. Though the aforementioned international instruments have no binding force on States, they are concluded with careful negotiations and include good faith commitments of States. These instruments reveal the genuine view of States regarding the significance of renewable energy to sustainable development.

In addition, the close relationship between renewable energy and sustainable development has also been recognized by many States and States organizations in their domestic or regional legislations and policies. The EU Strategy for Sustainable Development recognizes renewable energy as one object of efforts for coping with the unsustainable challenges, especially climate change. The Chinese 2005 Renewable Energy Law, which lays down various governmental measures for supporting renewable energy, states that the major objectives of this legislation are the protection of the environment and the realization of sustainable economic and social development.

2.2 A Legal Right Entailed by International Climate Change Regime

The ultimate objective of UNFCCC is to stabilize “greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system” within a certain time frame. The Convention does not set specific climate goals for the parties, but rather formulates very general obligations of the parties to take steps to achieve its objective, especially by developing promotion plans and programs, and by international cooperation. In 1997, 192 State signed and ratified the Kyoto Protocol to the UNFCCC. The Annex I parties of the Protocol, consisting of most developed countries except the United States, made the quantified GHGs emission limitation and reduction commitments. In the first

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29 UNGA Resolution, “Transforming our world.”
30 Evans, International Law, 120.
34 Article 2 of UNFCCC.
period from 2008 to 2012, the overall GHGs emissions of the committed States shall be cut by at least 5 per cent below 1990 levels. Article 2(1) of the Kyoto Protocol prescribes the obligation of Annex I parties to implement policies and measures in accordance with national circumstances. The possible policies and measures include the promotion of research, development and use of renewable forms of energy. The legal influence of the Kyoto Protocol is very limited. Only a small number of industrialized States have committed to the reduction goals, whereas the United States, with an assigned target inscribed in Annex B, signed but did not ratify the Protocol. All developing countries were exempted from the binding reduction obligations. Moreover, there is decreasing willingness of Annex I States to make further emission commitments in the second Kyoto period from 2013 to 2020.

The wide and rapid adoption of the Paris Agreement, which was entered into force on 4 November 2016, has greatly encouraged the international community to combat climate change as a whole. The largest GHGs emitters worldwide, *inter alia*, China, the United States and India, have been included and legally bound by a common goal to control the global average temperature rise well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase further to 1.5°C above pre-industrial levels. Besides the long-term temperature goal, the Agreement also aims to reach a global peak of greenhouse gas emissions as soon as possible and to remove greenhouse gases in the second half of this century. Unlike the Kyoto Protocol, the Paris Agreement does not envisage an emission goal with an absolute deadline for each single party.

The overall obligations of States under the Agreement are more about measures rather than result. The “shall” language is absent in setting out the temperature goals as well as GHGs emissions goals in the Agreement, whereas this prescriptive norm is used for establishing targets in the Kyoto Protocol; instead, the term “aim to” is used. In order to achieve the temperature and emission goals, State parties to the Paris Agreement are explicitly obliged to make and maintain nationally determined contributions (NDCs), and to strive to formulate long-

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35 Ibid.
36 Article 2(1)(a)(iv) of Kyoto Protocol.
37 Noteworthy, the major contributions to the total global GHGs emissions are made by the uncommitted States. The three largest producers China, the US and India have contributed around 50% share to the global CO2 emissions in 2014. See Tom Boden, Bob Andres, and Gregg Marland, “World's Countries Ranked by 2014 Total Fossil-fuel CO2 Emissions,” *Carbon Dioxide Information Analysis Center*.
   (http://cdiac.ornl.gov/trends/emis/top2014.tot)
38 Canada, as an Annex I State in the first period, withdrew the Protocol on 15 December 2011 which entered into force on 15 December 2012, while Japan, New Zealand and Russian Federation have expressed not to assume quantitative emission reduction obligations for the second commitment period.
   (http://unfccc.int/files/kyoto_protocol/application/pdf/kp_doha_amendment_english.pdf)
term low greenhouse gas emission development strategies at their discretion.39 The text of the Agreement does not directly refer to exact measures in relation to renewable energy. It nevertheless rules that the States’ efforts to undertake rapid reductions of GHGs emissions shall be made in accordance with best available science.40 While the Agreement does not clearly define the terms “best available science”, State practice would indicate an emergence of international consensus on the certain scope of this term.41 For example, the EU’s first NDCs refers to “2020 climate and energy package” and “2030 climate and energy framework”, as policy tools for achieving the EU’s committed target of at least 40% domestic reduction in greenhouse gas emissions by 2030 compared to 1990.42 One key objective of the 2020 package is to increase the renewable energy share in total community energy consumption to 20%,43 while in the 2030 framework, the target of renewable energy share is enhanced to 27%.44 The Chinese government has also planned to implement preferential taxation policies and improve procurement mechanisms for promoting the development of renewable sources of energies in its action plan to NDCs. In addition, the Indian government elaborates at length its national renewable-energy-related measures and policies in its NDCs.45 Based on the foregoing, we see a consensus of States that the scope of the term “best available science” necessarily includes renewable energy technologies in light of present scientific progress. For achieving the temperature and emission goals of the Paris Agreement, all State parties would be hereby granted a right to accelerate the research, development and utilization of the renewable energy technologies.46

39 Article 4(2) and (19) of Paris Agreement.
40 Ibid., Article 4(1).
41 In the “Renewables 2016 Global Status Report” issued by REN 21, it noted that “[o]ut of the 189 countries that outlined voluntary plans to decelerate greenhouse gas emissions in their Intended Nationally Determined Contributions (INDCs) for COP21, 147 countries mentioned renewable energy, and 167 countries mentioned energy efficiency; in addition, some countries committed to fossil fuel subsidy reform.” 124.
42 EU, “Intended Nationally Determined Contribution of the EU and its Member States”, approved at Riga, 6 March 2015. (http://www4.unfccc.int/ndcregistry/PublishedDocuments/European%20Union%20First/LV-03-06-EU%20INDC.pdf)
45 India, “India's Intended Nationally Determined Contributions – Towards Climate Justice,” submitted on 1st October 2015. (http://www4.unfccc.int/ndcregistry/PublishedDocuments/India%20First/INDIA%20INDC%20TO%20UNFCCC.pdf)
2.3 A Legal Right Necessary to the Fulfillment of Human Right to Life and Health in the Context of Air Pollution

The problem of ambient, or outdoor, air pollution (AAP) is affecting millions of urban residents worldwide. The extensive and everlasting AAP not only significantly lowers people’s living standards, but constitutes a direct threat to people’s life and health.\(^{47}\) One major category of pollutants of AAP is generated as a result of fuel combustion mainly from fossil sources.\(^{48}\) The primary emitters of airborne pollutants include coal-based thermal power plants and other industrial sectors, as well as personal vehicles.\(^{49}\) Moreover, household, or indoor, air pollution (HAP) from solid fuels use, in daily cooking and heating, is found to generate no less danger to people’s life and health. Responsible for most of the home cooking in low-and middle-income countries (LMICs), women and girls are exposed to the largest health threats associated with HAP.\(^{50}\)

The right to life is a fundamental human right under the International Covenant on Civil and Political Rights (ICCPR),\(^{51}\) with an explicit expression in the Universal Declaration of Human Rights (UDHR).\(^{52}\) This right is widely recognized by major regional human rights conventions.\(^{53}\) Other human rights treaties offering special protection for certain groups of people guarantee the right to life as well. The Convention on the Rights of the Child (CRC) lays down that States shall ensure every child’s right to life to the maximum extent possible. Thereby, it requires States to take special consideration of the life of child as well as to take more positive responsibility in this regard. The right to life is a right of absolute character, so


\(^{51}\) Article 6 of ICCPR.

\(^{52}\) Article 3 of UDHR.

no derogation is allowed under any circumstances.\textsuperscript{54} States are bound to pursue an immediate realization of this right since nothing would justify an arbitrary deprivation of people’s life.\textsuperscript{55}

As to the lethal detriment imposed by the ambient and household air pollution, on the one hand, States should not act in a manner that would result in or contribute to further air pollution.\textsuperscript{56} On the other hand, in light of Article 2 of ICCPR, States have positive obligations to protect people’s right to life from any harm imposed by third parties, and should take necessary measures instantly to give effect to such right. Furthermore, it is observed that newborns and young children are most vulnerable to AAP, and girls often are the worst affected by the HAP.\textsuperscript{57} States’ maximized obligations under the CRC demands that they shall adopt all necessarily available means. As noted, the foregoing two types of lethal air pollution are rooted in the use of unclean fuels from conventional fossil sources in an environmentally unsafe manner. To reduce the share of fossil fuels in the total energy mix and to replace them with cleaner sources of energy are imperative. In view of the substantial environmental benefits of renewable energy, as well as its promising industrialization trend, the development and acceleration of this clean form of energy could be the “necessary” measures for States to resolve the problems of air pollution. On this account, States, especially those with seriously polluted air, would have a prevailing right, as well as obligation, to use and develop renewable energy in pursuance of their absolute obligations to the human right to life.

In addition, air pollution obviously does harm to people’s full enjoyment of the right to health. In light of Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), everyone has a right to the enjoyment of the highest attainable standard of health. The ICESCR does not impose an obligation on States to immediately achieve realization of the rights recognized in the Covenant. Rather, under Article 2, States are obliged to fulfill a progressive realization of the Covenant rights, by taking all appropriate means to the maximum of its available resources.\textsuperscript{58} The CRC imposes more restrictive obligations on States in order to ensure the right of children to the highest attainable standard of health. In light of Article 24 of CRC, pursuing a full implementation of this right, States shall take appropriate measures to diminish infant and child mortality. These obligations of measures would then provide persuasive legal grounds for States to adopt policies and regulations for supporting renewable energy, for the reason that renewable energy measures would be the most appro-

\textsuperscript{54} Article 4 of ICCPR.
\textsuperscript{56} Article 2 of ICCPR.
\textsuperscript{57} WHO, “Burning Opportunity,” ix-x.
\textsuperscript{58} Article 2 of ICESCR.
appropriate measures for improving the health conditions of all people, especially children, under the context of air pollution caused primarily by the burning of fossil fuels.

2.4 Conclusion

A States’ right to renewable energy entails that each State is permitted to support research in the renewable energy technologies, to promote the industrial production of renewable energy, and to ensure a wide use of renewable energy by people in their daily life, by adopting necessary and appropriate policies, regulations and measures according to their national circumstances. This right of State does not stand alone. It is substantially grounded in the obligation of means under the principle of sustainable development, the obligation to take significant efforts in accordance with best available science for achieving the temperature and emission goals within the climate change regime, and the obligation to take all necessarily available measures for the protection of the human right to life and health. The scope of this right is limited to the fulfilment of the aforementioned obligations. The exercise of this right should pursue the objective of sustainable development, the reduction of GHGs emissions, and the protection and promotion of human rights.
3 Renewable Energy Policies under the WTO Regime

This Chapter intends to demonstrate that the exercise of States’ right to renewable energy could possibly violate the WTO obligations. The first section gives a general introduction to the existing renewable energy policies. In the second section, I select the FIT as the target measure for the WTO-consistency examination. This examination is then carried out under the context of the SCM Agreement. The third section analyzes the applicability of Article XX of GATT to the SCM Agreement.

3.1 A Brief Review of Global Renewable Energy Policies

Even before the enter-into-force of the Paris Agreement by the end of 2016, a vast majority of States designed and implemented policies and measures to promote renewable energy technologies used in power generation, heating and cooling, and the transportation sectors. The renewable technology for power generation is the primary and common concern of global policy-makers. States often set ambitious and long-term renewable energy targets and thereby adopt various policy mechanisms for achieving these targets, including regulatory policies, fiscal incentives and public financing options. The FIT is the most popular regulatory policy among States. The renewable-transport-fuel mandate is another policy tool widely adopted by the high-income States. In addition, States also adopt fiscal incentives and financing mechanisms to accelerate the investments in renewable power and fuels, such as capital subsidy, grants, tax reductions, and governmental loans. While high-income States are the major supporters of renewable energy, some middle-income States, e.g. China, India and Brazil, have also adopted comprehensive regulatory policies and financial measures to accelerate the significant investment in and the rapid deployment of renewable energy.

A FIT policy generally includes a long-term electricity purchase contract between the local or central government and certain producers—individuals or companies—of renewable electricity. Currently the FIT policy contains two forms of design: the fixed FIT and the feed-in pre-

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60 Ibid.
61 According to REN 21, 173 countries have established renewable energy targets at national and/or sub-national level by the end of 2015. Ibid., 108.
64 Ibid., 21.
mium. As to the former design, the government sets a fixed rate of price in the contract for each unit of electricity generated by renewable sources of energy. The policy-makers would set various levels of payment to electricity producers which depends on the type of renewable energy sources, project sizes or other factors. The feed-in premium is an evolved version of the fixed FIT, in which the payment is not fixed but is based on the market price for electricity. While the fixed FIT is still the most common FIT policy, the feed-in premium has been increasingly introduced to and adopted by States. By way of example, the EU has encouraged its member States to phase out the fixed FIT and replace it with the market-based price finding mechanisms, e.g. the feed-in premium. A growing number of EU States have started to make such a shift, such as Germany, Italy, and Finland.

The existing FIT policies at national or sub-national level often prescribe extra domestic content requirements (DCRs) in order to bolster the local manufacturers. Under the DCRs, the generators of electricity from renewables technologies are imposed a burden to buy a certain portion of equipment from local producers. This policy is not primarily designed for the green purpose of promoting renewable energy deployment, but rather based on certain political incentives, such as local job creations. Either a FIT policy per se, a FIT with DCRs, or the DCRs per se could possibly be WTO-inconsistent: a FIT policy per se could be established as a subsidy so as to be challenged under the regulations of prohibited or actionable subsidies; a FIT with DCRs would be identified as a prohibited subsidy if a subsidy is established; and the DCRs per se would violate Article 2 of the Agreement on Trade-Related Investment Measures (TRIMs) and Article III of GATT. The legal issues regarding the former two measures are more contentious than the last one. The key question to such contentiousness is whether a FIT policy constitutes a subsidy under the regulations of the SCM Agreement. The following section addresses this question.

67 Ibid., 12.
69 Italy, “Feed-in Premium for Renewable Energy Sources Other Than Photovoltaic” (Ministerial Decree June 23th 2016).
70 Finland, “Finland’s National Action Plan for Promoting Energy from Renewable Sources”.
72 Ibid., 10.
While there are various policies and measures for promoting the renewable energy technologies and industries, I have selected the FIT as the target measure for the following WTO-consistency examination for two reasons. First, currently the FIT measure would be the most representative of all other measures of the same nature due to its wide application. It is also a measure which is often involved in the trade issues pertaining to renewable energy. Second, the legal examination in the following sections is to establish potential WTO-inconsistencies of the renewable energy policies, and so as to design the possible solutions for such norm conflict. The core solution designed in the next chapter for addressing this normative conflict is through an appropriate interpretation of the general exceptions to any WTO-inconsistencies under Article XX of GATT. Thereby, the types of the WTO inconsistencies, as long as legally established, are not decisive factors for invoking Article XX. A trade-issue caused by policies or measures other than the FIT could also refer to this interpretative solution.

### 3.2 FIT under the WTO Subsidy Regime

The 1994 GATT regulates subsidies primarily under Article VI and XVI, which are comprehensive and unclear. Currently, issues regarding subsidies and subsidized trade fall primarily within the realm of the SCM Agreement. WTO law does not absolutely prohibit subsidies, but differentiates between three types of subsidies, i.e. prohibited subsidies, actionable subsidies, and currently non-active subsidies. Most disputes to the DSB, pertaining to renewable energy policies, are filed under the provisions of prohibited subsidies, including the settled disputes with a final determination, e.g. *Canada – Renewable Energy (2013)*\(^{73}\) and *India – Solar Cells (2016)*\(^{74}\), as well as other pending disputes, e.g. *US – Renewable Energy* complained by India,\(^{75}\) and *EU – Energy Package* filed by Russia.\(^ {76}\) In *US – Renewable Energy*, India also challenged the US measures under the terms of actionable subsidies in consultation. India nevertheless dropped this claim when it proposed establishing a panel.\(^ {77}\)

This section aims to demonstrate that the implementation of a FIT measure would possibly violate Members’ obligations under the subsidy regime. Three requirements shall be met in

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\(^{74}\) Request for consultations by the United States, *India – Certain Measures Relating to Solar Cells and Solar Modules (2016)*. The claims under the SCM Agreement were nevertheless discarded by the claimant in the panel process.

\(^{75}\) Request for consultations by India, *United States – Certain Measures Relating to the Renewable Energy Sector*. A panel was established for this dispute on 21 March 2017.

\(^{76}\) Request for consultations by the Russian Federation, *European Union and its Member States – Certain Measures Relating to the Energy Sector*. A panel was established on 20 July 2015 and a panel report is scheduled to be issued in May 2017.

\(^{77}\) Request for the establishment of a panel by India, *US – Renewable Energy*. 
establishing the WTO-inconsistency under the SCM Agreement. First, the measure at issue is a subsidy within the meaning of Article 1 of the SCM Agreement. Second, the measure is specific under Article 2 of the SCM Agreement. Third, this disputed measure is prohibited under Article 3, or causes adverse effects to the interests of other Members under Article 5. The following subsections examine these three requirements respectively.

3.2.1 FIT as A Subsidy

According to Article 1 of the SCM Agreement, the concept of subsidy consists of three elements: (1) there is a financial contribution or any form of income or price support under Article XVI of GATT 1994, (2) by government or any public body, and (3) a benefit is conferred. Pertaining to the requirement of “a financial contribution”, the Agreement lays down an exhaustive list of types. These fixed types include a direct transfer of funds, government revenue that is otherwise due is foregone or not collected, government provision of goods or services other than general infrastructure, government purchase of goods, and government payments to a funding mechanism, or entrusts or directs a private body. In Canada – Renewable Energy (2013), the panel concluded that the challenged FIT measures are “purchases of goods”.

No issue arose with regard to the second element of subsidy in Canada – Renewable Energy (2013). Obviously, the challenged FIT measures were implemented by the government of Ontario. Nevertheless, the concept of “public body” has caused controversies in trade disputes in relation to non-market economies. In case a FIT measure was taken by a non-market economy, the examination of the second element of the three-tier test should be subject to further scrutiny in light of the WTO case-law.

The analysis of “benefit”, as to the third element of subsidy, by the Appellate Body in Canada – Renewable Energy (2013) has given rise to many controversies. Article 1.1 of the SCM Agreement briefly refers to the concept of “benefit”, without giving any instructions on how to identify and calculate a benefit. Article 14 nevertheless provides some guidance. Under this provision, any party investigating an alleged subsidy shall adopt a method for calculating the benefit to the recipient conferred in accordance with its guidelines. As to the purchase of goods as a type of financial contribution, the investigation authority shall establish that the

80 See United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (2011) and United States – Countervailing Duty Measures on Certain Products from China (2014).
purchase is made for more than adequate remuneration, in order to consider such purchase as conferring a benefit. In addition, the second paragraph of Article 14(d) sets forth that “[t]he adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase…” 81 The WTO adjudications frequently refer to this provision as a useful context for “benefit” analysis. In Canada – Aircraft (1999), the Appellate Body considered that certain comparison was inherent to the word “benefit” and the marketplace provided an appropriate basis for such comparison since “the trade-distorting potential of a ‘financial contribution’ can be identified by determining whether the recipient has received a ‘financial contribution’ on terms more favorable than those available to the recipient in the market.” 82 The WTO case-law thereafter has consolidated this methodology. Concerning the case involving a FIT measure, the complaining party could establish the “benefit” by comparing the appropriate market benchmark. Alternatively, Rubini proposed a liberal approach in this regard, through a claim that a FIT measure did “inherently and purposely” confer a benefit. 83

A new difficulty arose in Canada – Renewable Energy (2013) pertaining to the benefit analysis. 84 The Appellate Body adopted an innovative method for defining the concept “market”, for the purpose of identifying the appropriate market benchmark for comparison in the benefit analysis. It attempted to define the electricity market from both the demand-side and the supply-side. By doing so it concluded that there was a distinct market for electricity produced from renewables, other than the market of electricity generated from other energy sources. The implementation of this innovative approach led to a politically desirable outcome: the determination of FIT as a subsidy was avoided and the DCR was ruled out because it violated the TRIMs Agreement and the GATT. This approach might be legitimate in light of its potential environmental benefits, but is legally problematic for three reasons.

First of all, according to the Appellate Body, “[t]he definition of the relevant market is central to, and a prerequisite for, a benefit analysis under Article 1.1(b) the SCM Agreement.” This conclusion seems problematic. On the one hand, the wording in Article 1.1(b) does not mention “market”. On the other hand, the essence of a benefit analysis was to determine whether a financial contribution was more favorable than those available in the market for the recipient. Assuming the financial contribution is X and the collection of other available measures is Y,

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81 Article 14 (d) of the SCM Agreement.
84 Ibid., 911.
it then needs to prove \( X+Y > Y \). As long as \( X \) is positive, there would be a benefit conferred. In *US – Large Civil Aircraft (2nd complaint) (2012)*, the Appellate Body noted that “the determination of ‘benefit’ under Article 1.1(b) of the SCM Agreement seeks to identify whether the financial contribution has made the recipient ‘better off’ than it would otherwise have been, absent that contribution.”\(^{85}\) A definition of market thereby was not indispensable as the Appellate Body stated in *Canada – Renewable Energy (2013)*.

Secondly, there is no doubt that a comparison of the prices of products on the market is an appropriate approach for the benefit analysis; even if it is not inevitable *per se*. The methodology found by the Appellate Body for defining the “market” under the context of Article 1.1(b) would be questionable. To reach this finding, the Appellate Body referred to an earlier report in *EC and certain member States – Large Civil Aircraft (2011)*, which undertook an analysis of demand-side as well as supply-side for addressing the definition of market within Article 6.3(a) and (b) of the SCM Agreement.\(^{86}\) These two provisions set forth the conditions in which “serious prejudice” to the interests of another Member may arise due to the use of subsidy.\(^{87}\) Obviously, the examination of market definition within Article 6.3(a) and (b), so as to identify an *actionable subsidy*, is posterior to the establishment of a subsidy. If Article 1.1 requires considerations of both demand-side and supply-side factors for defining a relevant market, this would render an identical or largely overlap examination within Article 6.3(a) and (b) redundant. This would be inconsistent with the interpretation principle of effectiveness. As the Appellate Body noted in *US – Gasoline (1996)*, “[o]ne of the corollaries of the ‘general rule of interpretation’ in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”\(^{88}\) Considering that the SCM Agreement only prohibits limited categories of subsidies, the scope of “market” in the benefit analysis for the definition of subsidy should be broader than the same concept within the regulations of challengeable subsidies. By considering the supply-side factors, the market definition would be largely narrowed down, which is evidenced by the denial of a single market existing for both electricity from renewables and electricity from conventional energy sources in *Canada – Renewable Energy (2013)*.\(^{89}\) This would not be the purpose of a preliminary examination of subsidy.

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87 Article 5(c) of the SCM Agreement.


89 Rubini also noted other potential legal problems resulted from a narrow market definition. The conferring of benefit would less likely be proven in all types of disputes, not only those involving “green” matters. The
Thirdly, even assuming the supply-side factors were relevant, the Appellate Body’s reasoning in this regard was not sufficient to reach its conclusion. The Appellate Body recognized that “electricity is physically identical, regardless of how it is generated, suggests that there is high demand-side substitutability between electricity generated through different technologies.” 90

From the demand-side, the physical characteristics, end users and consumer preference of the two forms of electricity were almost identical, which strongly indicated that these two products were sufficiently substitutable in a single market. The Appellate Body nevertheless reached the conclusion of separate markets after considering the supply-side factors. As the Appellate Body observed, there are “differences in cost structures and operating costs and characteristics between wind power as well as solar PV technologies and other technologies.” 91 The former has very high capital costs, very low operating costs, and fewer economies of scale. In addition, electricity from these renewables technologies was produced intermittently, depended on the sunshine and the wind, and could not serve for the purposes of baseload and peak-load power provision. Therefore, these facts meant that the wind power and solar PV generators were very unlikely to exercise any price constraints on the conventional generators. As Rubini pointed out, these facts presented by the Appellate Body per se were not relevant to the essential analysis of substitutability. The Appellate Body should at least have made further explanations as to how these factors had significantly changed the highly substitutive status of the products from a demand-side perspective. 92 In light of the preceding reasons, and considering other dissenting views put forward by other prominent scholars, 93 I would reject the innovative methodology implemented by the Appellate Body and agree that the renewable electricity and conventional electricity are in the same market in the Canadian case.

By examining a FIT measure through the foregoing three-tier test, we see that, in a trade dispute involving a FIT measure, the measure at issue could very possibly constitute a financial contribution by a government or a public body which conferred a benefit within the definition of subsidy under Article 1 of the SCM Agreement.

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91 Ibid., para.5.174.
92 Rubini, “The Good, the Bad, and the Ugly”, 913.
3.2.2 Specificity Requirement

Not all subsidies are regulated by the SCM Agreement, but only certain specific types in accordance with Article 2. Therefore, a WTO ruled subsidy should be specific to either certain enterprise or industry (Article 2.1), or enterprises located within a designated geographic region (Article 2.2), or prohibited subsidies under Article 3 (Article 2.3). The FIT policy, or other renewable energy policies of a subsidy nature, often target the electricity producers which use certain or all types of renewable energy technologies. These policies may very possibly fall within the scope of enterprise or industry specificity. Still, the test of such specificity should follow the three principles set out in the subparagraphs of Article 2.1. Moreover, a FIT measure with DCRs may indicate that the granting government targets the products using domestic input as the subject of subsidization. Such a measure would thereby be identified as a prohibited subsidy under Article 3.1(b), which is regarded as specific automatically.

3.2.3 FIT: Prohibited or Challengeable?

The forgoing subsections demonstrated that a FIT measure would constitute a specific subsidy which is subject to the provisions of prohibited subsidies and actionable subsidies. In Canada – Renewable Energy (2013), Japan claimed that the disputed measures taken by Canada, i.e. the FIT-related measures for wind and solar PV projects which prescribed a minimum required domestic content level, constituted prohibited subsidies contingent upon the use of domestic over imported goods within the meaning of Articles 3.1(b). The specific requirements laid down in this provision were not examined by the panel, since it concluded that the complaints failed to establish that the FIT-related measures constituted subsidies. Based on the finding that a FIT measure does constitute a subsidy, I will first examine whether a FIT measure with the DCRs falls under the regulation of Article 3.1(b). In Canada – Autos (2000), the Appellate Body, by looking into the relevant context of this provision, concluded that Article 3.1(b) extended to subsidies contingent both “de jure” and “de facto” upon the use of domestic over imported goods, even though this provision did not directly use these languages. In both Canadian – Renewable Energy (2013) and India – Solar Cells (2016), the formulation of DCRs could be easily found in the submitted FIT policies adopted by the respondent States. In these cases, it would not be difficult to establish that a FIT measure with

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94 Article 1.2 of the SCM Agreement.
95 Article 2.1 (a), (b) and (c) of the SCM Agreement.
DCRs is a subsidy contingent *de jure* upon the use of domestic over imported goods under Article 3.1(b).

Does a pure FIT policy, without any requirement of domestic content, violate the regulations in the SCM Agreement? Even without being prohibited by Article 3.1 and 3.2, such a measure could still possibly fall within the rule of actionable subsidies, in case it causes adverse effects to the interests of other Members.\(^98\) The subparagraphs (a) to (c) of Article 5 set out three exclusive conditions of such “adverse effects”, *inter alia*, injury to domestic industry,\(^99\) nullification or impairment of benefits,\(^100\) and serious prejudice to interests.\(^101\) In the pending case *US – Renewable Energy*, India challenged certain measures taken by several states of the US with relation to domestic content requirements and subsidies in the renewable energy sector. In consultation, India put forward that these US measures might constitute prohibited subsidies within Article 3.1(b) and 3.2, or may cause serious prejudice to India’s interests by displacing or impeding the imports of like products from India into the US market on the terms of Articles 5(a), 5(c), 6.3(a), and 6.3(c).\(^102\) Only the former claim was retained in the panel process by India, probably because all the contentious US legal instruments referred to contain DCRs. There is still a possibility, at least in theory, that a pure FIT would be challenged under the provisions of actionable subsidies. By way of example, imagine the electricity market of State X was mainly dominated by the conventional electricity producers from State Y. Since 2010, the renewable energy technologies in State X have been greatly improved due to the constant efforts of the research institutes of State X. Thereafter, the renewable electricity industry in State X started to rapidly grow. In the meanwhile, the renewables technologies are underdeveloped in State Y and no company in State Y possesses the capability to generate electricity from renewable sources of energy. In 2015, State X designed and implemented an unconditional FIT policy to accelerate the production of renewable electricity in its domestic market. This policy mainly benefits the domestic renewable electricity companies in State X due to their obvious technical advantages. The renewable electricity price is significantly lowered in State X because of the FIT policy. The conventional electricity producers from State Y have lost their sale of electricity in the electricity market of State X because more customers choose to buy the cheaper green electricity. In this circumstance, the FIT without DCRs used by State X would cause serious prejudice to the interests of State Y within the meaning of Article 5(c) and 6.3(c).\(^103\)

\(^{98}\) The chapeau of Article 5 of the SCM Agreement.

\(^{99}\) Article 5(a) of the SCM Agreement.

\(^{100}\) Article 5(b) of the SCM Agreement.

\(^{101}\) Article 5(c) of the SCM Agreement.

\(^{102}\) Request for consultations by India, *US – Renewable Energy*.

\(^{103}\) Article 5(c) and 6.3(c)of the SCM Agreement.
3.2.4 Summary

In light of the foregoing arguments, we see that a FIT measure would be identified as a subsidy under Article 1 of the SCM Agreement. A FIT measure, with or without DCRs, could meet the specific requirement under Article 2. Therefore, both forms of FIT measures would be subject to the regulations of prohibited subsidies and actionable subsidies. A FIT measure with DCRs would very possibly be identified as a prohibited subsidy under Article 3.1. An unconditioned FIT measure could possibly cause adverse effects to the interests of other Members, and thereby State granting such a subsidy should remove the adverse effects or withdraw the subsidy.104

3.3 Applicability of Article XX of GATT to Subsidies

Article XX of GATT lays down an exhaustive list of general exceptions to justify breaches of GATT obligations, including but not limited to national treatment, most-favored-nation treatment, and quantitative restrictions. The purpose of this provision is to balance the objective of trade liberation and other social values and interests, such as public health, environment, employment, and national security.105 The excepted measures include those necessary to protect human, animal or plant life or health,106 to secure the compliance with laws or regulations which are not inconsistent with the provisions of this Agreement,107 and measures relating to the conservation of exhaustible natural resources.108 Under Article XX, the rules of the principle of sustainable development, environmental law as well as human rights law would be considered in the WTO regime. While, according to the chapeau of Article XX, any inconsistency with “this Agreement” will be justified under the sub-paragraphs (a) to (j), concerns may arise pertaining to the applicability of Article XX to WTO agreements other than GATT.109 The literal meaning of the term “this Agreement” seems to limit the scope of application only to violations within the GATT.110 The WTO case-law has some different implications.

104 Article 7.8 of the SCM Agreement.
106 Article XX (b) of GATT.
107 Article XX (d) of GATT.
108 Article XX (g) of GATT.
In *China – Publications and Audiovisual Products (2009)*, the United States challenged certain trade restrictive measures imposed by China on certain imported products and services, which would be possibly inconsistent with China’s Accession Protocol. China invoked Article XX (a) as a defense for derogation from its trade commitments under the Accession Protocol. The alleged legal basis of China’s invocation is located in the introductory clause of paragraph 5.1 under its Accession Protocol. The beginning of this paragraph sets forth that “[w]ithout prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement…” The Appellate Body observed that “the reference to China's power to regulate trade ‘in a manner consistent with the WTO Agreement’ seems to us to encompass both … and China's power to take regulatory action that derogates from WTO obligations that would otherwise constrain China's exercise of such power—that is, to relevant exceptions.”

It then confirmed the possibility of such defense. Nevertheless, in *China – Raw Materials (2012)*, China relied upon Article XX (g) of GATT to justify its export duties that were inconsistent with its obligations under paragraph 11.3 of the Accession Protocol. The Appellate Body rejected the availability of the GATT exceptions to these non-GATT obligations. This conclusion was grounded in the argument that, unlike paragraph 5.1, there was no textual reference to GATT in paragraph 11.3. In this vein, the WTO jurisprudence shows that Article XX of GATT could exempt obligations under other non-GATT agreements if the latter agreements have incorporated the provisions of GATT by cross-reference.

Can the general exceptions under GATT apply to the provisions of the SCM Agreement? This question is thorny even for accomplished legal scholars. On the one hand, the SCM Agreement contains no specific reference to Article XX of the GATT. Furthermore, the SCM Agreement builds upon and expands the GATT regulations of subsidies and countervailing duties. A provision of the SCM Agreement would be *lex posterior* and *lex specialis* if it conflicts with a relevant GATT rule, and the former thereby prevails over the latter. The “general interpretative note to Annex 1A” of the WTO Agreement confirms that, “[i]n the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization”.

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112 Ibid., 233.
115 Rubini, “‘The Good, the Bad, and the Ugly’,” 910.
116 Article XVI, Article VI, and Article III:8(b) of GATT.
Trade Organization … the provision of the other agreement shall prevail to the extent of the conflict.”117 If the SCM Agreement lays down strict disciplines on subsidies, the loose regulations in the GATT may hardly challenge them.

However, the Preamble to the WTO Agreement clarifies the objectives and purposes of this Agreement, which includes raising the standards of living, ensuring full employment, promoting sustainable development, protecting and preserving environment, and addressing the concerns of developing countries. Indisputably, the interpretation and application of regulations in the WTO Agreement should reflect these purposes. It is nevertheless not so clear whether this Preamble applies to Annex 1A agreements. In the earlier case Brazil – Desiccated Coconut (1997), the Appellate Body observed that the WTO Agreement was a “single undertaking”, within which, “all WTO Members are bound by all the rights and obligations in the WTO Agreement and its Annexes 1, 2 and 3.”118 This WTO case-law would imply that the implementation of Annex 1A agreements should not arbitrarily derogate the objectives and purposes enshrined in the Preamble attached to the WTO Agreement. Furthermore, panels and the Appellate Body often refer to the Preamble in their interpretation of provisions to the Annex 1A Agreements. By way of example, in US – Shrimp (1998), the Appellate Body noted that “[t]he preamble of the WTO Agreement -- which informs not only the GATT 1994, but also the other covered agreements -- explicitly acknowledges ‘the objective of sustainable development’.”119 By considering this Preamble objective, the Appellate Body concluded that the term “natural resources” within Article XX(g) is not static but rather evolutionary.120 In EC – Tariff Preferences (2004), the Preamble objective of ensuring the interests of developing countries in international trade was cited for interpreting provisions of the Enabling Clause.121 From the perspective of a “single undertaking”, and on terms of the WTO case-law in this regard, the interpretation of the SCM Agreement should also give consideration to the objectives attached to the WTO Agreement. As the Appellate Body noted in EC – Tariff Preferences (2004), “[t]he Preamble to the WTO Agreement identifies certain objectives that may be pursued by Members through measures that would have to be justified under the ‘General Exceptions’ of Article XX.”122 It would therefore not be the WTO negotiators’ intention to set

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117 General interpretative note to Annex 1A Multilateral Agreements on Trade in Goods.
120 Ibid., 130.
122 Ibid., para.94.
up a restrictive discipline of subsidies under the SCM Agreement, without attempting to strike a balance between trade liberation and other social interests.

Furthermore, the wording of Article 32.1 of the SCM Agreement may leave a door open to the GATT general exceptions. This provision provides that “[n]o specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.” The footnote to this provision further stated that “[t]his paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate.” A logic deduction from the combination of these two paragraphs would be that any action pursuant to the relevant provisions of GATT, which have been interpreted by the SCM Agreement, can be taken within Article 32.1. In Brazil – Desiccated Coconut (1997), the panel observed in a textual analysis that Article 32.1 made it clear that the SCM Agreement was an interpretation of relevant provisions of GATT. The meaning of Article XVI, titled “subsidies”, would only be established by referring to relevant “interpretations” in the SCM Agreement, such as provisions regulating the definition of subsidies, prohibited subsidies, and actionable subsidies. The above analysis makes evident that there are very close objective connections between the SCM Agreement and GATT. Equally important is that Article XX does not have an interpretative function for any provisions of subsidies and countervailing duties. It would not create conflict with the “interpretative” SCM Agreement. Therefore, the issue of lex specialis, as confirmed by the general interpretive note to Annex 1A, would not arise. Rather, Article XX provides WTO Member States with potential grounds of justification for their WTO-inconsistent measures. The general exceptions would not alter the illegal or quasi-illegal nature of prohibited or actionable subsidies under the SCM Agreement. If and when the exceptional conditions set out in Article XX cease to exist, the disputed measures would be challenged before the DSB again.

In summary, the foregoing arguments show that the SCM Agreement is closely related to the GATT provisions regulating subsidies and countervailing duties. In light of the Preamble objectives attached to the WTO Agreement, and considering the importance of Article XX for fulfilling such objectives, the general exceptions, which exempt all the obligations within GATT, could very likely justify measures inconsistent with the SCM Agreement. The invocation of Article XX for such a purpose would not give rise to the issue of lex specialis, since

123 Article 32.1 of the SCM Agreement.
124 Footnote 56 to Article 32.1 of the SCM Agreement.
126 The panel noted that “the meaning of Article VI of GATT 1994 cannot be established without reference to the provisions of the SCM Agreement.” Ibid.
this non-interpretative provision would not be contrary to any interpretative regulations in the SCM Agreement.

3.4 Conclusion

This Chapter has mainly discussed the WTO-consistency of the FIT measure for promoting renewable energy development and utilization. While the Appellate Body left the determination of a subsidy out of the Canadian case, its legal reasoning was flawed in the benefit analysis. It is more likely that a FIT measure constitutes a subsidy within the meaning of Article 1 of the SCM Agreement. A FIT measure, with or without DCRs, would also meet the specificity requirement since it targets only the renewable energy industries. It is likely that these two types of FIT measures would lead to a breach of WTO obligations under the terms of prohibited or actionable subsidies. In the end of this Chapter, I elaborated the possibility that Article XX of GATT would apply to the SCM Agreement by analyzing relevant provisions in the SCM Agreement, and in consideration of the purpose and objective of the WTO Agreement. The next Chapter discusses how Article XX could provide a justification to a WTO-inconsistent FIT measure.
4 Seeking Coexistence Between Conflicting Legal Norms

In light of the arguments presented in the second chapter, States are granted a right in international law to use and develop renewable energy technologies for fulfilling their obligations under the principle of sustainable development, for addressing the climate change problems within the UNFCCC and its covered agreements, and for protecting and promoting the human right to life and health in the context of serious air pollution. As noted in last Chapter, the exercise of such a right, by implementing the FIT or other renewable energy policies or measures, may conflict with States’ obligations under WTO law. This conflict of norms would just be “potential conflict”, which could be prevented by resorting to conflict-avoidance techniques at both legal and political levels. On the one hand, at the legal level, when a dispute regarding renewable energy policies is filed to the WTO dispute settlement, the WTO adjudicators could avoid a normative conflict by interpreting the WTO agreements in consideration of other international legal instruments within their jurisdiction. As noted, Article XX of GATT would be a bridge between these conflicting norms of different legal disciplines. An appropriate interpretation and application of this provision would maintain coexistence between these conflicting legal norms. On the other hand, States may resort to political negotiations to prevent the conflict of norms. States could draft a new legal norm, which clearly indicates a derogation from another norm. They may also have recourse to bilateral or multilateral consultation so as to avert a challenge of disputed measures before the WTO adjudicating bodies. By doing so, a potential normative conflict might be frozen before the litigation stage. This Chapter mainly addresses the question of how an appropriate interpretation of Article XX could avoid the potential normative conflict, in other words, how a WTO-inconsistent renewable energy measure could be justified under Article XX. The political pathway for preventing the conflict of norms will also be briefly discussed.

4.1 Article XX: A Bridge Between Conflicting Legal Norms

Under Article XX, the considerations of human rights, environment and sustainable development are incorporated into the regulations of WTO law. In light of the general interpretative rules laid down in the VCLT, and Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the DSB should take into account relevant international legal instruments not covered by the WTO agreements in its clarification of trade

127 Pauwelyn, Conflict of Norms in Public International Law, 237-38.
128 Ibid., 239.
rules. According to the WTO case-law, a two-tier test is set forth for examining measures under Article XX. The DSB should first examine the provisional consistency of a measure under one of the subparagraphs of Article XX. Subsequently, the DSB should check whether the disputed measure meets the requirements of the introductory clauses of Article XX. The following four subsections discuss the appropriate interpretation of the subparagraphs (b), (d), and (g), as well as the chapeau of Article XX in consideration of the relevant human rights and environmental treaties and the principle of sustainable development. The paper aims to analyze how this interpretation could justify WTO-inconsistent policies or measures with respect to renewable energy. The FIT measure with, or without DCRs, will be used again as example measure.

4.1.1 Article XX(b) and the Human Right to Life and Health

Article XX(b) provides a defense for measures which are necessary for protecting human, animal or plant life or health. The WTO case-law has established that, in determining whether a measure is provisionally consistent with Article XX(b), a two-tier test should be undertaken. The measure at issue should be of a policy objective to protect human, animal or plant life or health on the one hand, and, on the other, this measure should be necessary to fulfill its policy objective. The following analysis will demonstrate that an unconditioned FIT measure could be justified under this provision, but a FIT measure with DCRs would not.

Pertaining to the first element of the two-tier test, the wording “protect human life or health” inevitably links to the considerations of human right to life and health. Member States bear both the economic obligations under the WTO agreements and human rights obligations under human rights treaties and customary international law. Noteworthy, in light of Article 4(2) of ICCPR, no derogation from the human right to life is allowed. In case of conflict, the obligations to this non-derogative human right would prevail over any economic obligations. Taking into account the common commitments made by the Member States in human rights treaties, the scope of the terms “human life or health” within the meaning of Article XX(b) of GATT should not be narrower than the scope of the same terms under human rights treaties. Accordingly, a measure closely related to the protection of human life and health under the human rights regime would fall within the rule of the subparagraph (b) of Article XX.

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As discussed in Chapter Two, serious air pollution in many developing countries has caused significant damage and immediate threat to people’s life and health. The utilization of renewable energy technologies in sectors of power generation, traffic and heating would significantly contribute to addressing the problems of air pollution in an effective and sustainable manner. Complying with the international human rights treaties, States should take all available measures necessary for alleviating and solving the problem of air pollution. In this context, States have a right to develop and use renewable energy for fulfilling their human rights obligations. In practice, some States have elaborated in their environmental laws or regulation that the objective of implementing renewable energy policy is to control pollution.\textsuperscript{132} In \textit{US – Gasoline (1996)}, the panel confirmed that, “a policy to reduce air pollution resulting from the consumption of gasoline was a policy within the range of those concerning the protection of human, animal and plant life or health mentioned in Article XX(b).”\textsuperscript{133} Thereby, a renewable energy policy or measure aimed at reducing air pollution may very possibly satisfy the test of policy objective under Article XX(b). While it would be easy to establish that the policy objective pursued by a pure FIT measure is to protect human life or health within the meaning of Article XX(b), it might be doubtful whether a FIT with DCRs pursues the same policy objective. Obviously, the DCRs \textit{per se} could hardly be linked with the protection of human life and health. Nevertheless, if we see a FIT measure with DCRs as a whole, the overall design and structure of this measure is primarily to promote the production of renewable electricity, even though it also intends to promote local employment. The subparagraph (b) does not exclude a measure of plural objectives. Therefore, I would consider that a FIT with DCRs also falls within the range of policies covered by Article XX(b).

Second, regarding the second element of the provisional consistency test under Article XX(b), the WTO jurisprudence has given specific considerations to the value of human rights and health in their interpretation of the term “necessary”. In \textit{Korea – Various Measures on Beef (2000)}, the Appellate Body, in the examination of the “necessity” under the context of Article XX(d), concluded that, “[t]he more vital or important those common interests or values are, the easier it would be to accept as ‘necessary’ a measure designed as an enforcement instrument.”\textsuperscript{134} This case-law was recalled by the Appellate Body in its analysis of “necessity” within the meaning of Article XX(b) in \textit{EC – Asbestos (2001)}. Meanwhile, the Appellate Body affirmed that the value pursued by the measure at issue, for preserving human life and

\textsuperscript{132} For example, Article 40 of the Environmental Protection Law of the People's Republic of China.
health, was “both vital and important in the highest degree.” Accordingly, a FIT measure for protecting human life and health should be given more favorable consideration in the necessity test.

Nonetheless, a policy objective to protect human life and health per se is not sufficient to meet all the requirements of “necessity” within the meaning of Article XX(b). The Appellate Body pointed out in Brazil – Retreaded Tyres (2007) that, in determining whether a measure is necessary under Article XX (b), the panel should consider relevant factors, “particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness.” The State invoking a defense under Article XX(b) thereby bears more burden to prove the necessity of the measure at issue. According to the Appellate Body, a justified measure under Article XX(b) should bring about a material contribution to the achievement of its policy objective. A material contribution could be in existence, or be apt to exist. Pertaining to the factor of trade restrictiveness, the Appellate Body noted that a determination of necessity should be confirmed by “comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective.”

An unconditioned FIT measure would very likely meet the requirement of necessity by providing evidence in respect of its substantial contribution to the production of renewable electricity. Subsequently, the complaining party bears the proof burden in respect of reasonably available alternatives to the unconditional FIT measure. Currently, it would be difficult, if not impossible, to find such an alternative measure which is less trade-restrictive and would provide an equivalent contribution to the production of renewable energy. The situation of a FIT measure with DCRs is different. Some scientific data and study have shown that the implementation of an unconditional FIT program would increase the renewable electricity produced in the domestic industry, whereas a FIT program with DCR would reduce the total amount of renewable electricity production and exacerbate discrimination against foreign

137 Ibid., para.151.
138 Ibid., para.156.
producers of power generation equipment.\textsuperscript{140} It seems that an unconditioned FIT measure, which is less trade-restrictive, would provide more contribution to the achievement of the objective pursued than a FIT with DCRs would. Therefore, it would hardly establish a FIT with DCR as a necessary measure within the meaning of Article XX(b).

Furthermore, the national policy-makers should bear in mind that Article XX(b) aims to strike a balance between trade liberation and values of human rights. The Member States could not raise a defense under this provision to avoid their WTO obligations unless they have fulfilled their responsibility to respect and protect people’s human rights with due diligence; otherwise, it would hardly establish a genuine objective nexus between the measure at issue and the policy objective of Article XX(b). If a Member is directly responsible for the lethal air pollution, they should first exhaust all the possible WTO-consistent measures to solve the problem and to make remediation. In case these legal measures are unable to provide a complete solution, they may resort to necessary measures departing from their trade obligations.

\subsection*{4.1.2 Article XX(d) and Principle of Sustainable Development and International Environmental Law}

A measure which departs from the WTO obligations can be justified under Article XX(d), provided that such measure is “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement.”\textsuperscript{141} A justification under Article XX(d) must satisfy a two-tier test. First, the measure at issue should be designed to secure compliance with laws or regulations that are not themselves GATT-inconsistent. Second, the measure should be necessary to secure such compliance.\textsuperscript{142} Regarding the FIT measures, it is possible for an unconditioned FIT to be justified under this provision; but it is not the case for a FIT with DCRs. This subsection will demonstrate this point.

Pertaining to the first element of the test, in \textit{Mexico – Taxes on Soft Drinks (2006)}, the Appellate Body suggested that the terms “laws or regulations” only “refer to rules that form part of the domestic legal system of a WTO Member.”\textsuperscript{143} A rule of international law may fall within the scope of Article XX(d) provided that it has been incorporated into domestic legal sys-

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\textsuperscript{141} Article XX(d) of GATT.


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tems. The Appellate Body also noted that certain international rules may have direct effect at the national level without any domestic implementing instrument being required. This case-law has been referred to by the WTO adjudicating bodies in later dispute settlement. In *India – Solar Cell (2016)*, India invoked a defense under Article XX(d) for justifying its DCR measures under the Jawaharlal Nehru National Solar Mission. In this defense, India provided relevant provisions of both international and domestic instruments as evidence of “laws or regulations”. With regard to the international instruments, India submitted the following treaty rules: (1) the objective of sustainable development in the preamble of the WTO Agreement, (2) the principle of sustainable development under Article 3 of the UNFCCC, (3) common but differentiated responsibilities under the chapeau of Article 4 of the UNFCCC, and (4) commitments to formulate and implement appropriate measures to mitigate and adapt to climate change under Article 4(b) and (f) of the UNFCCC. India also referred to the soft law instruments pertaining to the Rio Declaration and the Rio+20 outcome document adopted by the UNGA resolution. India added that, in line with its domestic legal system, rules of international environmental treaties and the general principle of sustainable development would be automatically incorporated into its domestic law without express legislative action, provided that these international rules were not in conflict with domestic law.

As the panel observed, India failed to prove the “direct effect” of these international instruments, because India’s explanation demonstrated on the contrary that its executive or legislation branch seemingly needed to take actions to incorporate relevant international obligations into its national legal system. Thereby, the panel refused to consider the aforementioned international instruments as “laws or regulations” within the meaning of Article XX(d). The Appellate Body upheld this decision of the panel in the appeal. The failure of India in this defense would just be a matter of deficient litigation. The WTO adjudicating bodies did not deny the possibility that a renewable-energy-related measure, for securing compliance with the international environmental treaties and the general principle of sustainable development, would be justified within the rule of Article XX(d). Instead, they considered the genuine domestic effects of these international instruments on a case-by-case basis.

144 Ibid.
147 Ibid., paras.7.269-74.
148 UNGA Resolution, “The Future We Want”.
150 Ibid., para.7.298.
Furthermore, the Appellate Body observed that, in determining whether a rule fell within the ambit of the terms “laws or regulations” under Article XX(d), the panel should “evaluate and give due consideration to all the characteristics of the relevant instrument(s)”.

Particularly, the panel might consider the degree of normativity of the instrument, the degree of specificity of the relevant rule, the legal enforceability of the rule, the authority of the legislator, the domestic form and title given to the instrument, and the penalties or sanctions accompanying the relevant rule. This case-law also gives guidance to the policy-makers in their domestic action. For achieving a justification of a FIT measure under Article XX(d), the policy-makers may take efforts to improve their national law-making, so as to incorporate and specify their obligations under the UNFCCC and its protocols in their domestic legal systems. It would be helpful for the policy-makers to bear in mind that the domestic rules reflecting international environmental obligations should be clear and enforceable, in a way that individuals or companies could easily rely on these rules as sources of legal rights and obligations at the domestic level. Punishment and remediation of violations should also be laid down in the national laws. Given this, the foregoing WTO case-law may to a certain degree compel Member States to fulfil their environmental commitments to the climate change regime, as well as their commitments to promote sustainable development, through domestic legislative measures. If the granting State have strengthened their internal law-making in accordance with the foregoing case-law, a FIT measure for environmental protection would be very possibly meet the first requirement of the two-tier test.

Pertaining to the element of “necessity” under the two-tier test, the Appellate Body’s ruling in *Korea – Various Measures on Beef (2000)* provided insights. The Appellate Body noted that the term “necessary” did not equal to “indispensable” or “inevitable”. But rather, this term referred to a range of degrees of necessity from the pole of “indispensable” to the opposite pole of “making a contribution to”. A necessary measure within the meaning of Article XX(d) should locate “significantly closer to the pole of ‘indispensable’”. The Appellate Body noted that, in determining whether a measure is necessary under this provision, a process of weighing and balancing prominent factors should be involved. These factors included (1) the common interests or values protected by that law or regulation, and (2) the accompanying impact of the law or regulation on trade. If a FIT measure is grounded in clear obligations under domestic environmental law in line with the principle of sustainable development, such law should be considered to have higher moral value since the environment is essential to the

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152 Ibid.


health and survival of all human beings. Nevertheless, it still needs to consider the trade-restrictiveness under the “necessary” requirement. As discussed in the last subsection, an unconditioned FIT measure would very possibly fulfil the “necessary” requirement since currently there might be no alternative measure which is less trade-restrictive and provide equivalent contribution. Nevertheless, a FIT measure with DCR would hardly meet this requirement since an unconditional FIT measure could very likely serve as a reasonably available alternative.

4.1.3 Article XX(g) and Environmental Benefits

Article XX(g) provides an easier option for justifying a WTO-inconsistent measure by using the terms “relating to” rather than the term “necessary”. This provision concerns measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”155 Three elements should be tested in determining the provisional consistency under Article XX(g), inter alia, (1) “conservation of exhaustible natural resources”, (2) “relating to”, and (3) “made effective in conjunction with restrictions on domestic production or consumption”.156 I will demonstrate in this subsection that both an unconditioned FIT measure and a FIT measure with DCRs could be justified under this provision.

As discussed in Chapter Two, the use and development of renewable energy would significantly contribute to the solution of air pollution and the mitigation of climate change. With regard to the first element of the three-tier test, in determining whether a FIT measure—for the purpose of supporting renewable energy—falls within the meaning of Article XX(g), it needs to establish that “clean air” or “safe air composition” falls within the category of “exhaustible natural resources”. The policy aimed at the conservation of clean air had been found to fall within the ambit of Article XX(g) in US – Gasoline (1996). In this case, the panel noted that clean air was a natural resource which would be depleted by pollutants emitted through the consumption of gasoline. It then concluded that “a policy to reduce the depletion of clean air was a policy to conserve a natural resource within the meaning of Article XX(g).”157

The WTO jurisprudence has not directly addressed the question whether the “safe air composition”—that would be depleted by enormous anthropogenic emission of greenhouse gases—is exhaustible under Article XX(g). The WTO case-law nevertheless provided a broad interpretation of the terms “exhaustible natural resources”. In US – Shrimp (1998), the Appellate

155 Article XX(g) of GATT.
Body noted that “exhaustible” natural resources and “renewable” natural resources were not mutually exclusive.\textsuperscript{158} It emphasized that these terms should be interpreted “in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.”\textsuperscript{159} According to the Appellate body, the term “natural resources” was not static but rather evolutionary. In line with this case-law, considering that the climate change has become a common concern of the international community as a whole, the “safe air composition” should be regarded as a kind of “natural resource”. The drastic climate change in the past decades has shown that “safe air composition” as a natural resource is “susceptible of depletion, exhaustion and extinction, frequently because of human activities.”\textsuperscript{160} Therefore, “safe air composition” would fall under the rule of Article XX(g).\textsuperscript{161} Based on the foregoing, a pure FIT measure for controlling air pollution and mitigating climate change could fall within the policy scope of this provision. A FIT measure even with DCRs is primarily designed for such environmental purposes and should thereby meets the requirement of policy objective under Article XX(g).

Pertaining to the second element “relating to”, the Appellate Body in \textit{US – Shrimp (1998)} noted that the disputed measure “Section 609… is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species. The means are, in principle, \textit{reasonably related to} the ends. The \textit{means and ends relationship} between Section 609 and the legitimate policy of conserving an exhaustible, and, in fact, endangered species, is observably a \textit{close and real} one.”\textsuperscript{162} According to this case-law, the terms “relating to” within the meaning of Article XX(g) means that the disputed measure should have a close, real and reasonable relationship with the policy objective. In the case of an unconditional FIT measure, such a measure is aimed at promoting the production of electricity generated from renewable energy, which closely adheres to and significantly contributes to the policy objective of addressing the air pollution and eliminating the emission of greenhouse gases. An unconditional FIT measure thereby fulfils the requirement “relating to” under Article XX(g).

An examination of a FIT measure conditioned by the DCRs within the terms “relating to” is different than an examination within the term “necessary”. In \textit{US – Shrimp (1998)}, the Appel-

\textsuperscript{159} Ibid., para.129.
\textsuperscript{160} Ibid., para.128.
\textsuperscript{161} Wiers noted that “it would seem that air not ‘depleted’ by excessive greenhouse gas concentrations caused by human-induced CO2-emissions may also qualify as an exhaustible natural resource.” Jochem Wiers, “French Ideas on Climate Trade Policies.” \textit{Carbon & Climate L. Rev.} (2008): 25.
late Body pointed out that the panel had erred by applying a “necessary” test in the course of examining the disputed measure under Article XX(g). As noted in the two subsections above, a FIT measure with DCRs would hardly pass the “necessary” test under Article(b) and (d), largely because of the existence of reasonably available alternatives, particularly an unconditioned FIT measure. This more trade-restrictive measure would nevertheless meet the requirement of “relating to” within the meaning of Article XX(g). A FIT measure with DCRs is primarily designed to promote the production of renewable electricity for environmental purposes, even though it is also aimed at affording preferential treatment to local producers. The implementation of such measure will more or less make a contribution to the attainment of the environmental policy objective. A close and reasonable relationship thereby would exist between a FIT measure with the DCRs and the conservation of clean air or safe air composition. Accordingly, such a conditioned FIT measure could fall within the reach of the terms “relating to” under Article XX(g).

Pertaining to the third element, the Appellate Body in US – Gasoline (1996) read the terms “made effective in conjunction with” as a requirement of even-handedness in the imposition of restrictions, not only in respect to imported products but also with respect to domestic products. In line with this case-law, both the unconditioned FIT measure and the conditioned FIT measure would meet the requirement of those terms, for the reason that these measures impose trade restrictions on both imported and domestic electricity generated from conventional fuels.

4.1.4 Chapeau of Article XX

The justification of a trade-restrictive measure under the chapeau Article XX must satisfy a two-tier test. First, the disputed measure should not be “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail”. Second, this measure should not be “a disguised restriction on international trade”. According to the literal meaning of the text, the chapeau concerns the trade-restrictiveness of the manner in which the measure at issue is applied, rather than the trade-restrictiveness of the measure per se. The Appellate Body in US – Gasoline (1996) stated that, “[t]he chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied.” In US – Shrimp (1998), the Appellate Body described the chapeau of Article XX as an expres-

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164 Chapeau of Article XX.
165 Ibid.
sion of the principle of good faith. Accordingly, a Member should exercise the rights granted by the subparagraphs of Article XX *bona fide*. 167

Pertaining to the first tier of the test, the Appellate Body in *US – Shrimp (1998)* noted that the phrase “arbitrary or unjustifiable discrimination between countries where the same conditions prevail” contained three elements. As the Appellate Body stated, “[f]irst, the application of the measure must result in discrimination… Second, the discrimination must be arbitrary or unjustifiable in character… Third, this discrimination must occur between countries where the same conditions prevail.” 168 With regard to the concept of “discrimination”, the Appellate Body had found in *US – Gasoline (1996)* that the standard of “discrimination” under the chapeau of Article XX should be different than the standard under the substantive rules of GATT, such as rules setting out obligations of national treatment and most-favored-nation treatment. 169 The Appellate Body further clarified in *US – Shrimp (1998)* that, “[w]e believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.” 170 According to this case-law, the concept of “discrimination” includes a situation in which the standards of due process are violated. In the case that discrimination had resulted, the application of a measure would constitute “arbitrary discrimination” if it was applied in a rigid and inflexible way. 171 In light of the WTO case-law, the discrimination would be unjustifiable if a Member failed to pursue negotiation with all relevant Member States, for establishing multilateral means for achieving the relevant policy objective, before resorting to unilateral measures. 172 In respect of the test of “disguised restriction on international trade”, the Appellate Body in *US – Gasoline (1996)* observed that the terms “disguised restriction” were related to the terms “arbitrary or unjustifiable”. These terms impart meaning to one another and may be read together. 173

As noted, the two-tier test under the chapeau of Article XX mainly focuses on the application by a Member of the measure at issue. Pertaining to an unconditional FIT measure, or a FIT

168 Ibid., para.150.
169 The Appellate Body stated in the report that “[t]he provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred.” Appellate Body Report, *US – Gasoline (1996)*, p.23.
measure attached with DCRs, the specific content of the measure *per se* is not the issue to be addressed within the meaning of the chapeau. Nevertheless, for justifying a measure under the chapeau, the policy-makers should bear in mind that, in their application of a FIT measure, the principle of good faith should be adhered to. The governmental procedures under which the FIT measure is applied should also follow the standards of due process and fairness.\(^\text{174}\) In practice, States often apply a FIT measure unilaterally without negotiating with other affected Members. This fact would weaken States’ justification under the chapeau.

### 4.1.5 Summary and Implications

While the exercise of a right to renewable energy may conflict with the substantive obligations under the WTO agreements, this conflict of norms may not be material or inherent. The legal grounds of a right to renewable energy are reflected, to a certain degree, by the subparagraphs of Article XX of GATT. An appropriate interpretation of Article XX could avoid the potential conflict between the right to renewable energy and the WTO obligations. Based on the foregoing discussion, the policy pursued by a FIT measure, with or without DCRs, to address the air pollution or to control the emission of GHGs would fall within the policy objectives under Article XX(b), (d) and (g). An unconditioned FIT measure would likely meet both the requirement of “necessary” under Article XX(b) and (d), and the requirement of “relating to” under Article (g). However, a FIT measure with DCRs would hardly meet the “necessary” requirement, but would satisfy the requirement of “relating to”. The chapeau of Article XX concerns the manner in which the WTO-inconsistent measures are applied, rather than the measures at issue *per se*. The Member States should not apply a provisionally justified measure under the subparagraphs of Article XX in an abusive manner; otherwise they would fail the justification under the chapeau.

The public often has misconceptions about the functioning of WTO system on environmental protection. Right after the circulation of the panel report of *India – Solar Cells (2016)*, a report was submitted by the Independent Expert to the Human Rights Council. The report stated that the panel’s decision frustrated the efforts of India to support renewable energy and such decision implied the unwillingness of the panel to interpret broadly the general exceptions under Article XX.\(^\text{175}\) Such an opinion was rather roughly made. The disputed DCR measures *per se* did not objectively link to the production of renewable electricity. Rather, these measures were primarily pursuing a policy objective of local employment, which fell outside the policy scope of Article XX. Besides, the WTO case-law on the contrary have revealed the


willingness of the DSB to give a broad interpretation to the terms of “human life or health” and “exhaustible natural resources”. In the Indian case, I would consider that the adjudicating bodies did rightly and appropriately interpret and apply the legal norms. While India could maintain its FIT measures per se, it should rule out the domestic content requirements and strengthen its domestic legal system to protect environment. The key issue then is not whether States are permitted to apply a renewable energy measure in violation of their trade obligations, but rather how States should adequately apply such a measure in accordance with the subparagraphs and chapeau of Article XX. In the process of designing and implementing renewable energy policies or measures, States should avoid any move towards pure protectionism.

4.2 Political Pathway to Avoid the Conflict of Norms

The ambiguous norms of trade law leave the door open for evolutive and reasonable interpretation, so as to make coexistence between norms from different international legal regimes. However, the norms may also be interpreted in a restrictive way that results in a materialized conflict. The jurisdiction of the WTO adjudicating bodies is also limited. For pursuing a political objective of green economy, in which air pollution and climate change would be mitigated and solved, the Member States would, and should, take a central role to clarify or modify the existing rules through multilateral negotiations. First, as noted in the paper, the SCM Agreement does not contain an explicit provision referring to Article XX of GATT. The Member States would take efforts to make this legal linkage clearer and more solid through modifying the provisions of the SCM Agreement. Second, a justification of a FIT measure with DCRs under Article XX(g) may frustrate a political outcome to enable FIT per se and, meanwhile, to abolish DCR. The Member States may negotiate a new environmental exception to Article XX using the “necessary” language. This new exception may explicitly refer to the global concern of climate change. In addition, Cosbey and Mavroidis recommended another political pathway. They proposed to expand the ambit of Article 8 of the SCM Agreement in a way that subsidies for pursuing global public goods would be sheltered under this provision.176

States may also choose a litigating preference so as not to submit an apparent conflict of norms to the WTO adjudicating bodies. As we see in India – Solar Cells (2016), the United States claimed in its request for consultation that the FIT measures relating to DCRs adopted by India were inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement. In the panel process, the claims under the SCM Agreement were discarded by the United States. Instead,

the claimant only challenged the DCR measures *per se* under provisions of the TRIMs Agreement and the GATT. By doing so, the issue of FIT was excluded from the WTO jurisprudence. In addition, the DCR measures *per se* would fall outside the range of justification under Article XX(g), since it would hardly establish a linkage between DCR measures *per se* and the policy objective to conserve exhaustible natural resources.
5 Conclusion

In light of the foregoing arguments, this paper demonstrated the existence of a potential normative conflict between States’ right to renewable energy and States’ obligations under WTO law, and discussed the ways to avoid this conflict of norms by applying the legal interpretative tool as well as political negotiation.

The paper started by establishing a States’ right to renewable energy in international law, which is the first step to identifying the conflict of norms under discussion. The second Chapter examined the international legal regimes in respect to the principle of sustainable development, international climate change treaties and international human rights conventions. In light of the principle of sustainable development, States are imposed the obligation to take means for achieving the objective of sustainable economic and social development. A wide range of international instruments note that renewable energy per se constitutes a dimension of sustainable development. The use of renewable sources of energy is also recognized as a necessary measure for promoting the economic productivity in consideration of environmental needs. Thereby, a States’ right to renewable energy is necessary for attaining the sustainable development goals. A States’ right to renewable energy is also grounded in the international climate change regime. The Kyoto Protocol explicitly lists the promotion of renewable energy as a measure for achieving States’ compulsory emission goals. The recent Paris Agreement requires States to undertake rapid reductions of greenhouse gas emissions in accordance with best available science. The renewable energy measures are commonly recorded in the NDCs submitted by States under the Paris Agreement. Furthermore, in the context of serious air pollution, States are under absolute obligations to take all measures necessary to alleviate and eliminate the pollution of air. Undoubtedly, the promotion of the deployment of renewable energy in sectors of power generation, transportation and heating constitutes the “necessary measure” for protecting human right to life and health in this context. On this account, a States’ right to renewable energy is closely linked to, as well as limited by, States’ obligations to take measures under both the general principle of law and international treaty law.

The third Chapter dealt with the question whether the exercise of a States’ right to renewable energy would violate the WTO obligations, through examining the WTO-consistency of current renewable energy policies or measures under the SCM Agreement. The paper selected the feed-in tariff measure as the target measure for examination. A FIT measure would be identified as a subsidy within the meaning of Article 1 of the SCM Agreement. The examination showed that, by implementing a FIT measure, a government or a public body would provide a financial contribution and thereby confer a benefit to the recipient. A FIT measure with DCRs is specific under Article 2(3) and Article 3 of the SCM Agreement. It would also be
established that an unconditioned FIT measure falls under the rule of Article 2 since this measure is specific to enterprises and industries of renewable energy. Furthermore, a FIT measure with DCRs would constitute a prohibited subsidy since this subsidy is contingent upon the use of domestic over imported goods in light of Article 3.1(b) of the SCM Agreement. An unconditioned FIT measure may fall under the rule of actionable subsidies if this measure causes adverse effects on the interests of other Members. In addition to establishing a FIT measure as WTO-inconsistent, this Chapter also discussed the applicability of Article XX of GATT to justify breaches of the SCM Agreement. An affirmative conclusion was made in this regard.

The last Chapter addressed the question of how to prevent the conflict of norms between a States’ right to renewable energy and the trade obligations by resorting to treaty interpretation and political negotiation. The possible justifications of a FIT measure under Article XX were discussed. An unconditioned FIT measure would likely be justified under subparagraphs (b), (d), and (g) of Article XX, while a FIT measure with DCRs would possibly only be justified under Article XX(g) since it fails the “necessity” test. For pursuing the outcome of green economy in which a balance is achieved between trade liberation, on the one hand, and values of environment and human rights on the other, a final and stable resolution may be located in Member States’ political actions. Member States may place the reform of WTO law on their future negotiation agenda so as to promote greater coherence between different legal regimes. They would also temporarily avoid submitting a FIT measure per se to the DSB so as to freeze the potential conflict of norms before the judicial procedure starts.
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**Treaties/Statutes**

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Agreement Establishing the World Trade Organization

Agreement on Subsidies and Countervailing Measures

American Convention on Human Rights

Annex 1A Multilateral Agreements on Trade in Goods

Charter of the Association of Southeast Asian Nations

Constitutive Act of the African Union

Constitutive Treaty of the Union of South American Nations

Convention Establishing the Association of Caribbean States

European Convention on Human Rights

General Agreement on Tariffs and Trade

International Covenant on Civil and Political Rights

International Covenant on Economic, Social and Cultural Rights

Kyoto Protocol to the United Nations Framework Convention on Climate Change

Paris Agreement

Statute of the International Court of Justice

Treaty on European Union

Understanding on Rules and Procedures Governing the Settlement of Disputes

United Nations Framework Convention on Climate Change

Universal Declaration of Human Rights

Vienna Convention on the Law of Treaties

**Municipal/Regional Laws and Regulations**


Constitution of France (revised 2008)
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