

# Chapter 6

## Provisions in trade agreements reserving or promoting green industrial policy

### Key contents of the chapter:

- 1 The consistency of green industrial policies with trade agreements can be seen as an enabling condition for the adoption of such policies but also as a tool in its own right, when the focus is on the types of provisions that can be used in trade agreements to promote or reserve policy space for green industrial policies.
  - 2 Provisions in trade agreements promoting or reserving policy space for green industrial policies are a sub-set of a broader category of provisions relating to environmental protection and sustainable development. Two main categories can be identified, namely provisions relevant to all green industrial policy tools (e.g. preambular references, reservations of environmental policy space, exceptions) and provisions relevant to specific types of green industrial policies, such as border measures (e.g. carve-outs for additional financial charges, provisions encouraging trade in environmental goods and services), subsidies (e.g. provisions aimed at removing distorting subsidies, carve-outs for specific subsidies), standards (e.g. general commitments to increase or not to lower environmental standards, presumptions of consistency, general references to international standards) and public procurement (specific carve-outs, references to sustainability criteria).
  - 3 A good illustration is the increasing space for renewable energy policy in the trade agreement practise of the EU and the US.
  - 4 A summary table placing the tools reviewed in this chapter within the overall methodology presented in Chapter 1 is provided at the end of the chapter.
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## 1. Overview

The world trading system is still essentially based on the ideas of progressive trade liberalisation (increased access to foreign markets through a negotiated lowering of tariffs) and non-discrimination (levelling of the playing field across producers, irrespective of their nationality, which must only compete on cost and quality). However, over time, these two core ideas of international trade law have been adjusted to allow for sufficient space for other considerations, such as different degrees of development, human rights and environmental protection. The transition to an inclusive green economy is at the heart of the relations between these different objectives. Green industrial policies can, depending on their specific design, be **consistent or not with international trade law**. It is therefore important to understand the legal space that can be harnessed by countries considering the adoption of one of the policy instruments discussed in this manual.



The assessment of consistency with international policy frameworks is **part of the overall process** suggested in Chapter 1 and discussed in the more specific context of each policy tool in subsequent chapters. It is, at the same time, a **form of policy tool** in that it creates the basis, at the international level, for the adoption of a variety of measures to promote green industrial policy at the domestic level. This chapter adopts the second perspective and discusses different types of provisions in trade agreements providing space for green industrial policy. Significantly, in many cases, **these provisions**

**Green industrial policies can, depending on their specific design, be consistent or not with international trade law.**

**remain untested in the case law**, at least in the context of green industrial policies. Indeed, although several provisions of the General Agreement on Tariffs and Trade (**GATT**) and of other related agreements, such as the Agreement on Technical Barriers to Trade (**TBT**) and the

Agreement on Sanitary and Phytosanitary Measures (**SPS**) have been interpreted and applied in the case law, in most cases the measures at stake were not part of a green industrial policy strategy. Thus, the operation of the provisions discussed in this chapter in connection with the policy tools surveyed in this manual is still largely untested. It must also be noted that, as mentioned in previous chapters, the **litigation risk** presented by the adoption of a measure is a function of a variety of factors, which include consistency with trade disciplines but also a number of political and economic considerations.

However, as a general matter, it is important for States considering the adoption of trade-related green industrial policies to understand the policy space left in international agreements as well as to be aware of the tools that can be used to expand such space. Section 2 of this chapter introduces the spectrum of measures that can be adopted for this purpose, paying particular attention to those provisions that have a **general scope** (i.e. which can serve to shield or promote most green industrial policies) and those that have a **more specific scope** (i.e. which relate to a specific policy tool). Section 3 discusses a more focused case-study, namely the increasing integration of renewable energy considerations in US and EU trade agreements. Section 4 summarises the chapter and places this tool within the methodology presented in Chapter 1.

## 2. The tool-box

### 2.1. Spectrum of measures used in practice

Governments interested in selecting appropriate tools to reserve legal space in trade agreements or to promote through them the development of a green industrial policy have to take into account a number of considerations, of which three are particularly important.

First, international trade relations among some three quarters of the States of the World rest on a **global system** organised under the aegis of the World Trade Organisation (**WTO**). This system governs trade relations subject to more specific rules that can be established by a **special system** applicable between some members through a bilateral or multilateral free trade agreement (**FTA**), a generic name for a variety of more specific agreements including preferential trade agreements, economic integration agreements, bilateral and regional trade agreements, among others. At present, there are several hundred FTAs. A minority of them (124) were notified to the GATT Secretariat before the establishment of the WTO, but most (over 400) have been concluded and notified since 1995. As provisions leaving space for green industrial policy may be included in the global or the special systems, it is useful to understand broadly the **interactions between these two layers**. This is addressed in Article XXIV of the GATT (as well as by paragraph 2(c) of the so-called Enabling Clause for developing countries, and by Article V of the General Agreement on Trade in Services – **GATS** – for services). This provision allows for a better treatment given to FTA partners under some specific consistency conditions. Yet, the system envisioned in this clause has not worked as planned, with hundreds of FTAs notified and none having completed the WTO consistency examination process. In practice, this means that in a litigation context, the WTO Member invoking provisions of an FTA would have to establish that the FTA meets the conditions of Article XXIV of the GATT (or paragraph 2(c) of the Enabling clause or Article V of the GATS).

Second, there are **different approaches to creating space for environmental regulation** in both the global and the special systems. There is a wealth of commentary and work done in this area, including a tool-kit recently developed by UN Environment and the International Institute for Sustainable Development (IISD) that compiles treaty practice in this area.<sup>13</sup>

The third consideration concerns legal operation. One important distinction that negotiators and government officials must keep in mind is the one between, on the one hand, 'derogations' or 'carve-outs' and, on the other hand, 'exceptions'.

In the general system, most of the attention has focused on the use of so-called **general exception** clauses that can justify measures that are otherwise in breach of a trade discipline. In the special systems, there are a variety of approaches ranging from the conclusion of an **environmental side agreement**, to the inclusion of a **sustainable development chapter** in the FTA, to more limited approaches based on the inclusion of **some provisions** or an **interpretive letter**, or both, joined to the

agreement. This spectrum of options concerns environmental protection or sustainable development in general, although some provisions focus more specifically on green industrial policy measures. Negotiators and other government officials may refer to this spectrum for reference, but they must keep in mind that, in many cases, the actual operation of different types of approaches or clauses has not been tested in litigation. Moreover, the organisation of the materials in the available resource platforms is mostly concerned with user-friendliness and does not necessarily reflect the sometimes very important legal differences in the operation of some tools.

The third consideration concerns precisely such **legal operation**. One important distinction that negotiators and government officials must keep in mind is the one between, on the one hand, **'derogations' or 'carve-outs'** and, on the other hand, **'exceptions'**. A derogation or carve-out means that a matter simply does not fall under the trade standard in question or the agreement as a whole (which means that the agreement does not apply to this subject matter). An example is provided by the public procurement

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13 This resource is available at the following link (retrieved on 15 September 2017): [http://www.spcclearinghouse.org/sites/default/files/globalreview\\_web\\_final.pdf](http://www.spcclearinghouse.org/sites/default/files/globalreview_web_final.pdf)

clause in Article III:8(a) of the GATT.<sup>14</sup> If a measure falls under this clause, then the national treatment standard of Article III of the GATT is not applicable. By contrast, exceptions (e.g. Article XX of the GATT) assume that the relevant trade standards are indeed applicable and that they have in fact been violated. The effect of the exception is only to justify the violation. In practice, this has important consequences relating to the burden of proof (which is on the party asking for the exception) and the scrutiny of the conditions (which is more demanding for exceptions)(Viñuales (2016)). This is but one example of the legal and practical considerations governments must keep in mind when selecting the different tools discussed in this chapter.

In the following sections, the chapter addresses two types of provisions, namely general provisions that could be relevant for all (or most) of the green industrial policy tools discussed in this manual (section 2.2) and narrower provisions that are relevant only to some specific policy tool (section 2.3). For ease of reference, the material is organised on the basis of both the type of provision and the type of policy tool that can be enabled through it.

## 2.2. General provisions relevant to all policy tools

### Preambles

General provisions aimed at preserving space for environmental protection and thereby for green industrial policy may take different forms. A basic yet potentially very important form is the inclusion of a reference to sustainable development or environmental protection in the **preamble** of a trade agreement. The effects of preambles have often been misunderstood. Much in the same way as a norm of customary international law, of another treaty or even of the same treaty, a reference to sustainable development in the preamble can be used to interpret trade (as well as investment) provisions in a manner that creates space for environmental measures, including green industrial policy measures. Significantly, a reference to sustainable development in the preamble may be **more easily obtained** in a tight negotiation context than more specific clauses, and its effect should not be underestimated. Box 1 provides a prominent example, namely the preamble of the Marrakesh Agreement establishing the WTO and its use to interpret Article XX of the GATT in the famous *Shrimp – Turtle* case.

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14 Article III.8(a) of the GATT states the following: ‘The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.’

### Box 1: The legal relevance of the WTO Agreement's preamble

In the opening paragraph of the Marrakesh Agreement establishing the WTO, the contracting Parties recognised that:

'their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development'

In the prominent *Shrimp-Turtle* case, this reference to sustainable development and environmental protection provided the basis for the WTO Appellate Body to interpret the terms 'exhaustible natural resources' in Article XX(g) of the GATT as encompassing endangered turtles straddling the jurisdictional water of the United States. Although the measure at stake (which was a standard broadly understood, requiring the use of certain techniques to harvest shrimps so as to avoid damage to certain species of turtles) was found to be in breach of the GATT disciplines and not justified (for failure to meet the additional requirements of the chapeau of Article XX), it is significant that the Appellate Body expanded the interpretation of letter (g) of Article XX by reading it in the light of the preamble of the WTO Agreement:

'Given the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the WTO Agreement, we believe it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources.'

**Source:** United States – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, 12 October 1998, WT/DS58/AB/R, para. 131.

## Clauses that affirm environmental policy space

Different clauses can be used to reserve environmental policy space in a trade agreement. Some may specifically refer to the **relations between the trade agreement and other treaties** aimed to protect the environment (often called ‘multilateral environmental agreements’ or **MEAs**) whereas some others may formulate a **commitment not to lower environmental standards or to apply high levels of environmental protection**. The second type of commitment serves also to level the playing field among producers in different countries (in order to avoid anticompetitive practices that consist of lowering costs for producers by reducing stringency of standards or environmental norms). Finally, some broader clauses can be used that simply state that the obligations arising from a trade (or an investment) agreement must not be interpreted as limiting the **ability of a State to adopt regulations in pursuance of certain public interests**, including national security or environmental protection. Box 2 offers one example of each of these different types of clauses.

These and other similar clauses appear rather frequently in FTAs. It must be noted that these provisions **concern not only trade but also investment matters**, as suggested by the express wording of Article 24.5 of CETA and Article 10.10 of the Oman-US Bilateral Investment Treaty (**BIT**). Moreover, even when the provision is not located in an investment chapter, it may be relevant for both trade and investment disputes, as suggested by the analysis of Article 104 of the NAFTA in an early investment dispute relating to a trade ban imposed by Canada on transboundary movements of hazardous waste (*S.D. Myers v. Canada*, Partial Award (2000)). Also of note is the fact that **very few of these provisions have been effectively tested in litigation**. Aside from Article 104 of the NAFTA, which was deemed not to be applicable in the end, one can refer to the application of Article 10.10 of the Oman-US BIT in another investment dispute (*Al Tamimi v. Oman*, Award (2015)), where the tribunal referred to this provision as well as to the environmental chapter in the treaty to interpret a basic investment provision (the fair and equitable treatment standard) in a manner protective of the environment. The measure adopted by the State on environmental grounds, among others, was thus deemed to be consistent with the FTA. Although investment dispute settlement is different in many significant ways from trade dispute settlement, these cases offer some guidance as to how such provisions could operate in practice to shield green industrial policy measures.

## Box 2: Examples of provisions reserving environmental regulatory space

### **NAFTA - North-American Free Trade Agreement (Canada, Mexico, US), Article 104 and Annex 104:**

'In the event of any inconsistency between this Agreement and the specific trade obligations set out in: (CITES, Montreal, Basel, or the agreements set out in annex 104.1, such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement'

### **CETA - Comprehensive Economic and Trade Agreement (Canada, EU), Article 24.5:**

'The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their environmental law.

A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental law, to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory.

A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its environmental law to encourage trade or investment'

### **Free Trade Agreement (Morocco, US), Article 17.1:**

'[E]ach Party shall ensure that its own environmental laws and policies provide for and encourage high levels of environmental protection and shall strive to continue to improve those laws and policies'

### **Free Trade Agreement (Oman, US), Article 10.10:**

'Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns'

## General exception clauses

The main example of general exception clauses is provided by Article XX of the GATT, which has been copied with some adjustments in numerous other treaties, whether applicable to all WTO members (e.g. Article XIV GATS),

only some of them (e.g. Article III(2) of the revised Agreement on Government Procurement, see below section 2.3), or to members of an FTA irrespective of WTO membership (e.g. Article 28.3 CETA). Given the wide reliance of governments on this approach and the fact that Article XX of the GATT has been widely tested in litigation, it is important to clarify three aspects of its operation.

The first aspect has already been mentioned, namely that **'exceptions'** are not an ideal way of providing policy space for environmental regulation because they assume that there has been a violation of a trade (or investment) standard that may exceptionally be justified. In practice, that carries difficult consequences for litigation, including the fact that the burden of proof rests on the respondent State, that scrutiny of the defence tends to be more demanding and less deferent to States as well as some other potential effects (Viñuales (2016)).

The second aspect is that the **focus of the cases as well as of legal commentary** has been on provisions that may afford some room for environmental protection (Article XX, letters (b) and (g), which concern respectively measures 'necessary to protect human, animal or plant life or health' and measures 'relating to the conservation of exhaustible natural resources') but which are not the only possible ones, as suggested by cases relating to standards broadly understood (looking at Article XX, letter (a), which concerns measures 'necessary to protect public morals') or to specific green industrial policy measures (looking at Article XX, letter (d), which concerns measures 'necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement'). Box 3 recalls the relevant text of Article XX and some of its exceptions.

The third aspect is the **actual operation of Article XX exceptions**, as interpreted by the WTO Appellate Body. As shown in Box 3, the exception clause has two components. The analysis must start, according to the Appellate Body, at the level of one of the letters of Article XX. If the measure falls under one or more of these letters, then the analysis moves to 'how' the measure has been implemented (although this has been disputed, see Bartels (2015)). By way of illustration, a measure that is necessary to protect public morals or human, animal or plant life or health may have been applied in a manner that is inconsistent with the requirements of the chapeau of Article XX. In practice, limitations in the availability of Article XX exceptions have resulted either from the first assessment (e.g. *India – Solar*

### Box 3: GATT Article XX - General Exceptions

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

(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health; [ ... ]

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade-marks and copyrights, and the prevention of deceptive practices; [ ... ]

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; [ ... ]

*Cells* case (2016), where India invoked unsuccessfully letter (d) to shield a feed-in-tariff scheme with local content requirements) or from the second one (e.g. *Shrimp – Turtle* case (1998), where the United States invoked letter (g) but the Appellate Body found that, although the measure fell under the scope of this letter, it had been applied in a manner inconsistent with the chapeau). A further challenge concerns the availability of Article XX in general, as shown by a case against China where certain measures adopted by China to restrain the exports of raw materials (an export quota) were deemed to be in violation of its Protocol of Accession to the WTO, a breach for which Article XX (even if all the conditions had been met) could not provide justification (*China – Raw Materials* (2012)). These different levels of analysis call for specific scrutiny of a measure during the process of its design, as highlighted in the over-arching methodology proposed in this manual.

## 2.3. Provisions relevant to specific policy tools

### Border measures

The broader context governing the lawfulness of a variety of border measures has been provided in Chapter 2 of this manual. Here we focus specifically on the types of provisions and wording within provisions to shield or promote border measures as green industrial policy tools. Different forms of border measures may rely on different provisions. In Chapter 2 we referred to both unilateral and coordinated green industrial policy.

**Increasing import tariffs** in order to protect an infant green industry is lawful if the tariffs are non-discriminatory and remain within the bound (maximum) level of tariff for the State in question appearing in its Schedule of Concessions (Article II:1(a) and (b) of the GATT). Moreover, provisions such as Article II:2 of the GATT allow States to go beyond the limits of measures allowed by Article II:1(a) and (b) and to impose, under certain conditions, **additional financial charges** if they meet certain requirements. Given the potential relevance of such allowance for the introduction of so-called carbon equalisation measures, Box 4 states the wording of Article II:2(a) of the GATT in full:

#### Box 4: Article II:2(a) of the GATT

2. Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:

(a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III [non-discrimination between domestic and foreign products] in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part.

Significantly, a measure that falls within Article II:2(a) of the GATT is not merely justified, as it would be through the operation of Article XX (i.e. violation of a trade clause but exceptionally justified under certain conditions). It is, more precisely, not in breach of Article II:1(b)'s prohibition of additional measures and, as a result, the complainant has the burden of establishing *prima facie* that Article II:2(a) is not available (*India – Additional Import Duties* (2008), paragraph 160). This highlights the difference between resorting to provisions that operate as 'derogations' or 'carve-outs' and resorting to the more common 'exceptions'.

Regarding **coordinated green industrial policy**, a variety of measures can be adopted to promote trade in environmental goods and services. The Doha round sought to promote such trade through the conclusion of a multilateral agreement that would have reduced or eliminated 'tariff and non-tariff barriers on environmental goods and services', but these efforts have been unsuccessful so far. A more limited attempt to craft a plurilateral **Environmental Goods Agreement** (among some WTO members), modelled on a regional initiative by APEC countries (see Chapter 2), was pursued between 2014 and 2016 but its conclusion is for the time being uncertain. Yet another possibility is to include clauses in FTAs such as those reproduced in Box 5:

### Box 5: Provisions in FTAs relating to trade in environmental goods and services

CETA - Comprehensive Economic and Trade Agreement (Canada, EU), Article 24.9(1):

'The Parties are resolved to make efforts to facilitate and promote trade and investment in environmental goods and services, including through addressing the reduction of non-tariff barriers related to these goods and services'

Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu on Economic Cooperation, chapter 17, Article 3.2(a):

'[T]he Parties shall eliminate all tariffs on environmental goods upon entry into force of this Agreement.

For the purposes of this Agreement, environmental goods are those which positively contribute to the green growth and sustainable development objectives of the Parties. A list of environmental goods is attached as Annex 7'

Source: IISD Toolkit for trade negotiators

## Subsidies

In Chapter 3, we discussed a wide variety of support schemes and their role in green industrial policy. The discussion covered **two aspects**. On the one hand, support schemes may prevent the transition to an inclusive green economy particularly when they create massive distortions in the price and thereby the consumption of certain goods, such as fossil fuels, and products of conventional agricultural products and of marine-capture fishing, with important negative implications for the environment. On the other hand, support schemes may specifically target certain sectors or producers through local content requirements in order to realise latent comparative advantages or align openness to trade with diversification of the domestic industry. Treaty provisions can be used to address these two aspects. Box 6 provides examples of provisions targeting these two issues derived from the draft Trans-Pacific Partnership (TPP) Agreement.

In addition, a key area of government support for green industries is public procurement. Given its importance and its different legal treatment, trade agreements typically address this question specifically. The relevant provisions are further discussed later in this section.

#### Box 6: TPP provisions relating to support schemes

##### Article 20.16(5):

'[ ... ] no Party shall grant or maintain any of the following subsidies [ ... ]:

- (a) Subsidies for fishing that negatively affect fish stocks that are in an overfished condition; and
- (b) Subsidies provided to any fishing vessel while listed by the flag State or a relevant Regional Fisheries Management Organisation or Arrangement for IUU [illegal, unregulated or unreported] fishing'

##### Article 9.9(3)(a) and (d):

'(a) Nothing in paragraph 2 [a detailed prohibition of local content requirements] shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment of an investor of a Party or of a non-Party in its territory, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory [ ... ]

'(d) Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, paragraphs 1(b) [prohibition of requiring a percentage of domestic content], 1(c) [prohibition of requirement to purchase, use or accord preference to goods and persons in the territory], 1(f) [prohibition of requiring the transfer of a technology, production process or proprietary knowledge to a person in the territory], 2(a) [prohibition of requiring a percentage of domestic content] and 2(b) [prohibition of requirement to purchase, use or accord preference to goods and persons in the territory] shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:

- I. necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement;
- ii. necessary to protect human, animal or plant life or health; or
- iii. related to the conservation of living or non-living exhaustible natural resources

## Standards

Provisions addressing standards, broadly understood as encompassing mandatory technical regulations (including those for sanitary and phytosanitary purposes), voluntary standards, and conformity assessment procedures, are **often of a general nature**. Some of these general provisions have been discussed in section 2.2 in connection with reservations of

environmental policy space. Thus, provisions in FTAs requiring States not to lower standards as a way of attracting investment or of providing a competitive advantage to exporters are a tool to endorse the need for high environmental standards. Similarly, provisions – often of an aspirational nature – encouraging States to promote high environmental standards are also relevant to assess the consistency of environmental standards with international trade law, although they have not been tested in litigation so far.

Some other provisions found in trade agreements **refer to corporate social responsibility standards**. Chapter 4 discusses the governance of technical regulations and standards under the Agreement on Technical Barriers to Trade (TBT) and the Agreement on Sanitary and Phytosanitary Measures (SPS). As noted in Chapter 4, policy-makers considering the adoption of technical regulations and standards are encouraged to make them consistent with international standards, as characterised in TBT and SPS, because that creates a presumption that the domestic measure is necessary (proportionate to the public purpose it pursues) or even in conformity with trade disciplines. These types of provisions can be very useful to shield green industrial policy measures, particularly when they require domestic and foreign producers to abide by well recognised standards, either to protect the domestic industry against foreign goods that are more polluting or of lower environmental quality or to promote the realisation of a comparative advantage. In addition, some provisions in FTAs increasingly refer to a variety of **private standards** that are to be promoted by States parties. Such provisions are also of an aspirational nature, but they could be very useful to interpret trade provisions in a manner that makes room for green industrial policy measures. Box 7 provides examples from these two types of provisions specifically referring to standards.

**Box 7: Provisions specifically referring to standards****TBT – Agreement on Technical Barriers to Trade, Article 2(5):**

'[ ... ] Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2 [ ... protection of human health or safety, animal or plant life or health, or the environment], and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade'

**SPS – Agreement on Sanitary and Phytosanitary Measures, Article 3(2):**

'Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994'

**Free Trade Agreement (EU, Vietnam), chapter 15, Article 9(e):**

'The Parties, in accordance with their domestic policies, agree to promote corporate social responsibility (CSR), provided that CSR-related measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction to trade. Promotion of CSR includes among others exchange of information and best practices, education and training activities and technical advice. In this regard, each Party takes into account relevant internationally accepted and agreed instruments, that have been endorsed or are supported by the Party, such as the OECD Guidelines for Multinational Enterprises, the UN Global Compact, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy'

## Public procurement

Due to its importance, public procurement is often specifically addressed in both the global and the special trade systems, whether through specific agreements (e.g. the revised plurilateral Agreement on Government Procurement) or specific provisions. Such provisions are structured as 'derogations' (or 'carve-outs') or as interpretive clarifications included in the text of a provision or, still, as exceptions. The general context of how sustainable public procurement is governed in international trade law was discussed in Chapter 5.

Box 8 provides examples of **three types of clauses**: (1) public procurement derogations, (2) provisions clarifying that sustainability criteria at different stages of the procurement process are consistent with trade provisions, and (3) public procurement specific exceptions similar to Article XX of the GATT. The order of the clauses reflects the larger or narrower scope left for sustainable public procurement in these different tools. Hence, trade

negotiators and government officials should prefer, when possible, to use general carve-outs and move down to less ambitious options as the need arises.

#### Box 8: Examples of provisions reserving environmental regulatory space

##### 1. Public procurement derogation

GATT – General Agreement on Tariffs and Trade, Article III:8(a):

‘The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale’

##### 2. Sustainability criteria

Free Trade Agreement (Australia, Korea), Article 12.8(6):

‘For greater certainty, a procuring entity may prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment’

Free Trade Agreement (EU, Singapore), chapter 10, Article 10.9(11):

‘The evaluation criteria set out in the notice of intended procurement or in another notice used as a notice of intended procurement or tender documentation may include, among others, price and other cost factors, quality, technical merit, environmental characteristics, and terms of delivery’

##### 3. Specific exception

Revised Agreement on Government Procurement, Article III:2(a)-(b):

‘Subject to the requirements that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures:

- (a) Necessary to protect public morals, order or safety;
- (b) Necessary to protect human, animal or plant life or health’

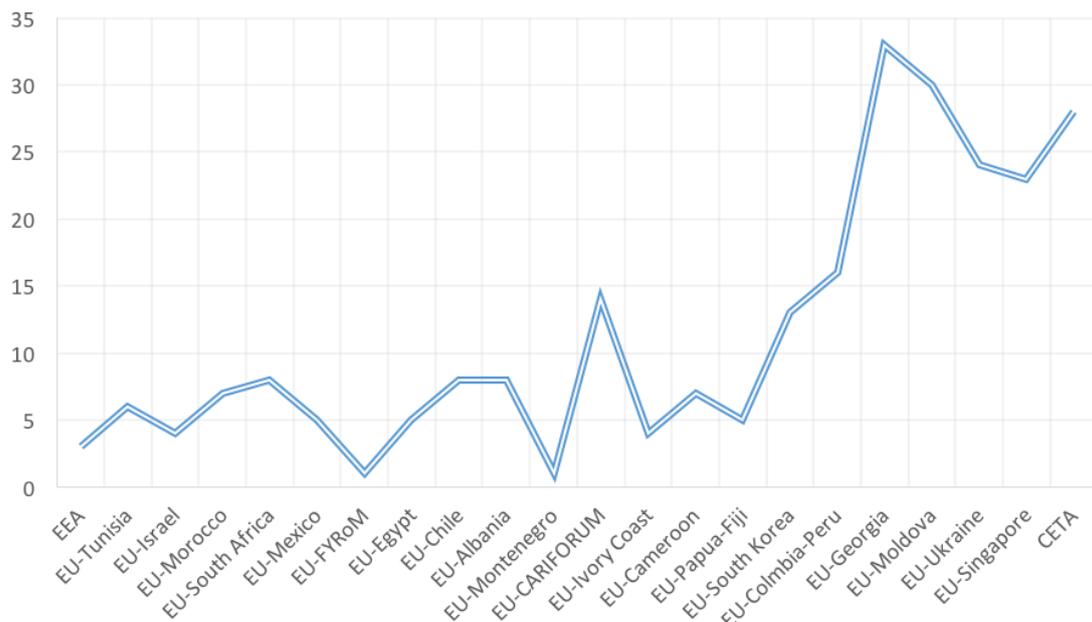
The public procurement derogation in Article III:8(a) of the GATT was **unsuccessfully invoked by both Canada and India** in two cases concerning green industrial policy and, more specifically, feed-in-tariff schemes involving local content requirements (*Canada – Renewables* (2012) and *India – Solar Cells* (2016)). A major difficulty in the operation of such clauses in the specific context of these cases was that the product being procured through the feed-in-tariff scheme (electricity) was different from the product being promoted through the local content requirement (domestic equipment). As a result, the public procurement clause in Article III:8(a) could not be used for the latter.

### 3. Case-study: the integration of renewable energy in FTAs

Although the WTO system governs fuels and equipment used to produce or transform energy (including renewable energy), it does not target it specifically. However, in a growing number of FTAs, provisions specifically addressing renewable energy or bearing a close relationship with it (e.g. removal of subsidies to fossil fuels or green public procurement) are being introduced.

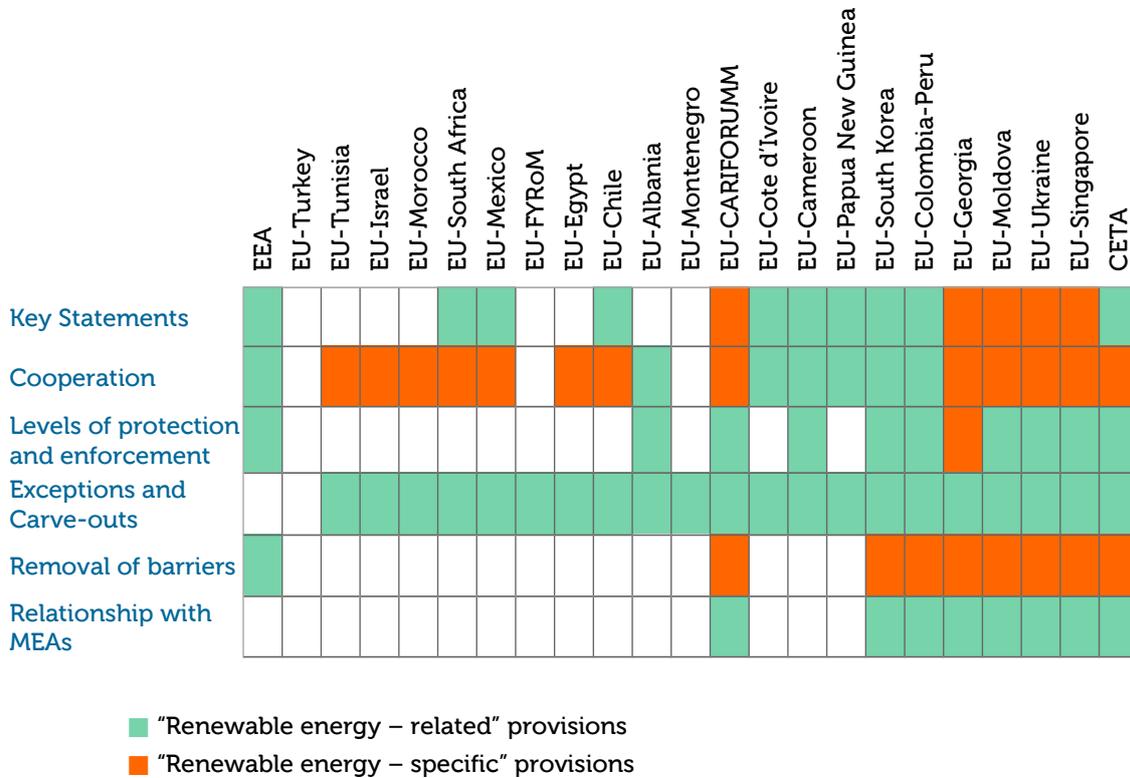
A recent study focusing on these provisions (Cima (2016)) offers a **panorama of the treaty practice of the United States and the European Union** in this regard. It makes a distinction between provisions which are renewable energy-specific (i.e. provisions expressly referring to renewable energy or renewable energy goods or services) and renewable energy-related (i.e. broader provisions relating to the environment or sustainable development, which were discussed in previous sections of this chapter). The latter are more frequently used than the former, although the treaties signed by the EU tend to include renewable energy-specific provisions more and more frequently. Figure 1 shows this trend in the context of the EU FTA practice:

Figure 1: Trends in the use of renewable energy provisions in EU FTAs (ordered chronologically from 1992 (EEA) to 2016 (CETA))



Source: Cima (2016)

Figure 2: Renewable energy provisions in EU FTAs



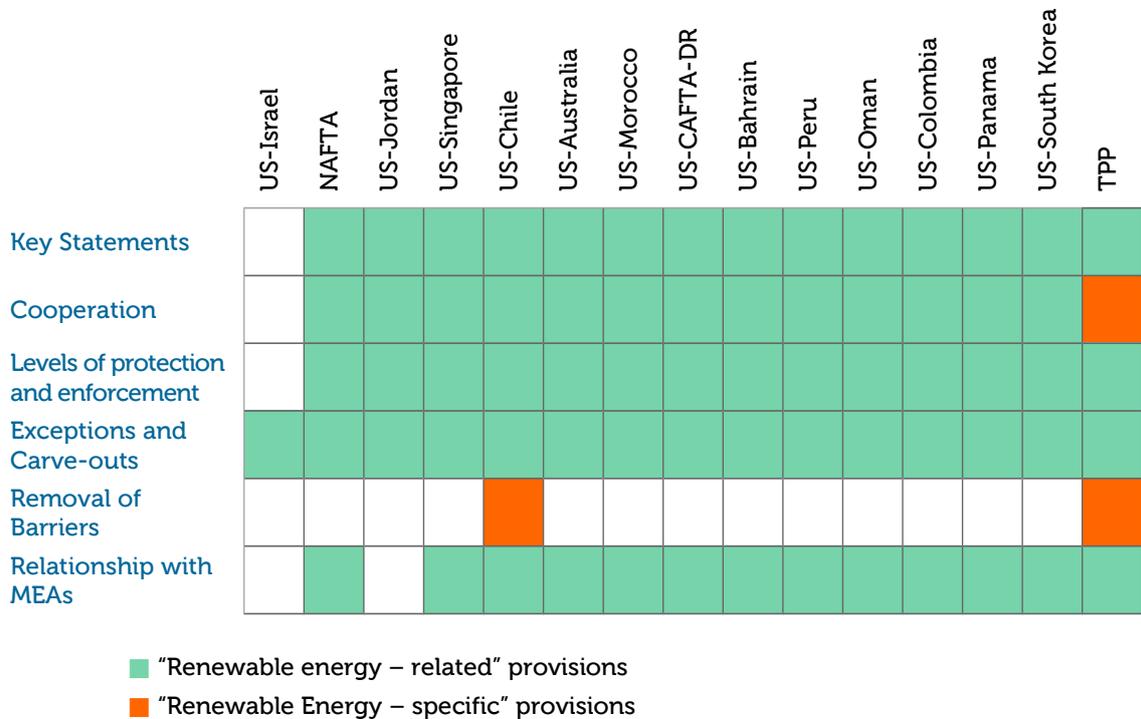
Note: the presence of 'renewable energy-specific' provisions is not alternative but rather cumulative to the existence of 'renewable energy-related' ones.

Source: Cima (2016)

Figures 2 and 3 provide a finer-grained picture of this trend, summarising the **relative frequency** of renewable energy-related and renewable energy-specific provisions, respectively in the EU and the US treaty practice. They also provide some detail regarding the contents of such provisions, which are further discussed below.

From a government's perspective, the main question is what specific types of provisions are being used to promote renewable energy. Interestingly, according to the study reviewed, these provisions seem to be moving the system from a situation in which green industrial policies promoting renewable energy are admitted (e.g. through exceptions) to one in which they are actively encouraged. The **tools used for such promotion are essentially of three types**, namely provisions relating to: (a) the removal of barriers, (b) the possibility of support for renewable energy, and (c) general cooperation provisions. Each type is discussed in turn, with reference to some selected examples.

Figure 3: Renewable energy provisions in US FTAs



Note: see Figure 2.

Source: Cima (2016)

A number of FTAs include provisions **specifically targeting barriers to goods and related services used for renewable energy**. These provisions are of two main types. Some concern trade liberalisation in green goods and services or, as discussed earlier in this chapter and in Chapter 2, provide more room for a coordinated green industrial policy. An example is provided by Article 24.9 of CETA according to which the parties shall ‘pay special attention to facilitating the removal of obstacles to trade or investment in goods and services of particular relevance for climate change mitigation and in particular trade or investment in renewable energy goods and related services’. Of particular note is the specific mention of renewable energy in this provision. Other examples of such provisions include Article 275 of the EU-Colombia FTA (according to which the parties are to ‘promote trade and investment measures that promote and facilitate access, dissemination and use of best available technologies for clean energy production and use, and for mitigation of and adaptation to climate change’) and Article 7.1 of the EU-Singapore FTA (which includes, in a specific chapter devoted to the removal of barriers for trade and investment in renewable energy, the objective of ‘developing and increasing the generation of energy from

renewable and sustainable non-fossil sources'). The EU-Singapore FTA, which is not yet in force, also provides an example of the second type of barrier-removal provision, which is far less frequent, namely a specific reference to a shared goal of progressively reducing fossil fuel subsidies. More fully, Article 13.11, which is located in the Trade and Sustainable Development chapter of the Agreement, states that:

'[t]he Parties recognise the need to ensure that, when developing public support systems for fossil fuels, proper account is taken of the need to reduce greenhouse gas emissions and to limit distortions of trade as much as possible. While subparagraph (2)(b) of Article 12.7 (Prohibited Subsidies) does not apply to subsidies to the coal industry, the Parties share the goal of progressively reducing subsidies for fossil fuels. Such a reduction may be accompanied by measures to alleviate the social consequences associated with the transition to low carbon fuels. In addition, both Parties will actively promote the development of a sustainable and safe low-carbon economy, such as investment in renewable energies and energy efficient solutions.'

Of note is the link between the removal of fossil fuel subsidies and the need to address the social consequences (including unemployment) of this transition, an issue which is discussed in Chapter 7 of this manual.

Another set of provisions focus on **support, specifically subsidies, to renewable energy**. The EU-Singapore FTA provides, again, a good illustration of the state of the art. Article 12.8, read together with Annex 12-A(e), introduces a carve-out to the general clause discouraging 'other subsidies' (i.e. subsidies other than those prohibited under Article 12.7) according to which:

'[ ... ] the following subsidies may be granted by a Party when they are necessary to achieve an objective of public interest, and when the amounts of the subsidies involved are limited to the minimum needed to achieve this objective and their effect on trade of the other Party is limited: [ ... ] (e) subsidies to facilitate the development of certain economic activities or of certain economic areas, where such aid does not affect conditions of trade of either Party and competition between the Parties'.

The scope of the carve-out is highly circumscribed. A footnote to letter (e) adds that:

'[t]his category [the subsidies in letter (e)] may include but is not limited to, subsidies for clearly defined research, development and innovation purposes, subsidies for training or for the creation of employment, subsidies for environmental purposes, and subsidies in favour of small and medium-sized companies, defined as companies employing fewer than 250 persons'.

This provision could provide some space for a wide number of trade-related green industrial policy measures.

The third type of provisions are **more general in nature and relate to cooperation on renewable energy matters**. The provisions characterising the cooperation envisaged range from general references (e.g. Article 57 of the EU-Tunisia Association Agreement; and Article 13.10(e) of the EU-Singapore FTA), to the information exchange provisions (e.g. Articles 23 and 34(2) of the EU-Mexico Global Agreement; Article 13.10(d) of the EU-Singapore FTA; Article 24.12 of CETA; Article 18.6 of the US-Singapore FTA; and Article 19.5 of the US-Singapore FTA) to deeper forms of cooperation to be arranged through instruments such as memoranda of understanding (e.g. Article 18.6 of the US-Singapore FTA; Article 19.5 of the US-Chile FTA; Article 17.9 of the US-CAFTA-DR).

The most advanced form of cooperation is through the conclusion of a side environmental cooperation agreement identifying areas of environmental cooperation. By way of illustration, according to Article 19.5(1) of the US-Chile FTA:

[ ... ] the Parties agree to undertake cooperative environmental activities, in particular through: [ ... ] (b) promptly negotiating a United States-Chile Environmental Cooperation Agreement to establish priorities for further cooperative environmental activities, as elaborated in Annex 19.3’.

This Annex sets out in some detail the areas where cooperation will be promoted as well as the channels through which it will happen. Renewable energy is implicit in a number of provisions, including the reference in Annex 19.3(1)(h) to the use of cleaner fuels, which may encompass the development of biofuels.

## Summary table

<p><b>High-level vision setting and stakeholder consultation</b></p>	<p>UNIDO Practitioner’s Guide for Strategic Green Industrial Policy – Phase 1</p>
<p><b>Stock-taking</b></p>	<p>Gathering information of socio-economic, environmental and existing policies to define a baseline, particularly as regards the following enabling conditions for trade-related green industrial policies:</p> <ul style="list-style-type: none"> <li>• Appropriate resource endowment and political/social conditions</li> <li>• Public investment and access to credit</li> <li>• Adequate infrastructure</li> <li>• Domestic legal and regulatory framework</li> <li>• Integration into international agreements</li> </ul>
<p><b>Prioritising intervention areas and goal-setting</b></p>	<p>Identifying policy rationales to be acted upon and sustainability goals to be reached. Policy rationales to be addressed include all those reviewed in previous chapters for which provisions in trade agreements may create legal space or that may be proactively promoted by such provisions.</p>
<p><b>Selecting the tools</b></p>	<p>Matching selected policy rationales with policy options. Policy options within the broad category of provisions in trade agreements:</p> <ul style="list-style-type: none"> <li>• General approaches:</li> <li>• Environmental side agreements</li> <li>• Environmental or sustainable development chapters</li> <li>• Interpretive letters</li> <li>• Provisions</li> </ul> <p>Provisions relevant to all green industrial policies:</p> <ul style="list-style-type: none"> <li>• Preambular references</li> <li>• Reservations of environmental policy space</li> <li>• Exceptions</li> </ul> <p>Provisions relevant to specific green industrial policies (typically for hard green industrial policy):</p> <ul style="list-style-type: none"> <li>• Border measures</li> <li>• Subsidies</li> <li>• Standards</li> <li>• Public procurement</li> </ul>

<p><b>Design and assessment</b></p>	<p>Specific design of policy option. Selection within each tool of specific design features:</p> <p>For provisions relevant to all green industrial policies:</p> <ul style="list-style-type: none"> <li>• Preambular language (more or less clear and fit for interpretation purposes)</li> <li>• Reservations of environmental policy space (relationships with multilateral environmental agreements, commitments not to lower environmental standards, commitment or allowance to raise environmental standards)</li> <li>• Exceptions (GATT-like, other wording)</li> </ul> <p>Provisions relevant to specific green industrial policies (typically for hard green industrial policy):</p> <ul style="list-style-type: none"> <li>• Border measures (carve-outs for additional financial charges, provisions encouraging trade in environmental goods or services)</li> <li>• Subsidies (provisions aimed at removing distorting subsidies, carve-outs for specific subsidies)</li> <li>• Standards (general commitments not to lower or to increase environmental standards, presumptions of consistency, general references to international standards)</li> <li>• Public procurement (specific carve-outs, references to sustainability criteria)</li> </ul> <p>Assessment of consistency and impact:</p> <ul style="list-style-type: none"> <li>• Legal assessment</li> <li>• Integrated socio-economic and environmental impact assessment</li> </ul>
<p><b>Implementation</b></p>	<p>UNIDO Practitioner’s Guide for Strategic Green Industrial Policy – Phase 6</p>

# Resources

**NB: all links last visited on 15 September 2017**

- Bartels, L., 'The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction' (2015) 109 *American Journal of International Law* 95.
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- Cima, E., 'Promoting renewables through free trade agreements? An assessment of the relevant Provisions', *C-EENRG Working Papers*, 2016-7 (2016), pp.1-50.
- George, G., 'Environment and Regional Trade Agreements: Emerging Trends and Policy Drivers', *OECD Trade and Environment Working Papers*, 2014/02.
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- UN Environment/IISD, *Sustainability tool-kit for trade negotiators*.
- Viñuales, J. E., *Foreign Investment and the Environment in International Law* (Cambridge University Press, 2012).
- Viñuales, J. E., 'Seven Ways of Escaping a Rule: Of Exceptions and their Avatars in International Law', in L. Bartels, F. Paddeu (eds), *Exceptions in International Law* (Oxford University Press, forthcoming 2017).
- Zvelc, R., 'Environmental integration in EU trade policy: the Generalised System of Preferences, trade Sustainability Impact Assessments and Free Trade Agreements', in E. Morgera (ed.), *The External Environmental Policy of the European Union EU and International Law Perspectives* (Cambridge University Press, 2012), pp. 174-203.