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STRENGTHENING THE GLOBAL TRADE SYSTEM



Trade Remedies and Development of Renewable Energy

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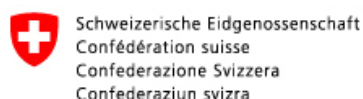
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ABSTRACT

As the aggressive use of trade remedies by the United States and the European Union against China, and vice versa, in the solar panel disputes shows, each of the major trade remedies—anti-dumping, subsidies and countervailing duties, and safeguards—present different challenges to the development of renewable, non-greenhouse gas-emitting energy. This paper examines each of these separately, although some, but not all, of the possible solutions overlap.

It points out that anti-dumping law as currently practiced around the world prevents the kind of rapid cost and price decreases that are necessary to make solar energy, and probably other clean energy technologies, viable competitors with fossil fuels and suggests several possible solutions.

Coming to CVDs, the paper points a trade-depressing effect even of the near initiation of AD and CVD cases. The paper proposes the negotiation of the definitions by which subsidies should be treated specially by a group including the main stakeholders and experts on different aspects of renewable energy, and three principles it should be guided by.

The main problems with safeguards as applied to renewable energy are the same as with AD and CVD— initiation of cases in themselves could have trade-distorting affects. So the recommendation is to abolish safeguards for renewable energy, as with AD and CVD, while implementing other possibilities that include modifying the Safeguards Agreement and speeding up WTO dispute resolution.

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LIST OF ABBREVIATIONS

AD	anti-dumping
ADA	Anti-Dumping Agreement
ASCM	Agreement on Subsidies and Countervailing Measures
CFLs	compact fluorescent lamps
CVD	countervailing duties
EU	European Union
FTA	free trade agreement
GHG	greenhouse gas
LEDs	light-emitting diodes
NAFTA	North American Free Trade Agreement
SGA	Safeguards Agreement
TTIP	Transatlantic Trade and Investment Partnership
US	United States

INTRODUCTION

“Trade war” is frequently used in newspapers (Washington Post 2013), but rarely is it so justified as in the aggressive use of trade remedy law by the United States (US) and the European Union (EU) against China, and vice versa, in the renewable energy sector.¹ The recent EU-China “settlement” of the solar panel dispute is a possible partial “truce” in that war if it holds up. The settlement, in its simplest description, sets a minimum price on Chinese exports of solar panels to the EU and a maximum volume of sales.² Understandably, clean-energy advocates might be baffled by the eagerness of governments to raise prices for renewable energy—precisely the governments which were spending the most money to subsidize it, notwithstanding the realization that high-priced renewable energy will neither be competitive nor viable.

Each of the major “trade remedies” (anti-dumping [AD], countervailing duties [CVD], and safeguards) present different challenges to the development of renewable, non-greenhouse gas (GHG) emitting energy. So this paper will treat each of those separately, although some, but not all, of the possible solutions overlap.

ANTI-DUMPING

Anti-dumping laws were first created by Canada in 1904, based on claims of predatory pricing (steel rails in the US were reportedly sold in Canada by a US monopoly, protected by high tariff walls and a sanctuary home market, at prices calculated to drive the Canadian industry out of business, and then raising them to extortionate levels). Nothing in the Canadian law required proof of any of these claims, and anti-dumping law around the world and in the World Trade Organization (WTO) remains supported by the rhetoric of predation without any need to prove it. Worse, many trade remedy enforcement authorities around the world view their jobs as “defending domestic industry,” so the opportunities for biased application are quite numerous and frequently used.

Anti-dumping was originally defined as selling different prices at different markets. Independent economists who look at anti-dumping are puzzled that anyone would care about differing prices in the absence of abuse of market power, but anti-dumping laws offer great scope for finding such price differences even where they do not exist (see Lindsey 2003 for a description of these “tilts”).

Since the 1970s, dumping has also been found if sales in the export market are “below cost”—defined as “fully loaded cost,” just at the time when competition laws around the world were gradually began to define predatory pricing by domestic firms as selling below “average variable cost,” thus creating a substantial protectionist pricing wedge between the prices allowed by domestic producers and the prices allowed by imports. This wedge is particularly large for industries such as solar panels, which are examples of “Moore’s Law,” where costs (and prices) are cut in half every 18 months by “learning-curve” economics (solar panels in many respects are very similar to semi-conductors). Figure 1 on the prices of Chinese solar panel exports to the EU bears a close resemblance to “Moore’s Law.”

1 China has retaliated by imposing duties on polysilicon—the input for solar panels—from the US and South Korea, and threatened to impose duties on a more traditional, higher valued form of solar energy and wine from Europe. This presumably has been solved by the “price undertaking” agreed in principle on 28 July 2013. This undertaking could keep solar panel prices high for at least two years—just when lower prices are needed to be competitive with fossil fuels. Meanwhile, China put a low antidumping (AD) duty on South Korean polysilicon while continuing the possibility of high AD duties on EU polysilicon, which means that that polysilicon prices in China do not rise, but the threat to EU polysilicon exports remains (see NPD Solarbuzz, <http://www.solarbuzz.com/>).

2 COMMISSION REGULATION (EU) No 748/2013, 2 Aug 2013, amending Regulation (EU) No 513/2013 imposing a provisional anti-dumping duty on imports of crystalline silicon photovoltaic modules and key components (that is, cells and wafers) originating in or consigned from the People’s Republic of China. Official Journal L 209/1.

In effect, anti-dumping law as currently practiced around the world is designed precisely to prevent the kind of rapid cost and price decreases that are necessary to make solar energy, and probably other clean energy technologies, viable competitors with (often heavily subsidized) fossil fuels.

There are several possible solutions.

(a) The only real solution for the application of anti-dumping rules to clean energy is to prohibit cases from even starting. The biggest problem with WTO rules is that they permit national authorities to impose high AD/CVD duties for political reasons with no effective recourse before a neutral body for four to six years (that is, when WTO-authorized retaliation can begin). A detailed study of the impact of trade cases on exports (Campos and Vita2004) concluded that there was a noticeable negative impact on exports for some time even after exporters won cases in the initial phase. This is consistent with the leading academic work on the subject (Prusa and Skeath 2002), and with the common wisdom among trade remedy practitioners (they rarely put in writing what the US lumber industry stated, in a thinly veiled manner—"Even if we reduce artificial price suppression by even 1 percent for one year, we will pay for a three-year effort four times over." This meant that the case would create enough trade disruption that even if the claim was disproven after 12 months, the return on the investment would be 400 percent—much better than the return on investment from improving the product or customer service [US Lumber Group 1995]). Thus, technical tinkering will not do the job, notwithstanding the alternatives listed below. If cases can be started, they will be solely to disrupt trade.³

As can be seen in these "solar panel wars," the EU and China have trade remedy systems flexible enough to "adjust" AD and CVD duties as needed, while the US does not. Thus, the US faces high AD duties on its polysilicon exports to China in return for its AD/CVD duties on Chinese panels.

(b) If it is not possible to abolish AD cases for renewable energy items, these are some possible partial fixes.

- Enforce existing law.

The current WTO Anti-Dumping Agreement (ADA) includes provisions (Art 2.2.1.1; fn. 6) that in effect require recognition of Moore's Law. Dumping calculations must take into account costs spread out over the product cycle, and the "startup" situation of new products and new factories.⁴

The EU and the US, having signed the ADA, have made a mockery of this, and refused to implement it honestly.

3 The US agricultural community recently came to the same conclusion, requesting the US government to negotiate with Europe the abolition of AD and CVD on food in the Transatlantic Trade and Investment Partnership (TTIP) negotiations. "Eliminate antidumping on all food and agriculture products once the tariff on those products reaches zero. Past experiences with NAFTA [North American Free Trade Agreement] indicate that anti-dumping has been a major barrier to trade within that FTA [free trade agreement] even after tariffs end (Food and Agriculture Working Group, Business Coalition for Transatlantic Trade, 2 July 2013).

4 This was forced upon the reluctant US Government by a coalition that included IBM, Hewlett Packard, Sun Microsystems, and others—ironically, against the opposition of Intel, of which Moore was vice chairman at the time, since Intel had been using anti-dumping to keep out foreign competitors.

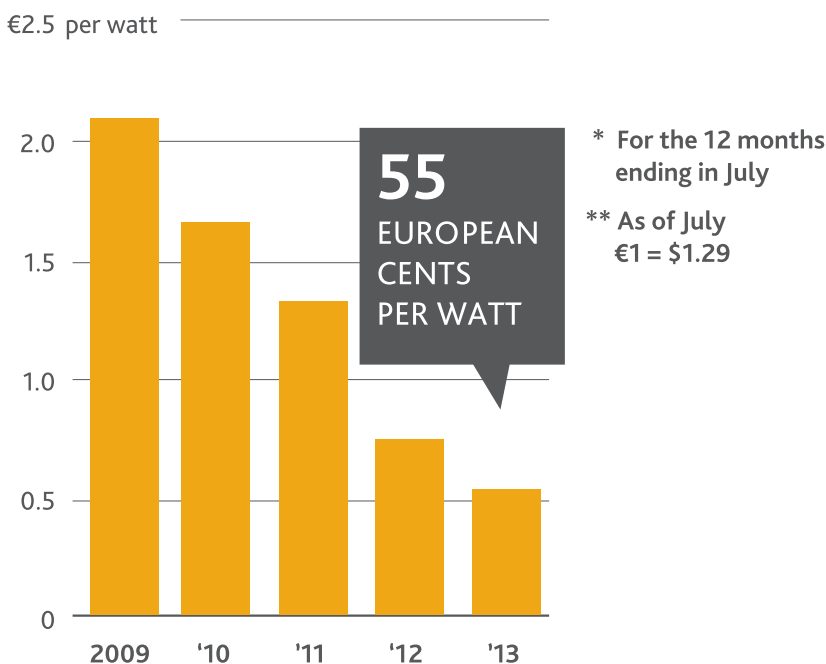


FIGURE 1:

Average Cost of Chinese Solar Panel Exports to Europe, 2009–2013

Source: European Commission.

For example, the US ordained that start-up costs do not include marketing costs (19 USC Section[f] [1] [iii]; limited to production costs), which would sound strange to a Silicon Valley startup or to a professional US accountant.

- Require that the complaining companies show that their costs are lower than the costs of exporters, using identical methodologies.
- Require that the AD duties not be high enough to raise the cost of the renewable energy above actual or likely fossil fuel competitors.

There are numerous other potential palliatives (for example, raise the *de minimis* level below which AD duties are not charged from the current 2 percent to 5 percent) but they would be mainly empty political gestures, and recognized as such.

SUBSIDIES AND COUNTERVAILING MEASURES

The first CVD law, passed by the US in 1890, was to mandate offsetting (“countervailing”) duties to offset the subsidies given on sugar exports by Czarist Russia. By definition, that CVD law was not protectionist, since it could not exceed the amount of subsidy to maintain the amount of the existing (admittedly protectionist) tariff. The US added non-export subsidies to its CVD law in 1922, but the Treasury effectively refused to enforce that part until the late 1970s, and even then it had to claim that certain Canadian investment “incentives” to Michelin were export subsidies because all the production was assumed to go to the US⁵ (it helps to know that there was no practical judicial view of these laughably unsupported decisions until the late 1970s). These CVDs by definition were also not protectionist because all they did was maintain the level of tariffs that would be effectively negated by export subsidies. It was a fairly simple law to administer, as the export subsidies involved were typically a fixed percentage of value of the export so that the CVD was the same amount.

But the trade-distorting effect of non-export subsidies (“domestic subsidies,” or, in WTO terms, “actionable” non-prohibited subsidies) was already being recognized, for example, in Articles 85-86 of the 1957 Treaty of Rome establishing the Common Market (see Baldwin 1970).

5 | Treasury Decision 73-10, 7 Cust. Bull. 24(1973), 38 Fed. Reg. 1018 (1973).

The General Agreement on Tariffs and Trade (GATT) had no real discipline on such subsidies. It contained permission for CVDs in Article VI (this was necessary because the US had such a law and could not accept anything in the GATT that changed it and thus required Congressional action). Even the 1979 Tokyo Round Subsidies Code had only hortatory statements about the possible trade-distorting effects of domestic subsidies (Article 11.3), and not even a definition (the US proposed an “Annex B” with examples, along the lines of Annex A on export subsidies, which was carried over mostly into the Agreement on Subsidies and Countervailing Measures [ASCM], but this was not agreed). In the wake of the 1979 Tokyo Round Agreements, the responsibility for AD/CVD law was moved from the US Treasury Department to the Commerce Department, in part because of a widespread perception that the Treasury would not pursue domestic subsidies. After two years, the Commerce Department was inundated with literally hundreds of CVD cases filed against domestic subsidies. By pure accident, involving the appointment of three different people in the Commerce Department line-up, the Department constructed a relatively non-protectionist set of methodologies for evaluating and measuring subsidies (with the exception of a distorted view of regional subsidies mandated in 1979 by certain senators).

This has changed over time, under pressure from protectionist lobbies, and the duties on solar panels demonstrate the potential for very high CVDs, whether related or not to reality. Even with a non-protectionist methodology, the near initiation of cases still has a trade-depressing effect (although less than anti-dumping, since the parties in a CVD case can presumably calculate their exposure in advance, unlike the irrationality of AD law). Thus, all the proposals suggested above for anti-dumping apply equally well to CVDs.

But the big difference is that unlike AD, where truly predatory pricing can be met by national competition laws (for example, the US has even extended criminal anti-trust laws extraterritorially⁶) and the rest of anti-dumping is just protectionism, subsidies present more of a problem, because disciplines (but not prohibitions) on subsidies for renewable energy need to be constructed instead of CVD laws.

This is not an entirely new endeavor. The entire topic of subsidy law and the environment was actively discussed during the Uruguay Round, and the result was a time-limited “trial period” of a very limited exemption from CVD law for certain environmental subsidies (as well as for certain research and development and regional subsidies) in Article 8 of the ASCM. This was based on the observation that certain subsidies, most notably subsidies for environmental clean-up, could have enough positive social benefit to justify trade distortions that could not be eliminated by drafting limitations and conditions. While the specific drafting of the

6 | US v. Nippon Paper Industries, 109 F.3d 1 (1st Cir. 1997).

environmental “green light,” Article 8.2(c) of the ASCM, was accidental (the Mexican delegate, under huge time pressure at the very end of the negotiation, pulled a six-year-old EU proposal out of his file, crossed out half of it and handed it to Director-General Peter Sutherland, who had been the EU Commissioner for Competition under whose aegis the proposal had been made. Understandably, he agreed it was a good draft) (Horlick and Clarke 1994). The Article 8 “green light” categories disappeared because of the inaction of the 1999 Seattle Ministerial, rather than a general agreement to get rid of them. There is no reason why they should not be revived, at least with regard to environmental subsidies (it is likely that lots of WTO Members will come up with some “countervailing” concession that they want in return for a “green subsidy” provision).

The specific possibilities include the negotiation of the definitions by which subsidies should be treated specially. This should be by a group, including the main stakeholders and experts on different aspects of renewable energy (technical, political, and so on), and experts on subsidy rules (mainly WTO and EU; the WTO Member with the most active discipline on subsidies). The negotiation should be guided by at least three principles.

- 1) There should be a presumption against any subsidy which would lead to increased persistent contamination (for example, the mercury in compact fluorescent lamps [CFLs] when light-emitting diodes [LEDs] were just around the corner), or to significant emissions of GHG.
- 2) The good projects should not be captured for private stakeholders while they leave the bad projects to governments. Even with all this, some of the money will be “wasted,” because it is inevitable that not all new technologies will succeed.
- 3) All new knowledge created with the help of public money or assistance should be made public.

Decision-making and dispute resolution on individual subsidies must be rapid and binding. The WTO agreement on pre-shipment inspection has binding dispute resolution within 10 days, and there is no reason, in an electronically linked world that does not require experts to fly around, why this cannot be done. Another possible model would be the ASCM's Permanent Group of Experts, which was designed for this task but whose mission was taken away at the last minute at the assistance of big powers (see footnote 35 to the ASCM). It is inevitable that whatever tribunal that is set up will make some mistakes, but there should be no appeal. The mistakes will even out over time, even those the losing party will complain loudly about, but the task is too important to be stifled with even more red tape.

SAFEGUARDS

Safeguards were little used before the Uruguay Round, as Article XIX GATT required that any increase in tariffs or imposition of quotas be “compensated” for by the importing country. This became increasingly difficult, especially for developed countries, as negotiated tariff reductions gradually made duties that protected the most sensitive domestic constituents the only ones that could be lowered as compensation. One of the EU's major negotiating goals in the Uruguay Round was elimination of that requirement. The EU succeeded, to the extent that the Safeguards Agreement (SGA) removed the requirement for compensation for the first three years of the duties or quotas as long as imports had increased absolutely rather than relatively (Art. 8.3).⁷

The use of safeguards has increased since then, but mainly by developing countries which find AD and CVD too expensive. In effect, the three-year non-compensation period has become a norm backed by the coincidence that WTO dispute challenges to safeguards last about three years, and the Appellate Body has never found a safeguard it approved. Consequently, it would seem that the main problem with safeguards as applied to renewable energy would be the same as with AD and CVD—initiation of cases in themselves could have trade-distorting effects. Beyond that, there are fewer methodological issues to deal with. There is no calculation of dumping or subsidies, and the determination of injury in safeguards cases is whimsical, as it is in AD and CVD. So the first recommendation is to abolish safeguards for renewable energy, as with AD and CVD. Other possibilities would include the following.

- Having a fast-track multinational expert group issue binding decisions on the legitimacy of proposed safeguards against imports of green energy items before they are initiated or put into effect.
- Introducing a “public interest test” as discussed above and similar tweaks from the AD and CVD recommendations.
- In addition, the SGA is virtually devoid of the procedural protections and rights of defense in the AD and CSM agreements, so some of those could be brought over as well.
- A leisurely two to three-year wait for dispute resolution and compliance such as that with WTO dispute resolution is laughable in a context of rapidly changing technology and markets.

⁶ Ironically, the EU could not take advantage of this change as a change in voting rules inspired by France, coupled with the addition of Austria, Finland and Sweden on 1 Jan, the date of entry into force of the Round, meant that the EU could not find the votes to impose safeguards.

REFERENCES

Baldwin, Robert E. 1970. *Non-Tariff Distortions of International Trade*. Brookings Institution, Washington, DC.

Campos, A. and Vita, A. 2004. "Abuse and Discretion: The Impact of Antidumping and Countervailing Duties Proceedings on Brazilian Exports to the United States." 38, *Journal of World Trade*, 37.

Horlick, G. and Clarke, P. 1994. "The 1994 WTO Subsidies Agreement." 17 (4), *World Competition*, 41.

Lindsey, Brink. 2003. *Antidumping Exposed: The Devilish Details of Unfair Trade Law*. Cato Institute, Washington, DC.

Prusa, Thomas and Skeath, Susan. 2002. "The Economic and Strategic Motives for Antidumping Filings." *Review of World Economics*, Springer, 183 (3), pp. 389-413.

"US Lumber Group Seeks Funds to Fight Canadian Subsidy," 1995. *Journal of Commerce*, 17 July.

Washington Post. 2013. "US Firms Brace for Chinese Tariffs in Solar-cell Battle," 24 July, A12.

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