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Mapping the Parameters of the GATT Article III:8(a)  
Government Procurement Derogation in the Renewable  
Energy Transition**

Mandy Meng FANG

Post-Doctoral Fellow, Asia-Pacific Centre for Environmental Law,  
Faculty of Law, NUS

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**Shades of Green:  
Mapping the Parameters of the GATT Article III:8(a) Government  
Procurement Derogation in the Renewable Energy Transition**

**Mandy Meng FANG**

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**ABSTRACT**

*The increasingly pervasive use of trade-related supportive measures in the renewable energy sector has created tensions with the World Trade Organization (WTO) obligations. This tension has led to a number of disputes, and in so doing became a testing ground for the compatibility between trade regime and climate regime. This article aims to add to the literature by focusing on one of the less discussed, but extremely important, WTO provisions relevant in assessing the legality of renewable energy measures – the GATT Article III:8(a). Dormant for more than six decades, Article III:8(a) became a focal point of both the Canada – Renewable Energy and India – Solar Cells disputes. The Appellate Body in both disputes interpreted the so-called government procurement derogation narrowly and in so doing limited the scope of the provision. This article argues that while the ultimate decision reached by the Appellate body was correct, its methodological approach was flawed and could render the provision inapplicable in even paradigm government procurement scenarios. While the methodological approach used by the Panel in Canada – Renewable Energy would be more preferable and closer to the context.*

**Key Words:** World Trade Organization, renewable energy, government procurement, climate change mitigation

## 1. Introduction

With the growing awareness of the potential of developing renewable energy to bring enormous social, economic and environmental benefits,<sup>1</sup> Both advanced economies and developing ones have eagerly engaged in various policy-making efforts to facilitate the development and deployment of renewable energy.<sup>2</sup> Renewable energy policy measures do not work in isolation but have close interaction with other policy areas, notably international trade. Some policy measures can be inconsistent with the World Trade Organization (WTO) rules, depending on their specific design and application. The literature is replete with examples of scholars attempting to assess the interaction between renewable energy supportive measures and the WTO disciplines.<sup>3</sup>

Whether the use of trade-restrictive renewable energy measures, which result in discrimination against other WTO Members, could nevertheless be exonerated through the application of certain exemptions/derogations contained in the WTO Agreements is becoming intriguing. Such provisions are contained in a wide range of WTO agreements, including the General Agreement on Tariffs and Trade (GATT),<sup>4</sup> the Agreement on Trade-Related Investment Measures (TRIMs)<sup>5</sup> and the Agreement on Subsidies and Countervailing Measures (SCM Agreement).<sup>6</sup> This article focuses on a single provision, namely the GATT Article III:8(a), and its application to the use of trade-restrictive renewable energy measures.

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\* Post-doctoral Fellow at the Asia-Pacific Center for Environmental Law, National University of Singapore. The author wants to thank Professor Anatole Boute, Professor Markus Wagner, Professor Bryan Mercurio, Professor Stephan Schill and two anonymous reviewers for their comments on an earlier draft.

<sup>1</sup> For a comprehensive analysis of benefits that renewable energy development can bring, see, International Renewable Energy Agency, *The Socio-Economic Benefits of Solar and wind energy* (IRENA 2014); Saini Akella and Sharma M.P, 'Social, Economic and Environmental Impacts of Renewable Energy Systems' (2009) 34 *Renewable Energy* 390, 390-96.

<sup>2</sup> A thorough and comprehensive database for renewable energy policy measures can be found in IEA and IRENA, *IEA/IRENA Joint Policies and Measures Database* (IEA) <<https://www.iea.org/policiesandmeasures/renewableenergy/>>.

<sup>3</sup> See ie Thomas Cottier and others (eds), *International Trade Regulation and the Mitigation of Climate World Trade Forum* (CUP 2009); Matthew A. Cole and Robert J. R. Elliott, 'Determining the Trade-Environment Composition Effect: The Role of Capital, Labor and Environmental Regulations' (2003) 46(3) *Journal of Environmental Economics and Management* 363-83; Thomas Cottier 'Renewable Energy and WTO Law: More Policy Space or Enhanced Disciplines?' (2014) 5(1) *Renewable Energy Law and Policy Review* 40-51; James K. R Watson, *The WTO and the Environment: Development of Competence beyond Trade* (Routledge 2013); Andrew Green 'Climate Change, Regulatory Policy and the WTO' (2005) 8(1) *JIEL* 143-89.

<sup>4</sup> GATT 1994 is part of Annex 1A: Multilateral Agreements on Trade in Goods of the WTO Agreement. GATT 1994 must be read in conjunction with GATT 1947.

<sup>5</sup> The Agreement on Trade-Related Investment Measures ('TRIMs Agreement'), one of the Multilateral Agreements on Trade in Goods, prohibits trade-related investment measures, such as local content requirements, that are inconsistent with basic provisions of GATT 1994.

<sup>6</sup> The WTO Agreement on Subsidies and Countervailing Measures disciplines the use of subsidies, and regulates the actions countries can take to counter the effects of subsidies.

Article III:8(a) carves out policy space for ‘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.’<sup>7</sup> Government procurement measures that fall under the ambit of Article III:8(a) would be exempted from being scrutinized by non-discrimination obligation. The detailed analysis of this article will be laid out in the following sections. Since trade restrictive renewable energy measures, in most if not all scenarios favor domestic producers or manufactures over foreign counterparts in a discriminatory manner, whether Article III:8(a) could be available is of significant importance.

Unlike other provisions under the GATT and other WTO agreements, Article III:8(a) – the so-called government procurement derogation – has not been extensively discussed in the existing literature.<sup>8</sup> This may be due to the fact that the article has not been frequently cited in WTO disputes. For more than six decades, no Member had referred to Article III:8(a) for exemption of WTO obligations in any dispute. However, this by no means indicates that government procurement is not a policy space sensitive matter with potential of trade frictions. In fact, the WTO and other experts estimate that government purchases range approximately from 10% to 15% of GDP of an economy on average.<sup>9</sup> Apparently, government entities can have an important impact on the market through their purchases directly. In some cases, governments favor domestic producers over foreign ones in their purchases, even if it means higher costs and inferior quality.<sup>10</sup>

Recently, Article III:8(a) surfaced in two WTO disputes addressing the legality of renewable energy measures: *Canada – Renewable Energy*<sup>11</sup> and *India – Solar Cells*<sup>12</sup>. In both disputes, both the Panel and the Appellate Body applied the specific case facts to the understanding of Article III:8(a), which implies time is ripe to give a critical review of this provision. The resemblance of the challenged measures in the two disputes is noteworthy since they concerned

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<sup>7</sup> The detailed analysis of this provision is in Chapter 3.

<sup>8</sup> Literature on Article III:8(a) includes Kamala Dawar, ‘Government Procurement in the WTO: A Case for Greater Integration’ (2016) 15 *World Trade Review* 645-70; Arwel Davies, ‘The GATT Article III: 8(a) Procurement Derogation and *Canada – Renewable Energy*’ (2015) 18(3) *JIEL* 543-54; Alan Yanovich, ‘*Canada – Renewable Energy* and *Canada – FIT Program* – Debunking the Myth that the GATT 1994 Provides Carte Blanche to Discriminate in Government Procurement’ (2013) 8(3) *Global Trade and Customs Journal* 430-34.

<sup>9</sup> See, WTO and Government Procurement, <[https://www.wto.org/english/tratop\\_e/gproc\\_e/gproc\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm)>. See also Simon Lester, Bryan Mercurio and Arwel Davies, *World Trade Law* (3<sup>rd</sup> ed Hart Publishing 2018) 755.

<sup>10</sup> See, OECD, *Government Purchasing in Europe, North America and Japan: Regulations and Procedures* (OECD 1966).

<sup>11</sup> WTO, *Canada: Certain Measures Affecting the Renewable Energy Generation Sector; Canada – Measures Relating to the Feed-In Tariff Program (Canada – Renewable Energy)*, Report of the Appellate Body (6 May 2013) WT/DS412/AB/R; WT/DS426/AB/R.

<sup>12</sup> WTO, *India: Certain Measures Relating to Solar Cells and Solar Modules (India – Solar Cells)*, Report of the Appellate Body (16 September 2016) WT/DS456/AB/R.

the imposition of local content requirements (LCRs), which mandated the electricity generators to source certain amount of renewable energy equipment, such as solar modules or wind turbines from domestic resources.<sup>13</sup> In this vein, foreign renewable energy manufacturers have to face an unlevelled playing field in these markets and their products would be disfavored.

As a global issue, LCRs implemented in the renewable energy sector can impact over USD 100 billion of trade annually.<sup>14</sup> Governments that design and implement LCRs as part of industrial policy usually justify with a wide range of grounds. For instance, the advantages that LCRs can create are: to create local employment opportunities; to nurture and support a local infant industry, particularly in the case of emerging economies aiming to enter high-tech sectors; a promising path to economic development; and a fiscal stimulus since most of the governmental assistance will feed back into the domestic economy.<sup>15</sup> As argued by Kuntze and Moerenhout, high capital financial support for renewable energy projects would be publicly supported through making corresponding local benefits visible.<sup>16</sup>

However, the skeptical voices seem to be even stronger in criticizing the deficiencies of using LCRs.<sup>17</sup> Firstly, many commentators seriously doubt that the use of LCRs can expand renewable energy and mitigate climate change.<sup>18</sup> Because employing LCRs could increase the cost of renewable energy production and slow down the diffusion of renewable energy technologies.<sup>19</sup> Secondly, LCRs are motivated by protectionist objectives as they intentionally discriminate against foreign manufacturers and favor domestic ones, which violates the non-discrimination obligation under the WTO. The use of LCRs in renewable energy has not gone unnoticed by affected trading partners, and in recent years a growing number of WTO disputes

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<sup>13</sup> For a comprehensive discussion of the use of local content requirements in both advanced economies and developing ones, please see, Gary Hufbauer and Jeffrey J. Schott, *Local Content Requirements: A Global Problem* (Peterson Institute for International Economics 2013).

<sup>14</sup> Sherry Stephenson, 'Addressing Local Content Requirements: Current Challenges and Future Opportunities' (*ICTSD*, 25 July 2013) <<http://www.ictsd.org/bridges-news/bioeres/news/addressing-local-content-requirements-current-challenges-and-future>> accessed 5 May 2017.

<sup>15</sup> See Hufbauer and Schott (n 13) 1.

<sup>16</sup> Jan-Christoph Kuntze and Tom Moerenhout, 'Local Content Requirements and Renewable Energy Industry- A Good Match?' (*ICTSD*, 3 June 2013) <<https://www.ictsd.org/themes/climate-and-energy/research/local-content-requirements-and-the-renewable-energy-industry-a>> accessed 12 June 2017.

<sup>17</sup> See Alan Deardorff and Robert M. Stern, 'Measurement of Non-Tariff Barriers' (OECD Economics Department Working Papers No 179, 1997) <[https://www.oecd-ilibrary.org/economics/measurement-of-non-tariff-barriers\\_568705648470](https://www.oecd-ilibrary.org/economics/measurement-of-non-tariff-barriers_568705648470)>; Michael Mussa, 'The Economics of Content Protection' (National Bureau of Economic Research Working Paper No. 1457, 1984) <<http://www.nber.org/papers/w1457>>.

<sup>18</sup> See Holger Hestermeyer and Laura Nielson, 'The Legality of Local Content Measures under WTO Law' (2014) 48(3) *JWIT* 553-59; Andrew Prag, 'Trade and SDG 13 – Action on Climate Change' (ADBI Working Paper 735, 2017) <<https://www.adb.org/publications/tradeand-sdg-13-action-climate-change>>.

<sup>19</sup> WTO and UNCTAD, *Trade-Related Investment Measures and Other Performance Requirements* (WTO, 2002) 24.

have concerned this matter,<sup>20</sup> which leads to an extensive academic discussions.<sup>21</sup> Whether the use of LCRs can be deemed as legitimate government procurement that fall into the derogation merits close attention.

In spite of the brevity of Article III:8(a), government procurement has been regulated more systematically under the WTO regime since the establishment of the Agreement on Government Procurement (GPA).<sup>22</sup> This Agreement stands outside the ‘Single Undertaking’, in that it is a plurilateral agreement with limited membership. Only WTO Members that have acceded to the agreement are bound by its rules. After three rounds of amendments, the Agreement has 19 parties comprising 47 WTO Members as of 2018.<sup>23</sup> In addition, the scope and coverage of the GPA is not unrestricted because the number of ‘government entities’ in acceded Members covered by the agreement is limited as well as the product and service.<sup>24</sup> Only entities listed in Appendix I of the agreement are covered by the GPA obligations that provide a framework to ensure procurements are conducted in a competitive, non-discriminatory, and transparent manner.

This clearly reflects the reluctance that a large number of WTO Members have had in subjecting government procurement to multilateral trade regulation as well as their wide divergence in how to regulate. As the discipline of government procurement under the GPA turns out to be rather limited, how to understand the scope of Article III:8(a) becomes a rather

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<sup>20</sup> In chronological order, WTO Request for Consultations by India, *United States – Certain Measures Relating to the Renewable Energy Sector*, WT/DS510/1, submitted on 9 September 2016; WTO Request for Consultations by the United States, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/1, submitted on 6 February 2013; WTO Request for Consultations by China, *European Union and Certain Member State – Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS452/1, submitted on 5 November 2012; WTO Request for Consultations by the European Union, *Canada – Measures Relating to the Feed-In Tariff Program*, WT/DS426/1, submitted on 11 August 2011; WTO Request for Consultations by United States, *China – Measures Concerning Wind Power Equipment*, WT/DS419/1, submitted on 22 December 2010; WTO Request for Consultations By Japan, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS412/1, submitted on 13 September 2010.

<sup>21</sup> See Luca Rubini, ‘The Good, the Bad, and the Ugly: Lessons on Methodology in Legal Analysis from the Recent WTO Litigation on Renewable Energy Subsidies’ (2014) 48(5) *JWT* 896-938; Samuel Griffin, ‘The World Trade Organization: A Barrier to Green Energy’ (2013) 22(1) *Transnational Law & Contemporary Problems* 205-27; Rajih Pal, ‘Has the Appellate Body’s Decision in Canada-Renewable Energy/Canada-Feed-in Tariff Program Opened the Door for Production Subsidies?’ (2014) 17(1) *JIEL* 125-37; Henrik Andersen, ‘Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions’ (2015) 18(2) *JIEL* 383-405; Sherzod Shadikhodjaev, ‘First WTO Judicial Review of Climate Change Subsidy Issues’ (2013) 107(4) *AJIL* 864-78

<sup>22</sup> See, Agreement on Government Procurement Annex 4(b) of the WTO Agreement, reprinted in Uruguay Round of Multilateral Trade Negotiations: Legal Instruments Embodying the Results of the Uruguay Round, Vol. 31, GATT Secretariat, Geneva, 1994. The first agreement on government procurement (the so-called ‘Tokyo Round Code on Government Procurement’) was signed in 1979 and entered into force in 1981.

<sup>23</sup> The GPA was amended in 1989, 1994 and 2012, respectively.

<sup>24</sup> The principles and procedural requirements set out by the text of the GPA do not automatically apply to all the procurement activities of each party but those that specified in the parties’ coverage schedules have to comply with the rules of the GPA See, the WTO GPA coverage schedules, [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_app\\_agree\\_e.htm#revisedGPA](https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm#revisedGPA).

sensitive matter.<sup>25</sup> This is to say, the policy scope Members that are non-signatory to the GPA and government entities in signatory Members that are not covered by the GPA have with respect to government procurement under the GATT national treatment obligation would be primarily decided by the interpretation of Article III:8(a).

For many years, commentators have believed that governments would enjoy sufficient discretion in their procurement activities to adopt policies restraining purchasing products from abroad. This reflects a desire that ‘our money’ should be spent on ‘our goods’ to keep ‘jobs at home’ and achieve other social and industrial policy objectives.<sup>26</sup> The plurilateral nature and narrow scope of the GPA also seems to imply that the WTO regime has paid much deference to government procurement. However, the recent decisions made in the two WTO disputes suggest that Article III:8(a) may not be as broad as generally perceived.<sup>27</sup> It is important to map out the parameters of Article III:8(a) on the basis of the Appellate Body decisions.

Section II summarizes the decisions made by the WTO Dispute Settlement Body on Article III:8(a) in the two renewable energy disputes. Section III, which forms the core of this article, critically analyzes the Panel and the Appellate Body’s rulings and draws attention to a few highly controversial issues from two perspectives. The first perspective is how the decisions implicate the interaction between the WTO regime and the climate regime. It begs the question whether the WTO jurisprudence in Article III:8(a) can uphold trade objectives while not compromising climate-related interests. The second perspective is how these decisions implicate future WTO dispute settlement in the area of government procurement. Of particular interest is whether the methodology adopted in the two disputes is legally sound and should be followed in future jurisprudence when similar disputes arise in not only in renewable energy area but also other fields.<sup>28</sup> Finally, Section IV concludes.

## **2. The GATT Article III:8(a) and WTO Renewable Energy Disputes: An Overview**

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<sup>25</sup> Maria Anna Corvaglia, *Public Procurement and Labour Rights: Towards Coherence in International Instruments of Procurement Regulation* (Hart 2017) 107.

<sup>26</sup> See Bernard Hoekman and Simon Evenett, ‘International Disciplines on Government Procurement’ in Arvid Lukauskas, Robert Stern and Gianni Zanini (eds) *Handbook of Trade Policy for Development* (OUP 2013) 851, 852-53.

<sup>27</sup> See Arwel Davies, ‘The Evolving GPA: Lessons of Experience and Prospects for the Future’ in Aris C. Georgopoulos, Bernard Hoekman and Petros C. Mavroidis (eds) *The Internationalization of Government Procurement Regulation* (OUP 2017) 23, 45.

<sup>28</sup> Although adopted panel and Appellate Body reports are technically only binding on the parties to the dispute, it is well known and recognised that ‘absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.’ See, Appellate Body Report, *US – Stainless Steel from Mexico*, WT/DS344/AB (20 May 2008), para 160.

This section reviews the Panel and the Appellate Body's interpretations of the GATT Article III:8(a) in two WTO disputes: *Canada – Renewable Energy* and *India – Solar Cells*. The manner in which the WTO adjudicatory bodies interpreted this provision is illustrative of under what circumstances WTO Members are permitted to discriminate in government procurement practices by favoring domestic producers over foreign ones without violating non-discrimination obligation. This has significant implications on procurement policy-making in not only the renewable energy sector, but also other sectors that are home to procurement activities.

### ***2.1 A Brief Introduction to the GATT Article III:8(a): Negotiation History and Its Wording Ambiguities***

How to regulate government procurement has been a challenging and controversial issue that the GATT and WTO drafters need to face.<sup>29</sup> It is useful to examine the negotiation history of Article III: 8(a) since it could shed some light on the meaning of certain provisions that are not unambiguously drafted. In Boyle's opinion, it helps in interpretation to explore and take into account drafters' intention at the treaty's conclusion.<sup>30</sup>

During the Havana Charter negotiations, government procurement practices were considered 'unreached' by the language of Article III,<sup>31</sup> given that the negotiators chose to create explicit carve-outs for government procurement. However, the original proposal made by the United States was to subject this matter to national treatment obligation in the Suggested Charter for an International Trade Organization.<sup>32</sup> This reflects that whether and to what extent government procurement should be bound by the WTO non-discrimination obligation divided Members at the very beginning. The difficulty to seek consensus among the WTO Members in this area is self-evident. It is perhaps not surprising that Article III:8(a) of the GATT has remained intact without any modification since the inception in 1947.

As briefly laid out in the Introduction, Article III:8(a) establishes three separate yet cumulative requirements that must be satisfied together for any measure to fall under the ambit. The first requirement is that the measure needs to be 'a law, regulation, or requirement governing procurement'; the second is the measure needs to involve 'procurement by governmental agencies'; and third is the procurement needs to be undertaken 'for governmental

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<sup>29</sup> Davies (n 27), 39.

<sup>30</sup> Alan Boyle, 'Further Development of the 1982 Law of the Sea Convention: Mechanisms for Change' (2005) 54(3) *International and Comparative Law Quarterly* 563, 567-68.

<sup>31</sup> John H. Jackson, *The Jurisprudence of GATT&WTO* (CUP 2000) 63.

<sup>32</sup> Kenneth Dam, *The GATT: Law and International Economic Organization* (University of Chicago Press 1970) 199-200.



purposes and not with a view to commercial resale'. Any measure that fails to meet any of the requirements would not be covered by Article III:8(a) but subject to the scrutiny of non-discrimination obligation.

Unfortunately, yet understandably, the wording of Article III:8(a) appears to be somewhat vague and imprecise. As Jackson rightly points out, the language of Article III:8(a) presents some interpretative difficulties.<sup>33</sup> The way the treaty was drafted 'is rarely precise enough to be unambiguous.'<sup>34</sup> For instance, the key terms: 'products purchased' and 'procurement' were left undefined by negotiators. When read as a whole the text of Article III:8(a), the meaning of 'procurement' and 'purchase' appears to be neither identical nor interchangeable because some types of government procurement would not involve purchases. How to distinguish between the two somehow similar concepts was not specified in the treaty. Another important phrase 'governmental purposes' also was undefined. What constitutes 'government purposes' would invite different thoughts from different Members, particularly non-market economies.<sup>35</sup> How to give meaning to the provision text and apply it to the concrete facts in each dispute is a challenge for adjudicators. The need to take into account the negotiators' intention as well as the objective and purpose of Article III:8(a) during interpretation merits close attention.

The narrower the scope of Article III:8(a) is, the more expansive the non-discrimination obligation is in its application. A narrowly interpreted government procurement derogation will frustrate, if not entirely deny even some forms of legitimate procurement practices that Members are entitled to. On the other hand, extending the scope of Article III:8(a) to be over-inclusive would allow WTO Members to discriminate in their procurement practices and obstruct trade liberalization. Therefore, the WTO Dispute Settlement Body has to strike a delicate balance between further liberalizing trade and not encroaching excessively into Members' regulatory autonomy in government procurement area.

## ***2.2 The Interpretation of Article III:8(a) in Canada – Renewable Energy***

The first dispute that referred to Article III:8(a) was *Canada-Renewable Energy*. In the dispute, the challenged measure consisted LCRs, which were attached in the Feed-in Tariff (FIT) Programme applicable to solar and wind power generation facilities. Established by the Ontario Power Authority (OPA),<sup>36</sup> the FIT Programme provided generators of renewable energy

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<sup>33</sup> John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (2nd edition, The MIT Press 1997) 225.

<sup>34</sup> José E Alvarez, *International Organizations as Law-makers* (OUP 2005) 84.

<sup>35</sup> Jackson (n 33) 225.

<sup>36</sup> OPA was established under Ontario's Electricity Restructuring Act of 2004 as a government agency responsible for managing Ontario's electricity supply.

electricity a guaranteed price for twenty years to or forty years. Access to FIT contracts was conditioned on meeting the minimum domestic content levels for power generation equipment. Japan and the EU alleged that the imposition of LCRs violated the GATT Article III: 4 (national treatment)<sup>37</sup> on the basis that foreign renewable energy generation equipment was subject to less favorable treatment than ‘like’ products of Ontario origin.<sup>38</sup>

Canada defended the challenged measure by arguing that the FIT programme amounted to ‘laws and requirements that govern the procurement of renewable energy electricity for governmental purpose of securing an electricity supply for Ontario from clean sources ... [and] not with a view to commercial resale or with a view to use in the production of goods for commercial sale.’<sup>39</sup> If Canada could successfully avail itself of Article III:8(a), even the discriminatory LCRs would have been exonerated.<sup>40</sup>

It is worth pointing out that Japan and the EU did not make any claim with respect to the breach of GPA obligations, although Canada has been acceded to the GPA. This is because the challenged measure was designed and enacted by the OPA, which is not covered by Canada’s obligations in the agreement.<sup>41</sup> Therefore, the complainants did not have legal grounds to file for Canada’s violation of its GPA obligation. Nevertheless, the nuanced relationship between the Article III:8(a) and the GPA should not be dismissed. Whether the limited scope of the GPA can shed some light on the application of Article III:8(a) becomes particularly essential for governments that are not bound by the GPA.<sup>42</sup>

Both the Panel and the Appellate Body rejected Canada’s defense with respect to Article III:8(a), yet they differed considerably in the reasoning. The panel agreed with Canada that the challenged measure amounted to ‘laws, regulations or requirements governing the procurement by governmental agencies of products purchased’. The Panel reasoned that LCRs compelled the purchase and use of renewable energy equipment, which was ‘a necessary prerequisite for the alleged procurement...to take place.’<sup>43</sup> In other words, if renewable energy generators did not satisfy the LCRs, the procurement of renewable energy electricity would not happen, which

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<sup>37</sup> GATT Article III: 4 provides: ‘The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.’

<sup>38</sup> See, Panel Report, *Canada-Renewable Energy*, paras.3.1-4.3. In their submissions, Japan and the EU also referred to the SCM Agreement, arguing that the measures constituted prohibited subsidies.

<sup>39</sup> Appellate Body Report, *Canada – Renewable Energy*, para. 1.10.

<sup>40</sup> Aaron Cosbey and Petros C. Mavroidis. ‘A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO’ (2014) 17(1) *Journal of International Economic Law* 11, 15.

<sup>41</sup> See, Canada’s GPA Annex.

<sup>42</sup> Hestermeyer and Nielson (n 18) 581.

<sup>43</sup> Panel Report, *Canada – Renewable Energy*, para. 7.124

proved that the LCRs governed procurement for the purpose of Article III:8(a). The Panel also noted that the LCRs were imposed on the very same equipment that was used to produce the electricity that was procured by the government, which evidenced ‘a close relationship’ between the products.<sup>44</sup> Thus, the EU’s argument that Article III:8(a) should only cover measures that directly affect a product identical to the product allegedly procured was rejected.

However, the Panel found that the Government of Ontario and the municipal governments did ‘profit from the resale of electricity that is purchased under the FIT Programme’ and that the resale of electricity was made ‘in competition with the licensed electricity retailers, which amounted to ‘commercial resale’ and failed to satisfy the last requirement.<sup>45</sup> Article III:8(a) was not applicable and the challenged measures were inconsistent with Article III of the GATT 1994 and with Article 2.1 of the TRIMs Agreement.

Both the complainants and the defendant appealed on the Panel’s interpretation. Seven out of eight Members that provided third participants’ submissions addressed the Panel’s interpretation of the government procurement derogation.<sup>46</sup> The US and China criticized Panel’s interpretation being too broad and argued for distinguishing between ‘procurement’ and ‘products purchased’ within the meaning of Article III:8(a).<sup>47</sup> Under this interpretation, the derogation cannot be applicable to the procurement of any product but a specific product.<sup>48</sup> The relationship between products being purchased and products being procured cannot be interpreted as broadly as the Panel did.

The Appellate Body upheld the Panel’s ruling that the challenged measures were incompatible with Canada’s obligations under the GATT and the TRIMs Agreement, however, on different legal reasoning. The Appellate Body first clarified the nature of this provision, holding that it is ‘a derogation limiting the scope of the national treatment obligation and it is not a justification for measures that would otherwise be inconsistent with that obligation.’<sup>49</sup>

The Appellate Body then proceeded to address the point it diverged with the Panel, which concerned whether the LCRs could be regarded as a legal requirement ‘governing’ the procurement of electricity.<sup>50</sup> In the Appellate Body report, to distinguish between procurement and products purchased was highlighted, which received little attention from the Panel.<sup>51</sup> The

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<sup>44</sup> Panel Report, *Canada – Renewable Energy*, para. 7.127.

<sup>45</sup> Panel Report, *Canada – Renewable Energy*, para. 7.151. The Panel found out that Hydro One, a provincial government entity and municipal public utilities resold the renewable electricity procured by the OPA.

<sup>46</sup> Appellate Body Report, *Canada – Renewable Energy*, paras. 2.194-2.225.

<sup>47</sup> Appellate Body Report, *Canada – Renewable Energy*, paras. 2.205, 2.216.

<sup>48</sup> Appellate Body Report, *Canada – Renewable Energy*, para. 2.216.

<sup>49</sup> Appellate Body Report, *Canada – Renewable Energy*, para. 5.56.

<sup>50</sup> To recall, the Panel decided that ‘a close relationship’ between the two products was sufficient in triggering the GATT Article III:8(a).

<sup>51</sup> Panel Report, *Canada – Renewable Energy*, para 7.135.

term procurement, as the Appellate Body asserted, referred to ‘the process by which government purchases products’ and a product, referred to ‘something that is capable of being traded.’<sup>52</sup> The Appellate Body decided that the reading of Article III:8(a) must be understood in relation to the obligations stipulated in GATT Article III as a whole.<sup>53</sup> This means the product of foreign origin that is allegedly discriminated against must be in ‘a competitive relationship’ with the product purchased by governmental agencies.<sup>54</sup> In other words, without a competitive relationship between the two products, the discriminatory requirements cannot be considered as ‘laws, regulations or requirements governing the procurement by governmental agencies’ within the meaning of Article III:8(a).

According to the Appellate Body, it was renewable energy generation equipment that was subject to discrimination and electricity that was purchased under the FIT Programme, which were not in a competitive relationship. The mere existence of ‘a close relationship’ between products cannot replace the requirement of ‘a competitive relationship’ in order to successfully invoke Article III:8(a).<sup>55</sup> Thus, the challenged measures did not qualify as ‘laws, regulations or requirements governing the procurement by government agencies’ of electricity under Article III:8(a).<sup>56</sup> Canada’s attempt to exonerate the deviation from the national treatment obligation via GATT Article III:8(a) failed and the use of LCRs breached the WTO rules.

It is noteworthy that the Appellate Body added that the consideration of ‘inputs and processes of production’ used in respect of products purchased may be accepted in assessing the relationship between products under Article III:8(a),<sup>57</sup> which however, was undecided in this dispute.<sup>58</sup> If the Appellate Body’s reasoning was followed, the next step was to examine whether renewable energy equipment constituted ‘inputs’ used to produce renewable energy electricity that was purchased by the Ontario government. The scope of the government procurement derogation could be broader if ‘inputs and processes of production’ could be taken into consideration. However, this issue will remain uncertain and controversial in the absence of further guidance.

The Appellate Body went on to analyze the key concepts contained in the last requirement of Article III:8(a). For instance, ‘governmental purposes’ would refer to ‘what is consumed by

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<sup>52</sup> Appellate Body Report, *Canada – Renewable Energy*, para 5.62.

<sup>53</sup> Appellate Body Report, *Canada – Renewable Energy*, para 5.58. To be in a competitive relationship, the two products should be identical or ‘like’, or directly competitive to or substitutable.

<sup>54</sup> Appellate Body Report, *Canada – Renewable Energy*, para 5.74. To be in a competitive relationship, the two products should be identical or ‘like’, or directly competitive to or substitutable.

<sup>55</sup> Appellate Body Report, *Canada – Renewable Energy*, para 5.76.

<sup>56</sup> Appellate Body Report, *Canada – Renewable Energy*, para. 5.79.

<sup>57</sup> Appellate Body Report, *Canada – Renewable Energy*, para. 5.63.

<sup>58</sup> Appellate Body Report, *Canada – Renewable Energy*, para. 5.74.

the government or what is provided by government to recipients in the discharge of its public functions.’<sup>59</sup> The scope of such governmental functions should be determined on a case-by-case basis while there must be ‘a rational relationship’ between the purchased products and the governmental function being discharged.<sup>60</sup> Simply demonstrating that governmental aims or objectives would be fulfilled in governmental purchases is insufficient in this regard. ‘Not with a view to commercial resale’ was understood by the Appellate Body as ‘not with a view to reselling the purchased products in an arm’s-length sale’ and ‘not with a view to using the product previously purchased in the production of goods for sale at arm’s length.’<sup>61</sup>

Nevertheless, the Appellate Body did not make decisions on whether the Ontario government performed governmental function in implementing the challenged measure after finding the measure failed to meet the first requirement of Article III:8(a). It is intriguing to reflect on whether the use of LCRs could be deemed as for ‘governmental purposes’ within the meaning of Article III:8(a). The author tends to think that it is difficult to prove the imposition of LCRs or other forms of blatantly discriminatory measures in renewable energy area by governments is to discharge its public functions, such as improving energy security or mitigating climate change. The primary objective of imposing LCRs is to change competition conditions and protect domestic industries’ interests. Measures adopted to expand renewable energy electricity utilization without restricting foreign producers are more likely to meet the definition of ‘for governmental purposes’. The requirement of ‘for governmental purposes’ represents another layer that could catch protectionism-motivated measures in government procurement practices.

The Panel and the Appellate Body disagreed in how to understand the relationship between products being discriminated against and products being purchased. The Appellate Body’s reversal of the Panel’s findings, which were more lenient towards the availability of derogation, would reduce the scope of Article III:8(a) and thus, the likelihood that WTO Members have in relying on this provision to shelter LCRs.<sup>62</sup> It begs the question whether a more restrictive interpretative approach meets the objective and purpose of Article III:8(a) and should be followed in future jurisprudence, which will be thoroughly analyzed in the following part.

The challenged measure in *Canada – Renewable Energy* was also assessed under the North American Free Trade Agreement (NAFTA) after Mesa Power Group LLC made a complaint

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<sup>59</sup> Appellate Body Report, *Canada –Renewable Energy*, para. 5.59.

<sup>60</sup> Appellate Body Report, *Canada –Renewable Energy*, para. 5.58.

<sup>61</sup> Appellate Body Report, *Canada –Renewable Energy*, para. 5.74.

<sup>62</sup> Hestermeyer and Nielsen (n 18) 577.

against Canada.<sup>63</sup> This reflects the possible overlaps between trade and investment regimes. In this investor-state dispute, the claimant argued that its failure to secure a contract to supply wind-sourced electricity in Ontario was due to discriminatory behavior on the part of the Province.<sup>64</sup> Canada defended itself claiming that the FIT programme constituted government procurement and thus, was to be excluded from non-discrimination obligation under the NAFTA.<sup>65</sup>

The NAFTA tribunal decided, although not on a unanimous basis<sup>66</sup> that the FIT was procurement and implemented by a state enterprise – OPA for the use of and for the ultimate benefit of the people of Ontario, which had all the hallmarks of procurement within the meaning of Article 1108(7) of the NAFTA.<sup>67</sup> Therefore, the challenged measures were not subject to any NAFTA discipline because the tribunal declared its lack of jurisdiction over the domestic content claims. Nevertheless, the claimant did refer to the Appellate Body’s reading of government procurement in *Canada – Renewable Energy* and argued that ‘the lack of link between the discriminating treatment in question and the purposes of the procurement of electricity’ would render measures outside of government procurement.<sup>68</sup> However, the NAFTA tribunal decided that the WTO jurisprudence in this respect was of limited use and disagreed with the claimant.<sup>69</sup>

The exception clause for government procurement has been applied in WTO and NAFTA in separate and distinct ways. This is illustrative how textual discrepancies, the different negotiation history, goals, and context of the two regimes would influence the interpretation of their specific obligations.<sup>70</sup> For instance, as compared with the GATT Article III:8(a), the exception for government procurement under the NAFTA Article 1108 is composed in brevity with fewer requirements attached.<sup>71</sup> Therefore, even the same measures would face entirely different fates (being scrutinized or being sheltered) under the WTO and NAFTA. The broad interpretation of government procurement exception under the NAFTA regime could shelter governments’ attempt to promote renewable energy development even with discriminatory

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<sup>63</sup> See, ‘NAFTA Tribunal Issues Ruling in Mesa Power-Canada Case’ (Bridges, 4 May 2016) <<https://www.ictsd.org/bridges-news/bridges/news/nafta-tribunal-issues-ruling-in-mesa-power-canada-case>> accessed 17 August 2018.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> Judge Charles Brower, Mesa’s nominee dissented from the majority on the basis that Articles 1108(7)(2) and 1108(b) referred to ‘procurement by a Party or a state enterprise’ not just ‘procurement’ alone.

<sup>67</sup> See, *Mesa Power Group, LLC v. Government of Canada*, PCA Case No 2012-17, Final Award dated 24 March 2016, para. 448.

<sup>68</sup> Ibid, para. 391.

<sup>69</sup> Ibid, para. 459.

<sup>70</sup> See, Nicholas DiMascio and Joost Pauwelyn, ‘Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?’ (2008) 102(1) AJIL 49.

<sup>71</sup> Davies (n 27) 42, 51.

measures attached.<sup>72</sup> The interaction between the investment and trade dispute settlement proceedings can be complex and even somewhat confusing. Nevertheless, it is not the research focus of this paper to compare the two regimes and elaborate on their divergences in regulating government procurement activities.

### ***2.3 The Interpretation of Article III:8(a) in India – Solar Cells***

Article III:8(a) was cited again in *India – Solar Cells* by the defendant to exempt the use of LCRs in its renewable energy sector from the WTO obligation.<sup>73</sup> This dispute concerned LCRs stemming from India's Jawaharlal Nehru National Solar Mission (JNNSM), a program launched in 2010 with the goal of deploying 20,000 MW (later revised upwards to 100,000 MW) of solar panels through an interconnected grid by 2022.<sup>74</sup>

Under the scheme, the government of India would enter into 25-year power purchase agreements (PPAs) with solar power developers, which guaranteed that electricity generated by the domestic solar power developers would be purchased at a preferential rate.<sup>75</sup> Access to the preferential rate of tariff for electricity and other forms of supportive schemes under the JNNSM was conditioned on the use of solar components manufactured only in India. Hence, solar products imported from foreign countries would be disfavored. It is the LCRs contained in the schemes that led the US to litigate against India at the WTO.<sup>76</sup>

In its defense, India submitted that the challenged measures should be exonerated by the means of Article III:8(a).<sup>77</sup> India tried to distinguish its measure from the challenged measure in *Canada – Renewable Energy* and argued for a different interpretation of Article III:8(a) from the one adopted in Canada case. In doing so, India contended that the Appellate Body's assertion in *Canada – Renewable Energy* of a 'competitive relationship' test between the products discriminated against and the product purchased 'is not a single inflexible rule'.<sup>78</sup>

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<sup>72</sup> Rachel Thrasher, 'Policy Space for Jobs and Clean Energy: Trade, Investment Rules, and Local Content Requirements in Renewable Energy Policies' (GEGI Working Paper 012, November 2017) <<https://www.bu.edu/gdp/files/2017/11/Policy-Space-for-Jobs-and-Clean-Energy.Thrasher.11.17.pdf>>.

<sup>73</sup> See, WTO Appellate Body Report, *India – Certain Measures Relating to Solar Cells and Solar Modules (India – Solar Cells)*, WT/DS456/AB/R.

<sup>74</sup> 'Ministry of New and Renewable Energy - Scheme / Documents' (*Government of India Ministry of New and Renewable Energy*, February 2012) <<http://www.mnre.gov.in/solar-mission/jnnsmission/introduction-2>> accessed 11 May 2017. This objective later was revised upward to 100,000 MW. According to India's Ministry of New and Renewable Energy, the scheme aims to reduce the cost of solar power generation in India, specifically via long-term policy, large-scale deployment targets, intensive research and development, and domestic production of the necessary raw materials and components.

<sup>75</sup> Panel Report, *India – Solar Cells*, para. 7.2. Two Indian electricity regulatory commissions, the Central Electricity Regulatory Commission at the national level and the State Electricity Regulatory Commission at each state level, determine the guaranteed rate of electricity produced under the PPAs.

<sup>76</sup> *Ibid.*

<sup>77</sup> See India's first written submission, paras. 101-64;

<sup>78</sup> Appellate Body Report, *India – Solar Cells*, para. 5.19.

Therefore, the consideration of other forms of relationship between products should be taken so as to avoid excessively narrowing this provision.

In support, India referred to an undecided issue in *Canada – Renewable Energy*, which concerns whether the derogation can extend to cover discrimination relating to ‘inputs and processes of products’ used in respect of products purchased by way of procurement.<sup>79</sup> Here, India emphasized the nature of solar cells and modules as ‘integral inputs for solar power generation’ and asked for a different analysis’ from the one adopted in *Canada – Renewable Energy* because it was ‘ancillary’ equipment involved in Canada dispute.<sup>80</sup> For instance, in *Canada – Renewable Energy*, a wide range of equipment and services that would construct and maintain renewable energy electricity generation system were included in the challenged measures.<sup>81</sup> India argued for the scope of the ‘products purchased’ to be extended to cover ‘integral input for generation or production of the product that is purchased.’<sup>82</sup>

The US, as the complainant countered that solar cells and modules were not ‘integral inputs’ in the generation of electricity because they were not ‘incorporated into or otherwise physically detectable’ in the electricity procured by the India government.<sup>83</sup> In addition, the US submitted that the equipment should be characterized as ‘capital goods’.<sup>84</sup> The Panel dismissed India’s attempt to distinguish the challenged measures from the measure assessed in *Canada – Renewable Energy* and found the discrimination against imported solar cells and modules were not covered by Article III:8(a) Furthermore, the Panel chose not to engage with India’s contention that as ‘integral inputs’ to the generation of electricity, solar cells and modules were relevant to the analysis under Article III:8(a) since these were issues that the Appellate Body left undecided in *Canada – Renewable Energy*.<sup>85</sup>

Before moving to the analysis of the Appellate Body decision, it is of interest to examine the third parties’ submissions (Brazil, the European Union and Japan) regarding the application of Article III:8(a). The EU followed the Appellate Body’s interpretative approach in *Canada – Renewable Energy* and disagreed with India in all manners.<sup>86</sup> Japan pointed out the distinguishability of solar cells and modules and electricity, which formed no basis to

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<sup>79</sup> Appellate Body Report, *Canada – Renewable Energy*, para. 5.73.

<sup>80</sup> See India’s Response to Panel Question No. 19, para 3.

<sup>81</sup> Panel Report, *India – Solar Cells*, para. 7.114.

<sup>82</sup> Panel Report, *India – Solar Cells*, para. 7.117.

<sup>83</sup> See, Second Written Submission of the United States, para. 20.

<sup>84</sup> *Ibid.*

<sup>85</sup> Panel Report, *India – Solar Cells*, paras. 7.118-7.120.

<sup>86</sup> See, Annex C of the Addendum to the Appellate Body Report, *India – Solar Cells*, Executive Summary of the Arguments of the European Union.



characterize solar cells and modules as ‘inputs’ for solar electricity generation.<sup>87</sup> Meanwhile, Japan was also not convinced that measures at issue were taken ‘for governmental purposes’ under Article III: 8(a). Given the status of the EU and Japan as complainants in *Canada – Renewable Energy*, it is not surprising that both of them argued against the application of government procurement derogation in the case of LCRs.

Brazil took a more nuanced position and contended that the consideration of ‘inputs’ may be covered by government procurement derogation.<sup>88</sup> In Brazil’s view, a competitive relationship test does not need to be applied in all cases and the purchase of inputs to be assembled into a final product may amount to the purchase of the final good.<sup>89</sup> In this vein, if the Appellate Body decided that the solar cells and modules at issue constituted ‘inputs’ necessary to produce the solar electricity, the purchase of these inputs would fall into the ambit of Article III:8(a).

This case brought the competitive relationship test in assessing the availability of Article III:8(a) to the forefront again. The Appellate Body upheld the Panel’s decisions and rejected India’s proposition. In doing so, the Appellate Body reiterated that products purchased under Article III:8(a) by way of procurement must be ‘like’, or ‘directly competitive’ with or ‘substitutable’ for the foreign products being discriminated against.<sup>90</sup> The reliance on a competitive relationship test in determining the applicability of Article III:8(a) has been even reinforced by the Appellate Body in the dispute. India’s defense could not be accepted because the discrimination did not directly refer to what India was purchasing, which was, electricity.

Meanwhile, the Appellate Body offered new insights by clarifying that ‘inputs and process of production’ consideration could be merited but cannot replace the competitive relationship test.<sup>91</sup> The coverage of Article III:8(a) could possibly extend to discrimination relating to ‘inputs and process of production’ used in respect of products purchased only after the products could demonstrate a competitive relationship with one another.<sup>92</sup> Both the Panel and the Appellate Body in this dispute consistently followed the interpretation adopted by the Appellate Body in *Canada – Renewable Energy*, which demonstrates the continuation of jurisprudence.

### **3. Reflections on the Implications of the Appellate Body Jurisprudence**

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<sup>87</sup> See, Annex C of the Addendum to the Appellate Body Report, *India – Solar Cells*, Executive Summary of the Arguments of Japan,

<sup>88</sup> See, Annex C of the Addendum to the Appellate Body Report, *India – Solar Cells*, Executive Summary of the Arguments of Brazil, paras 5-9,

<sup>89</sup> *Ibid.*

<sup>90</sup> Appellate Body Report, *India – Solar Cells*, para. 5.40.

<sup>91</sup> Appellate Body Report, *India – Solar Cells*, para. 5.40.

<sup>92</sup> Appellate Body Report, *India – Solar Cells*, para. 5.40.

The focal point in *Canada – Renewable Energy* and *India – Solar Cells* was whether Members can successfully invoke government procurement derogation to exonerate otherwise WTO-inconsistent renewable energy measures. Given the opaqueness of Article III:8(a) wording, its scope and coverage must be determined by the dispute settlement organs. The Appellate Body’s decisions could create security and predictability among Members and carry weight when relevant disputes occur in future.<sup>93</sup> The implications of the decisions would extend beyond renewable energy area but include all sectors that are home to government procurement activities. Hence, it begs the important question whether the Appellate Body did a good job in clarifying the originally unclear treaty text with a methodology that leads to sound jurisprudence and legal security.

This section discusses the implications that the Appellate Body decisions in relation to Article III:8(a) would have from two different perspectives. One is to analyze how the decisions impact the interaction between the WTO regime and the climate regime. Whether the decisions can uphold trade objectives while not threatening climate-related interests is an important matter. The other perspective is to assess the legal soundness of the methodology adopted by the Appellate Body in the dispute resolution. Whether the way the Appellate Body interpreted Article III:8(a) can be methodologically grounded cannot be dismissed.

The most eye-catching and also controversial finding in the Appellate Body Report is the requirement of ‘a competitive relationship’ between product that is discriminated against and product that is procured in the application of Article III:8(a). This decision has put ‘an important gloss’ on how to understand government procurement derogation in specific WTO disputes.<sup>94</sup> In Yanovich’s view, the Appellate Body’s holdings would ‘debunk the myth’ that non-GPA signatories had ‘carte blanche’ to favor domestic producers over foreign ones in government procurement.<sup>95</sup> Any challenged government procurement measure would not automatically fall into the ambit of Article III:8(a) but be subjected to close scrutiny of the provision.<sup>96</sup> Therefore, this requirement has largely widened the scope of Article III obligation beyond what some commentators had believed.

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<sup>93</sup> This reflects that the Appellate Body has succeeded in producing a consistent body of interpretation of WTO rules, despite the absence of a strict notion of *stare decisis*. See, Isabelle Van Damme, ‘Treaty Interpretation by the WTO Appellate Body’ (2010) 21(3) EJIL 605, 614.

<sup>94</sup> Steve Charnovitz and Carolyn Fischer, ‘*Canada – Renewable Energy*: Implications for WTO Law on Green and Not-So-Green Subsidies’ (2015) 14(2) WTR 170, 178.

<sup>95</sup> Yanovich (n 8) 430.

<sup>96</sup> See, Kamala (n 8) 647.

The Appellate Body in *India – Solar Cells* even squeezed the availability of Article III:8(a) by refusing to consider ‘inputs and processes of production’ used to produce the product as a parallel to the competitive relationship test, although the Appellate Body in *Canada – Renewable Energy* did not explicitly rule out this possibility. ‘A competitive relationship’ has been reinforced as the first and foremost requirement to be met by any measure that possibly could fall under the ambit of Article III:8(a).

In this vein, the author agrees that the decisions made by the Appellate Body in *India – Solar Cells* with respect to the relationship between products can be at odds with *Canada – Renewable Energy* decisions.<sup>97</sup> Because it does not make much sense to examine whether the products purchased constitute ‘inputs or processes of production’ if the two already can be proven to be in a competitive relationship. The Appellate Body in *India – Solar Cells* has explicitly made the consideration of ‘inputs and processes of production’ meaningless and therefore, missed the opportunity to take a strong stance on this matter.<sup>98</sup>

In striking down LCRs imposed on renewable energy generators by means of a narrow interpretation of Article III:8(a), the Appellate Body decisions have the potential to increase export opportunities of many countries in the Canadian, Indian and possibly other WTO Members’ renewable energy market. This can increase global competition in renewable energy area and thus, bring down the cost and promote further technological progress. As a major driving force underlying carbon emissions reduction, renewable energy development could substantially contribute to the goal of climate change mitigation. In this vein, the Appellate Body’s narrow interpretation of Article III:8(a) has the potential in nurturing synergy between liberalizing trade and mitigating climate change, which should be credited as climate-friendly.

Next, it is worth delving deeper and examining whether the WTO decisions are well grounded or somehow methodologically flawed. A desirable outcome in the WTO dispute settlement does not necessarily warrant the methodology to be applied in a legally sound manner. In some cases, mythological defects could be disguised by a well-received dispute settlement resolution. Particularly when it comes to the WTO provisions that are ambiguously drafted, it is essential that the adjudicating body can interpret them with legally sound methodology so as to provide guidance and certainty on future jurisprudence.

This article argues that methodologically, the Panel’s interpretation of Article III:8(a) in *Canada – Renewable Energy* is preferable to that of the Appellate Body in the same dispute as

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<sup>97</sup> Aditya Sarmah, ‘Renewable Energy and Article III: 8(a) of the GATT: Reassessing the Environment – Trade Conflict in Light of the ‘Next Generation’ Cases’ (2017) 9(2) Trade, Law and Development 197, 211.

<sup>98</sup> Marianna Karttunen and Michael Moore, ‘*India – Solar Cells*: Trade Rules, Climate Policy, and Sustainable Development Goals’ (2018) 17(2) WTR 215, 224.

well as the Panel and the Appellate Body in *India – Solar Cells*. For instance, the Panel offered a textual interpretation of what constitutes government procurement in a straightforward manner, which avoided twisting the treaty language of the first requirement of government procurement derogation.<sup>99</sup> As argued by Davies, the test established by the Panel is ‘generally applicable, easier to understand, and better corresponds with commercial reality.’<sup>100</sup> Meanwhile, the original drafters’ intention of carving out policy space under national treatment obligation for government procurement practices was accounted and respected in the Panel Report.

The concern that the Panel’s broad interpretation of Article III:8(a) might open the door for trade protectionism camouflaged as legitimate government procurement, although understandable, could be addressed. Because the Panel’s reading of key terms contained in the third requirement of Article III:8(a): ‘for governmental purposes’ and ‘not with a view to commercial resale’ serves as another layer of screening that could catch protectionism. Many forms of protectionism-motivated trade measures are designed with an aim of seeking profits via commercial resale, which cannot pass the scrutiny of the third requirement of Article III:8(a). In this regard, the Panel’s approach provides sufficient regulatory autonomy for Members in government procurement area while still maintaining an appropriate level of gatekeeping.<sup>101</sup>

In comparison, the Appellate Body’s reasoning in both Canada and India disputes is more twisted and difficult to comprehend, particularly its insistence that products must have a competitive relationship with each other in order to for the complainant to successfully invoke Article III:8(a) is rather ‘mechanical’.<sup>102</sup> The Appellate Body failed to consider how the underlying object and purpose of this provision as well as drafters’ intention could be relevant in the context of the WTO Agreement.<sup>103</sup> The clear sense of the provision as a whole in providing scope for the WTO Members seems to be dismissed by the Appellate Body.<sup>104</sup> It is the GPA rather the GATT Article III that should serve as the cornerstone in safeguarding and promoting the liberalization of government procurement market.<sup>105</sup> A narrow interpretation of

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<sup>99</sup> Davies (n 27) 52.

<sup>100</sup> Davies (n 8) 554.

<sup>101</sup> Sadeq Z. Bigdeli, ‘Clash of Rationalities: Revisiting the Trade and Environment Debate in Light of WTO Disputes Over Green Industrial Policy’ (2014) 6 Trade, Law and Development 177, 190.

<sup>102</sup> See, Gladwin Issac and Trishna Menon, ‘When Good Intentions Are Not Enough: Revisiting the US – India Solar Panels WTO Dispute’ (2017) 10(2) OIDA International Journal of Sustainable Development 37, 39.

<sup>103</sup> Ibid.

<sup>104</sup> Scott Sinclair and Stuart Trew, ‘International Constraints on Green Strategies: Ontario’s WTO Defeat and Public Sector Remedies’ in Carla Lipsig-Mumme and Stephen McBride (eds), *Working in A Warming World* (McGill-Queen’s University Press 2015) 13, 23.

<sup>105</sup> Davies (n 8) 549.

Article III:8(a) would considerably reduced the flexibility, which otherwise would have been significant, allowed by this provision for Members' government procurement activities.<sup>106</sup>

Even in paradigm government procurement situations, the availability of Article III:8(a), according to the Appellate Body's interpretations, is highly questionable.<sup>107</sup> For example, in the case that a government mandates the construction of a wind farm containing locally manufactured wind blades for the production of wind electricity for its own use, will Article III:8(a) apply? Following the Appellate Body's reasoning, wind blades are used as components in the manufacturing of wind turbines that form necessary part of a wind farm, while wind blades do not compete directly with a wind farm, therefore, Article III:8(a) would not be triggered. However, as a matter of policy, it may make more sense to allow discriminatory measure being imposed on inputs or components by means of Article III:8(a) because it is less trade-distorting than requiring the whole wind farm to be domestically made.

Despite of the criticism that the Appellate Body decisions have received with respect to interpreting Article III:8(a), it is intriguing to note that Bohanes and Salcedo offered different observations.<sup>108</sup> They challenged the Panel's decision in engaging in a 'close relationship' test as being 'unnecessarily generous' and 'too vague' while the Appellate Body's interpretations can provide more clarity and predictability.<sup>109</sup> The undecided matter whether Article III:8(a) can cover 'inputs or processes of production' used in respect of products purchased, in their view, demonstrates that the Appellate Body in *Canada – Renewable Energy* did not mean to reduce too much the latitude that Members can have in procurement activities.<sup>110</sup> In this vein, they apparently did not foresee the consideration of 'inputs or processes of production' was basically discarded by judiciaries in the following dispute.

#### 4. Concluding Analysis

This article argues that the Appellate Body in *Canada – Renewable Energy* and *India – Solar Cells* was absolutely right in striking down blatantly discriminatory LCRs because the measures would create obstacles to renewable energy development and slow down climate

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<sup>106</sup> Aaron Cosbey and Luca Rubini, 'Does It FIT? An Assessment of the Effectiveness of Renewable Energy Measures and of the Implications of the Canada – Renewable Energy/FIT Disputes' (E15 Initiative, December 2013), < <http://e15initiative.org/wp-content/uploads/2015/09/E15-Clean-Energy-Technologies-CosbeyRubini-FINAL.pdf>> accessed 12 August 2018.

<sup>107</sup> Davies (n 8) 554.

<sup>108</sup> Jan Bohanes and Karolyn Salcedo, 'Overview of WTO Jurisprudence in 2013' in Christoph Herrmann, Markus Krajewski, Jörg Philipp Terhechte (eds) *European Yearbook of International Economic Law* 2015 (Springer 2015) 337, 367-68.

<sup>109</sup> Ibid, 368.

<sup>110</sup> Ibid.

change mitigation. Narrowing the scope of Article III:8(a) to exclude LCRs could prevent misuse or abuse of this derogation by Members, as otherwise governments could easily camouflage protectionism-motivated renewable energy measures within government procurement. In this vein, the Appellate Body's understanding of Article III:8(a) could testify that the WTO has the potential to nurture the synergy between trade liberalization and climate change mitigation.

However, the article is skeptical of the methodology firstly adopted by the Appellate Body in *Canada – Renewable Energy* and then followed by the Panel and the Appellate Body in *India – Solar Cells* in analyzing Article III:8(a) since it is overly restrictive, unduly complex and running counter to the original spirit and negotiating history of the WTO procurement rules.<sup>111</sup> Exceedingly expanding obligations assumed only by the GPA signatories by means of a much-narrowed Article III:8(a) could be possibly dangerous and unwise, especially given the reluctance of a large block of Members to sign on to the GPA.<sup>112</sup> This will lead to imbalance between the application of obligations contained in multilateral and plurilateral agreements.<sup>113</sup> The lack of a consistent and systemic reading of WTO agreements would go against the principle of integration in interpretation.<sup>114</sup> The interpretation may even render Article III:8(a) moot or meaningless because the derogation would be unavailable even in some paradigm government procurement scenarios. The ramifications of the Appellate Body decisions in relation to the scope of Article III:8(a) would not be limited to the renewable energy sector but extend to other sectors, which are home to government procurement. As a result, the jurisprudence is likely to cast chilling effects on government procurement policy making.<sup>115</sup>

Nevertheless, the Panel in *Canada – Renewable Energy* offered a preferable interpretative approach, which was closer to its textual meaning and the underlying purposes of Article III:8(a). Applying the Panel's decisions, paradigm government procurement practices can easily fall into the ambit of Article III:8(a) and be excluded from national treatment obligation. Meanwhile, it would not risk opening the door to trade protectionism since the requirement of 'for governmental purposes' and 'not with a view to commercial resale' can catch protectionism-motivated measures. The Panel's reasoning not only accommodated dual goals

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<sup>111</sup> Davies (n 8) 547-49.

<sup>112</sup> Ibid.

<sup>113</sup> Corvaglia (n 25) 108.

<sup>114</sup> Van Damme (n 93) 628.

<sup>115</sup> Andrew Shoyer and Rajib Pal, 'Government Support for Green Energies: Is WTO Decision a Game-Changer?' (*Who's WHO Legal*, December 2013) <<http://whoswholegal.com/news/features/article/30990/>> accessed 17 December 2017.

of trade liberalization and climate change mitigation but also adopted a legally sound methodology.

This article urges for the excessively narrowed interpretation of Article III:8(a) to be revisited by panels and the Appellate Body in future so as to change course and render the provision once again applicable and available for use. The dispute filed by India most recently against the US concerning various LCRs and subsidies employed by a number of state governments in the renewable energy sector would provide an opportunity for the WTO to develop jurisprudence concerning Article III:8(a).<sup>116</sup> It is high time that the Appellate Body as well as the panels revisits the relationship requirement of Article III:8(a) and diligently balances the deference to WTO Members' regulatory autonomy in government procurement practices and the promotion of trade liberalization.

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<sup>116</sup> On 9 September 2016, India requested consultations with the United States regarding certain measures of the United States relating to domestic content requirements and subsidies instituted by the governments of the states of Washington, California, Montana, Massachusetts, Connecticut, Michigan, Delaware and Minnesota, in the energy sector. The WTO Panel composed on 24 April 2018. See, WTO/DS 510, *United States – Certain Measures Relating to the Renewable Energy Sector*.