International Economic Law and National Policies to Address Climate Change

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International Economic Law and the Pursuit of Core Societal Values and Interests

Outline

- Setting the context: the **climate change** challenge and the critical role of **renewable energy promotion**
- An overview of **national policies** for **RE** promotion
- Climate change and **WTO disputes on renewable energy**

Setting the context: climate change and renewable energy promotion policies

The Climate Change Challenge

- Based on the 5th Assessment Report (2013-2014)of the Intergovernmental Panel on Climate Change (IPCC), the warming of the climate system is '***unequivocal***'

- **Anthropogenic** greenhouse gas (GHG) emissions effects, '*together with those of other anthropogenic drivers, have been detected throughout the climate system and are* ***extremely likely*** *to have been the dominant cause of the observed warming since the mid 20th century*'.

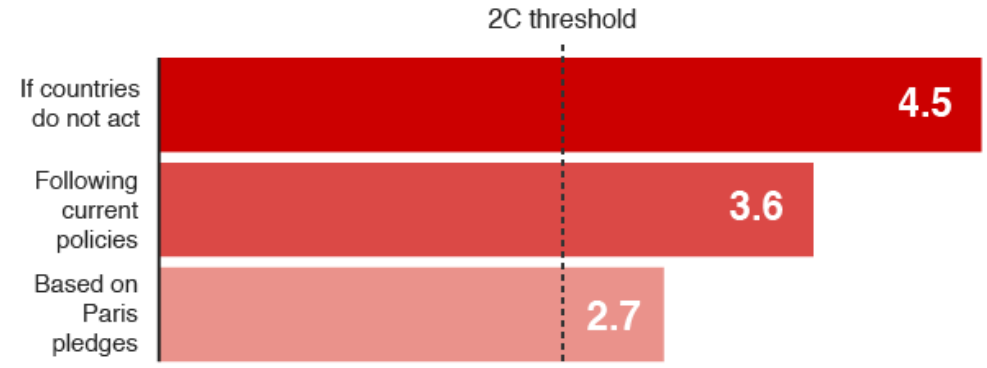
- Most recently, **human activities are estimated to have caused approximately 1.0° C of global warming above pre-industrial levels**, with a likely range of 0.8° C to 1.2° C. **Global warming is likely to reach 1.5° C between 2030 and 2052 if GHG emissions continue to increase at the current rate** (see Special IPCC Report, October 2018)

The Paris Agreement

- **The Paris Agreement aims to hold global average temperature to <2 ° C** & efforts to limit increase to 1.5 ° C above pre-industrial levels

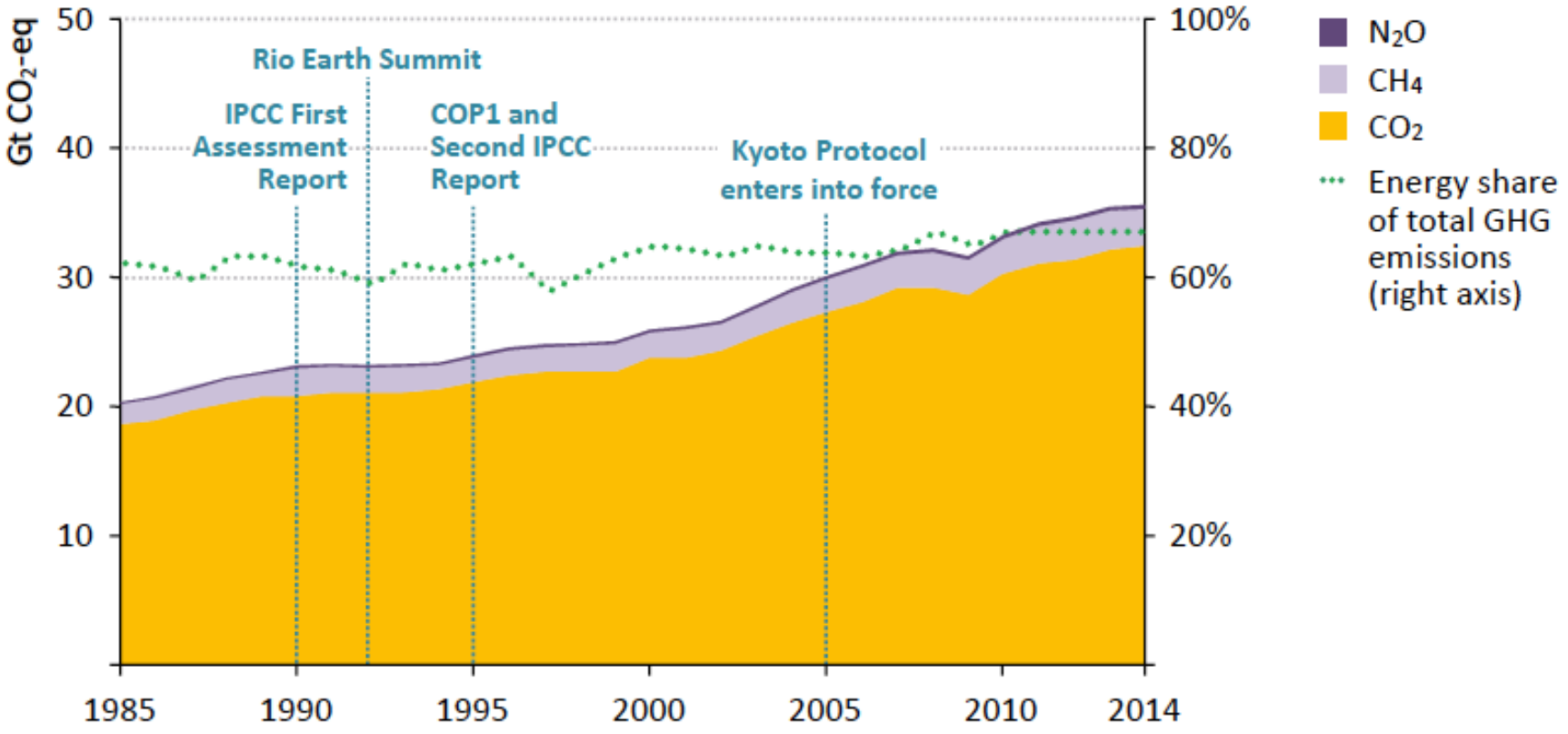
- Yet, **efforts** within the umbrella of the Paris Agreement (see nationally determined contributions) are **not sufficient**

Average warming (C) projected by 2100



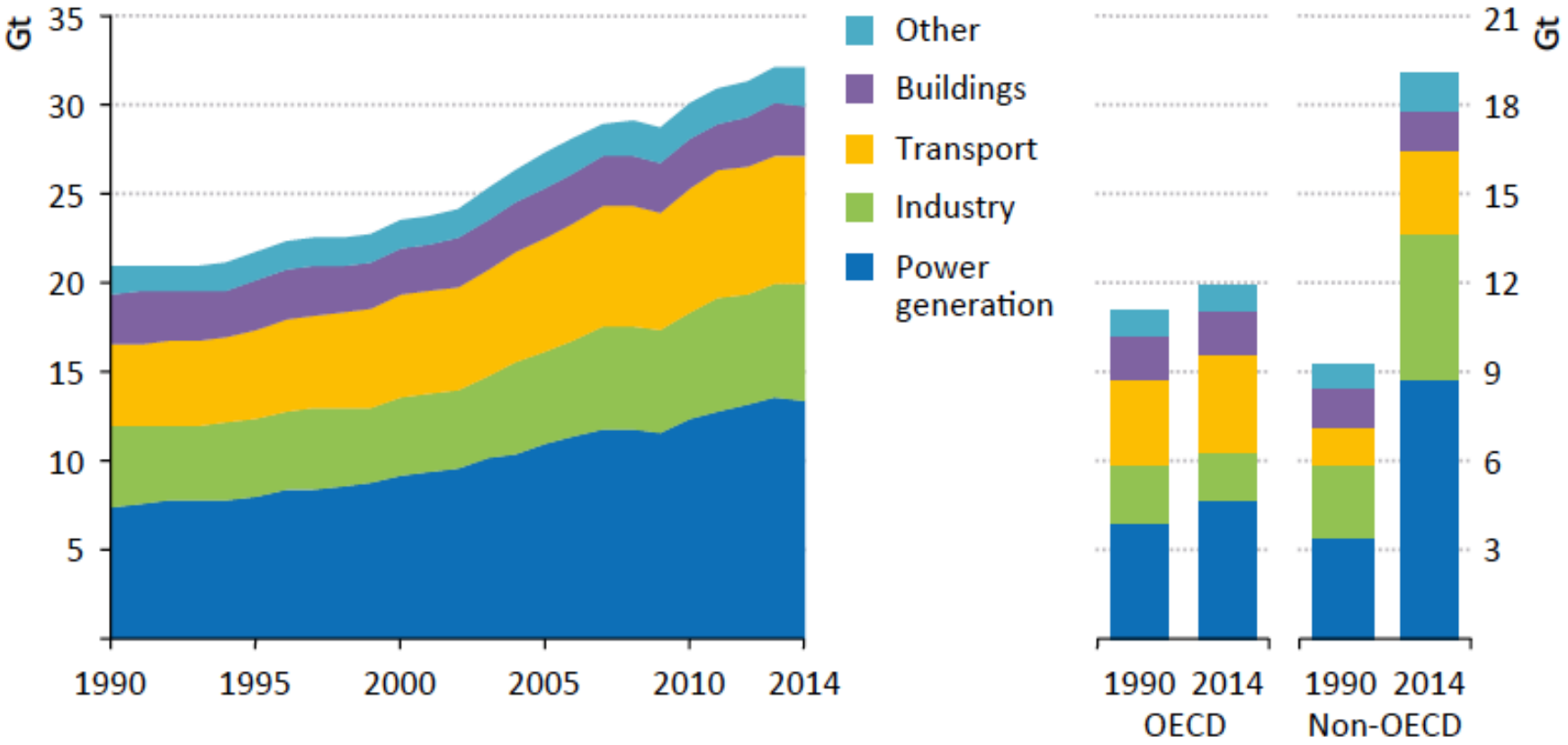
Source: Climate Action Tracker, data compiled by Climate Analytics, ECOFYS, New Climate Institute and Potsdam Institute for Climate Impact Research.

Why a focus on energy? Contribution of the energy sector to GHG emissions



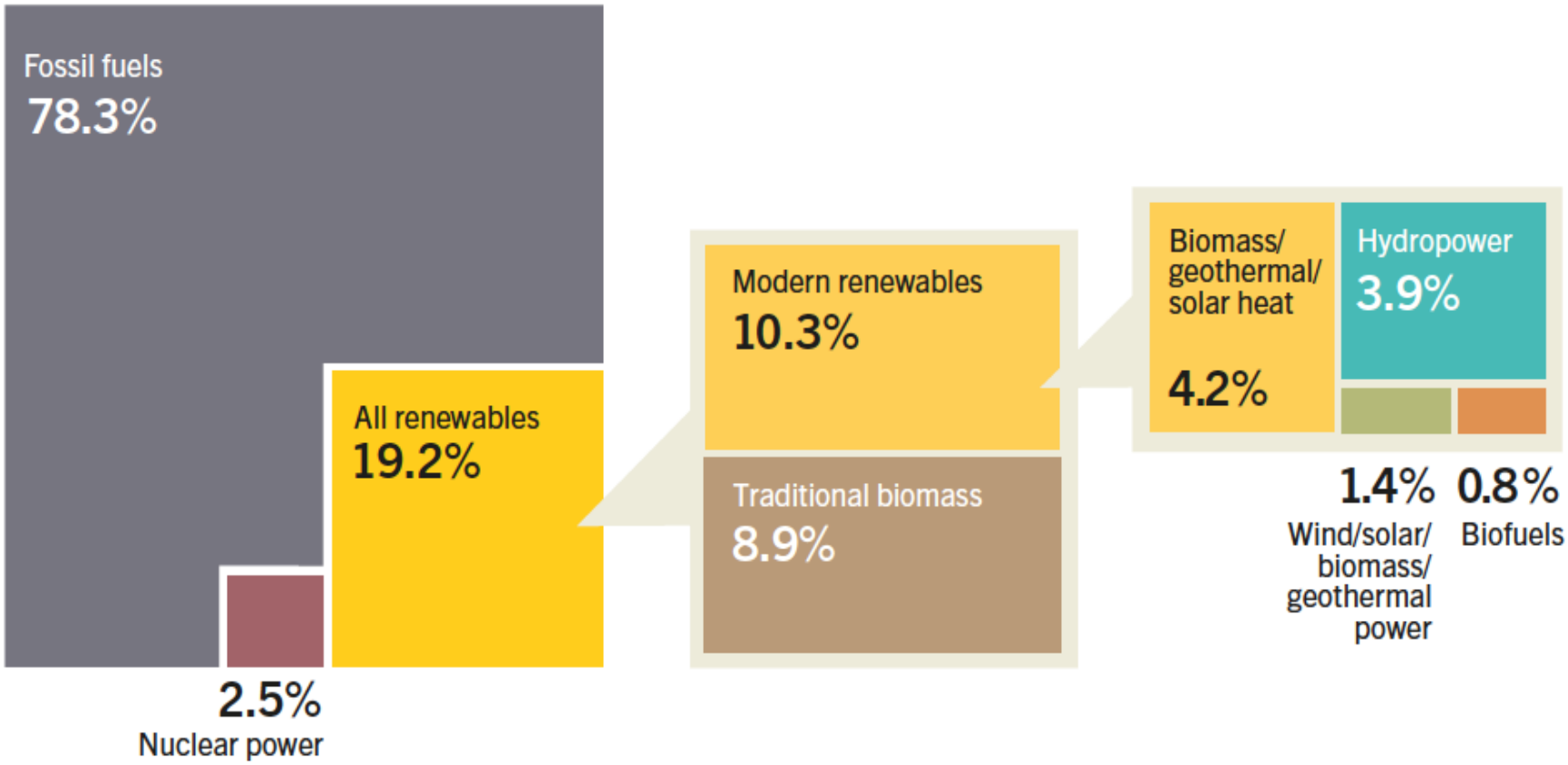
Source: IEA 2015

Global CO2 emissions by sector and region



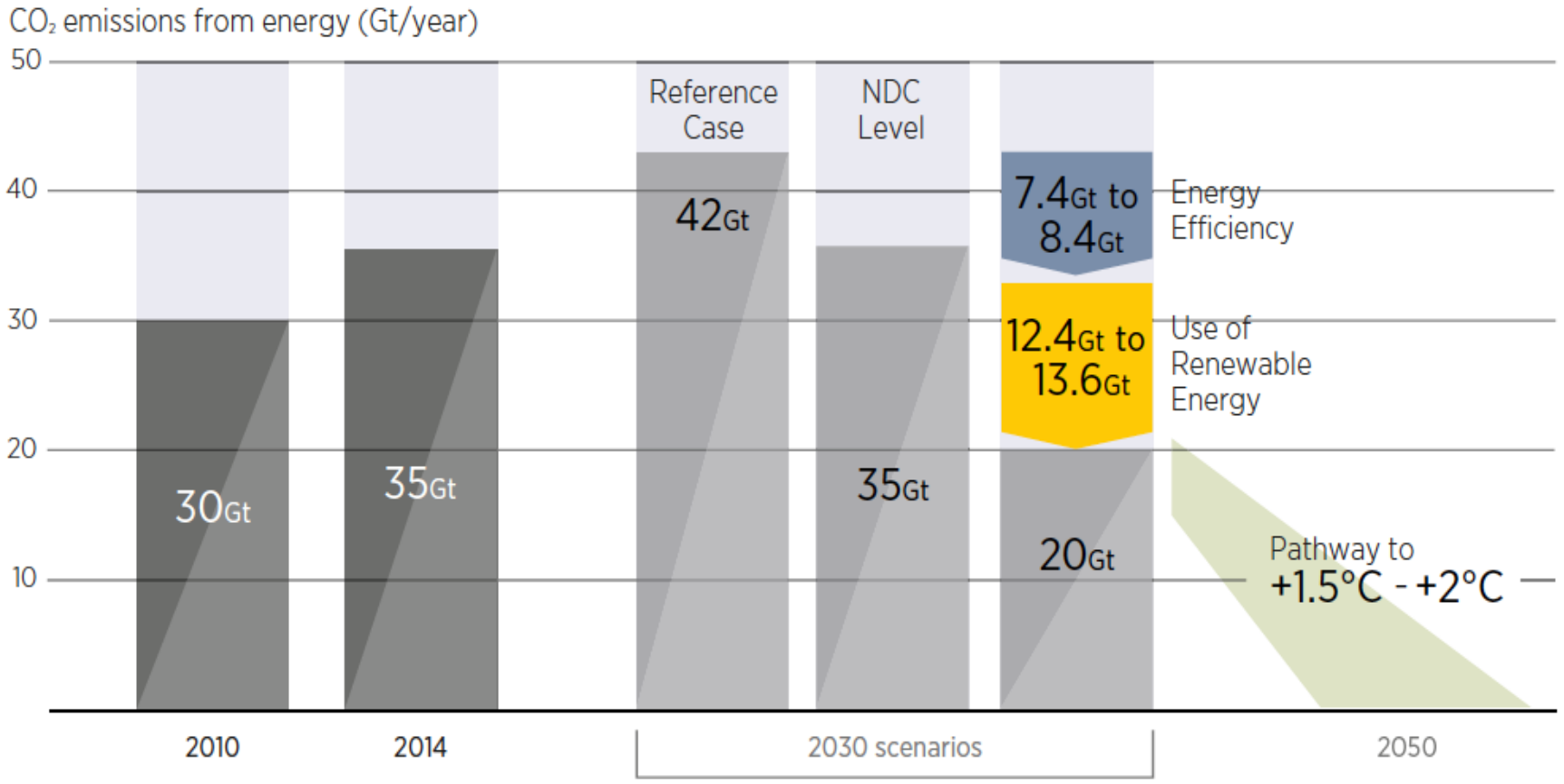
Source: IEA 2015

RE share of global final energy consumption



Source: REN21 2016

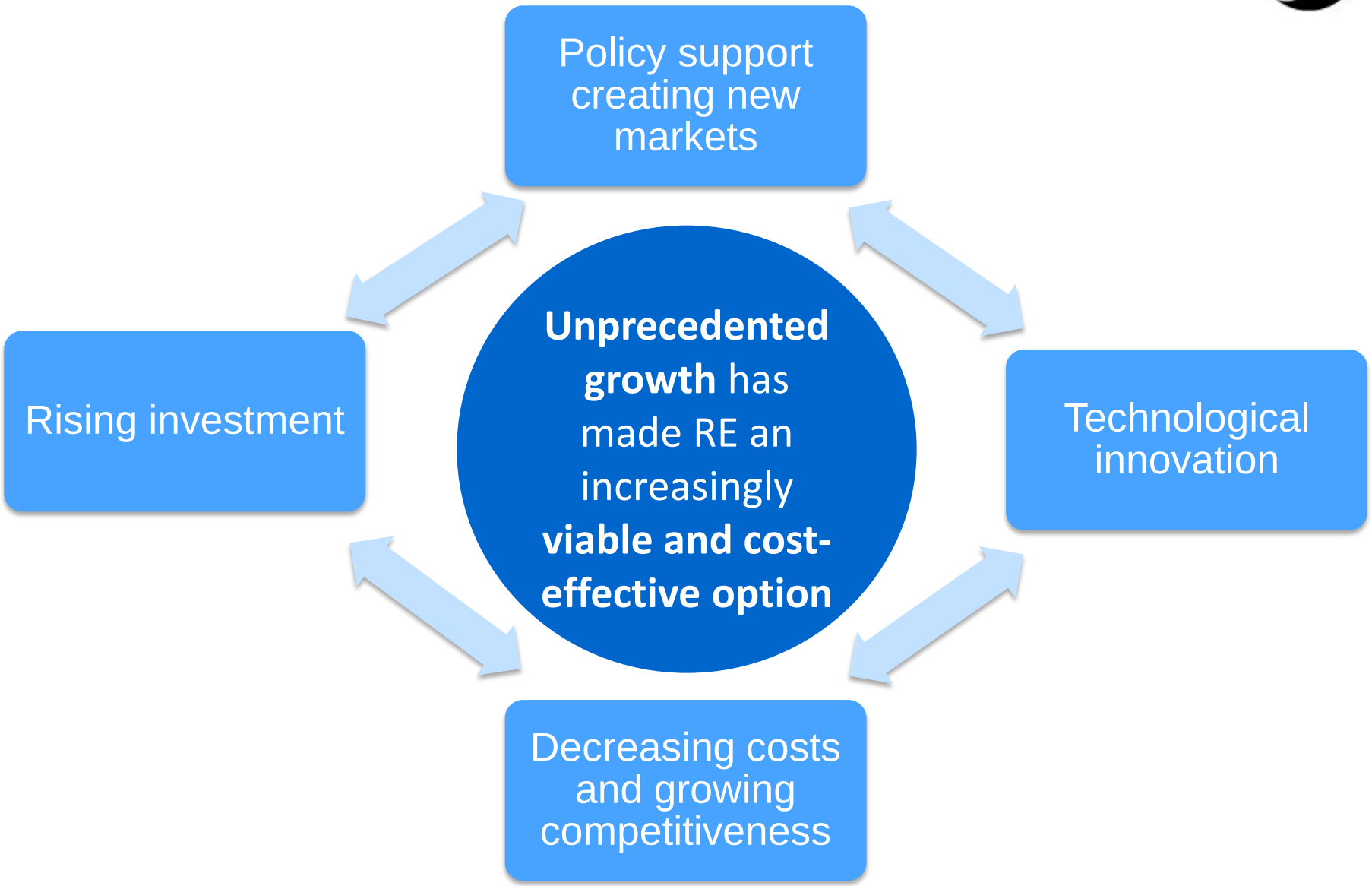
Centrality of RE for world's energy transformation



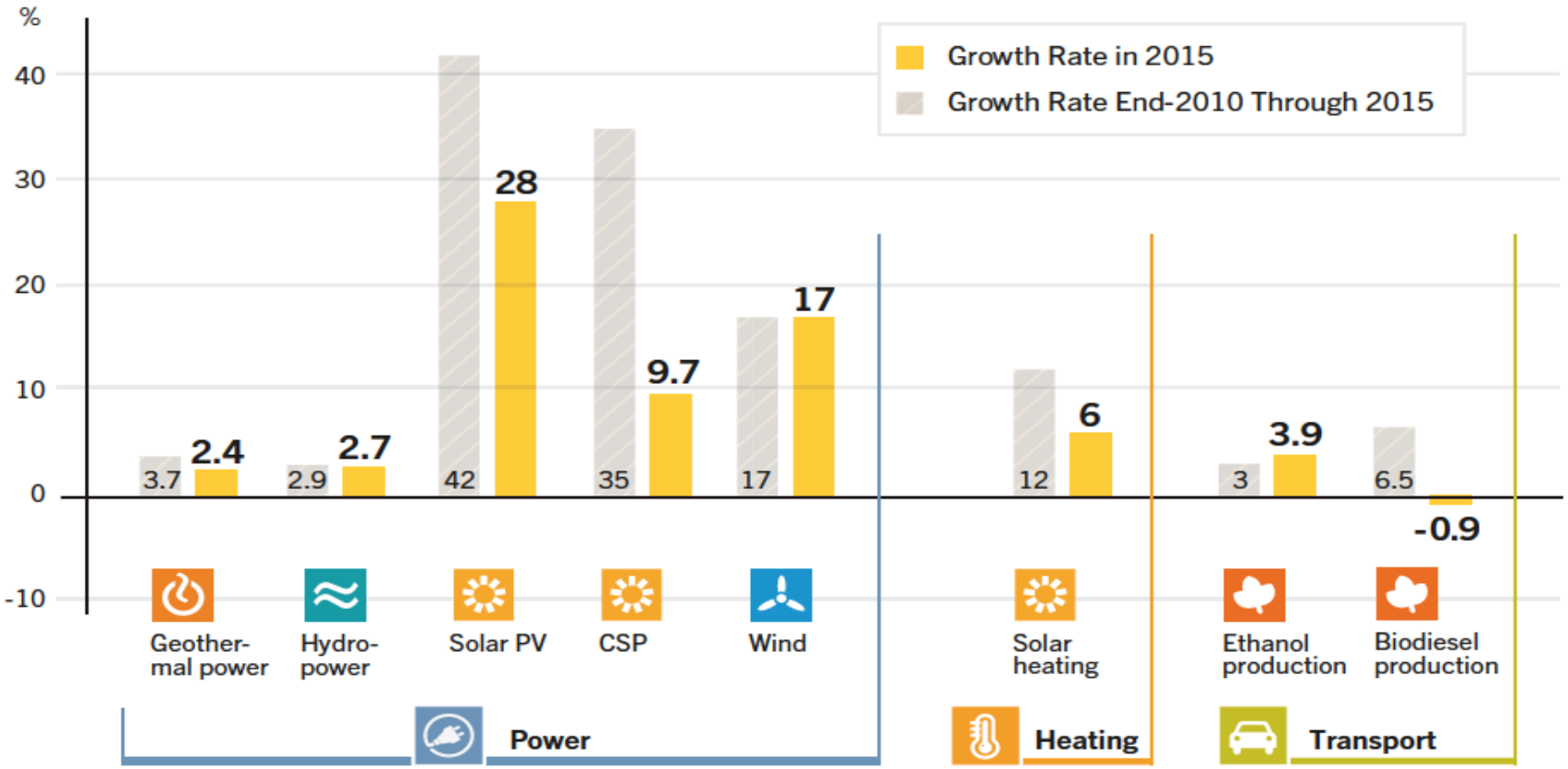
Source: IRENA 2017

Current state of the RE market

The virtuous cycle leading to RE deployment growth

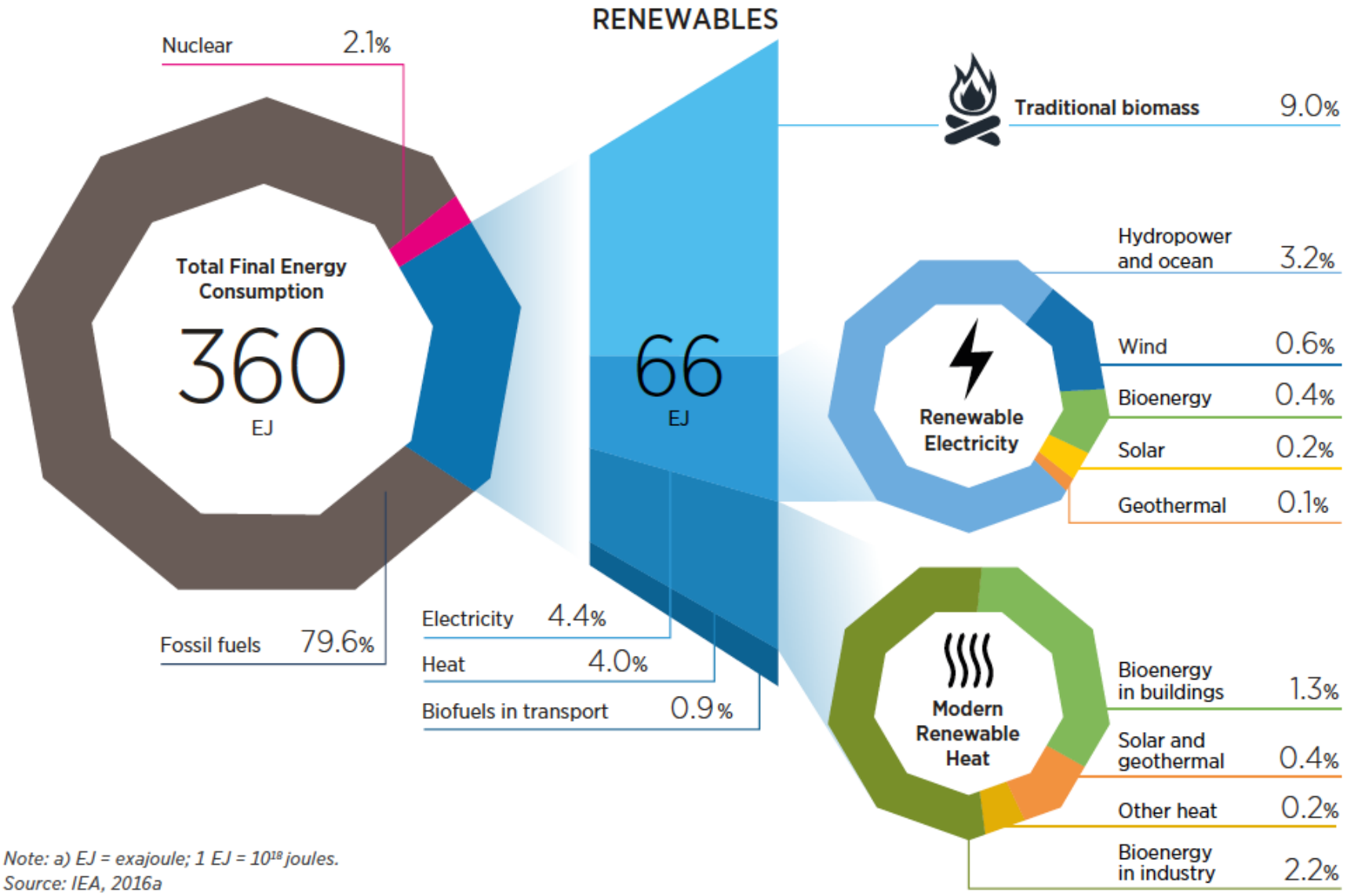


RE capacity growth rate



Source: REN21 2016

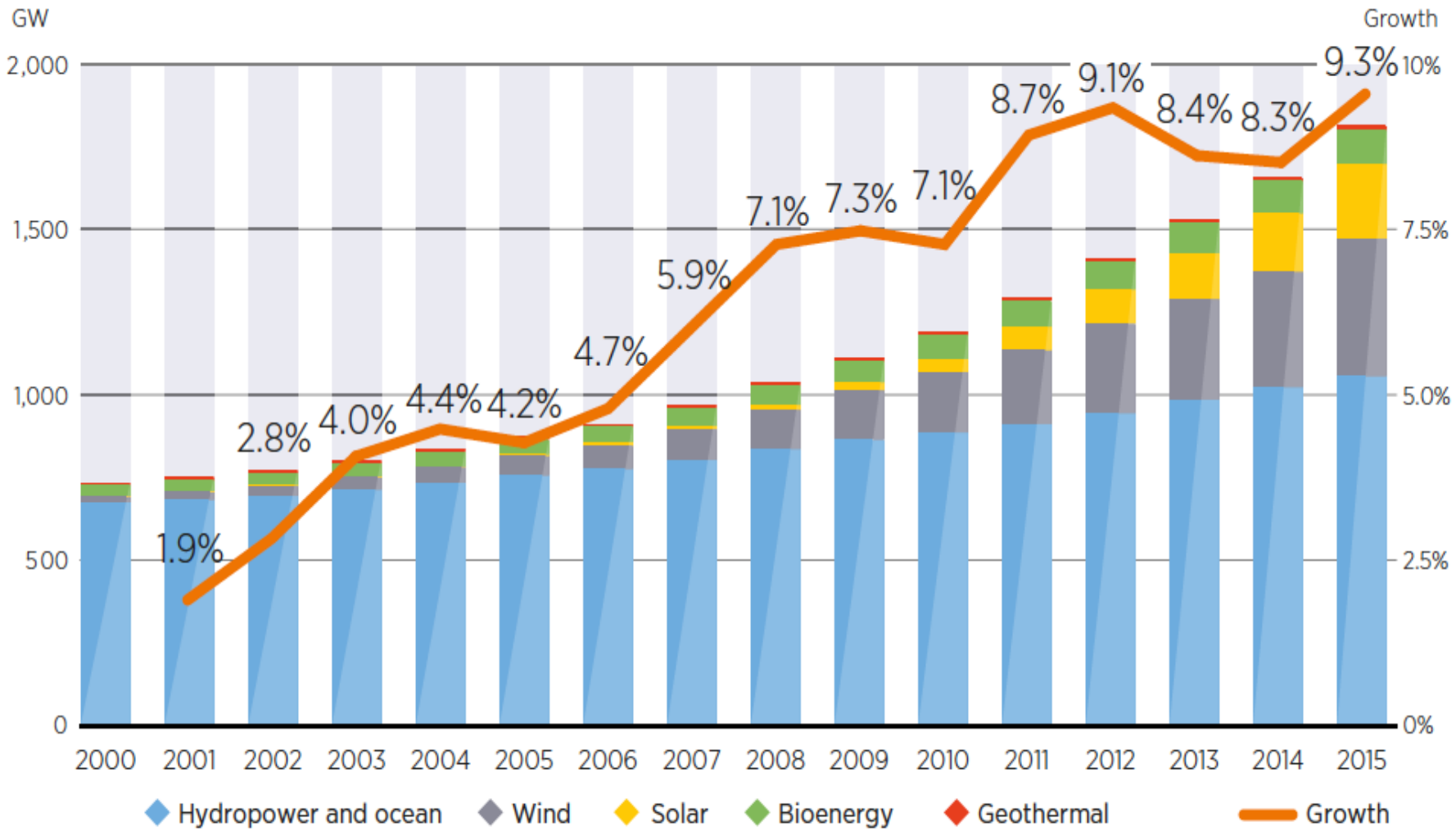
RE capacity growth rate



Note: a) EJ = exajoule; 1 EJ = 10^{18} joules.
Source: IEA, 2016a

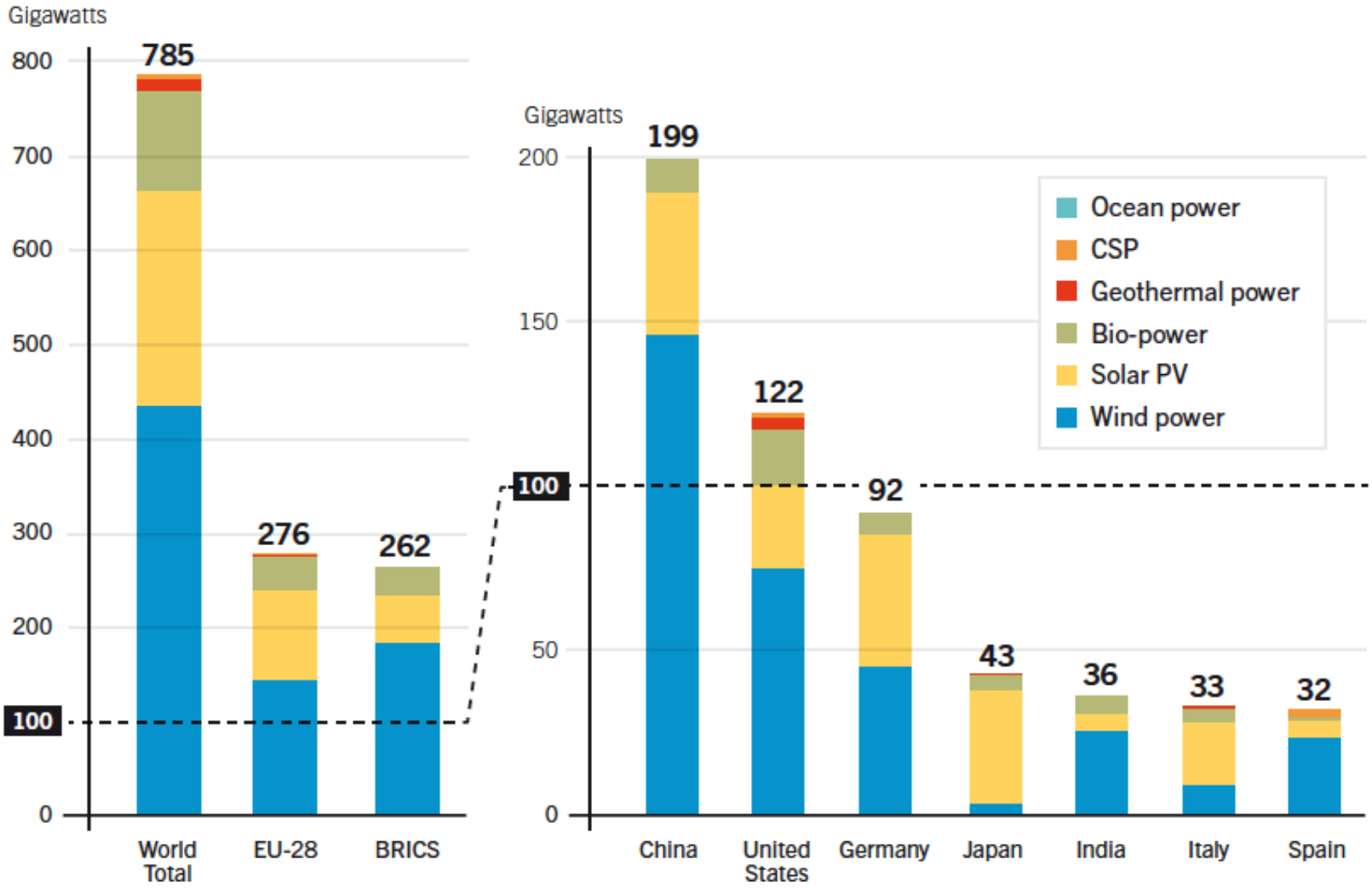
Source: IRENA 2017

RE success in the power sector



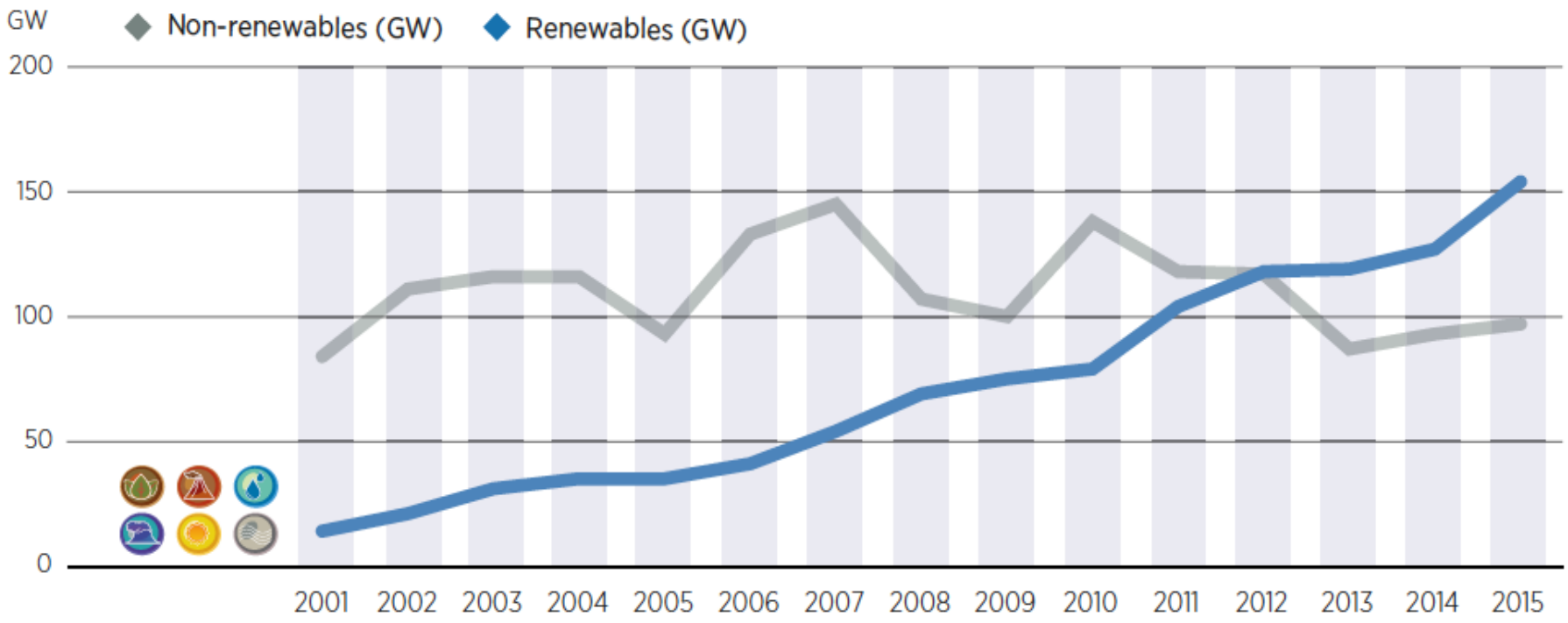
Source: IRENA 2017

RE power capacity in the world



Source: REN21 2016

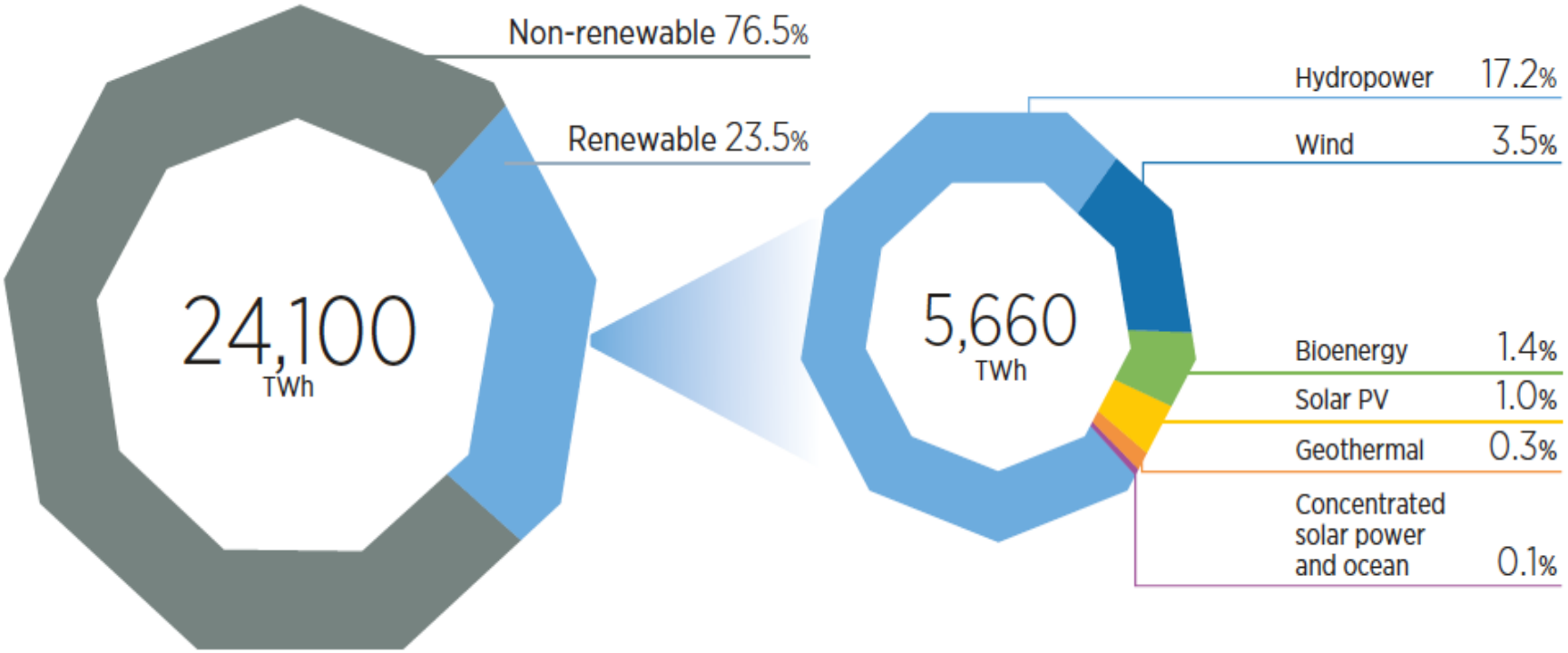
RE vs. non-renewables in the power sector



	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Renewables (GW)	14	21	31	35	35	41	54	69	75	79	104	118	119	127	154
Non-renewables (GW)	84	111	116	116	93	133	145	107	100	138	118	117	87	93	97

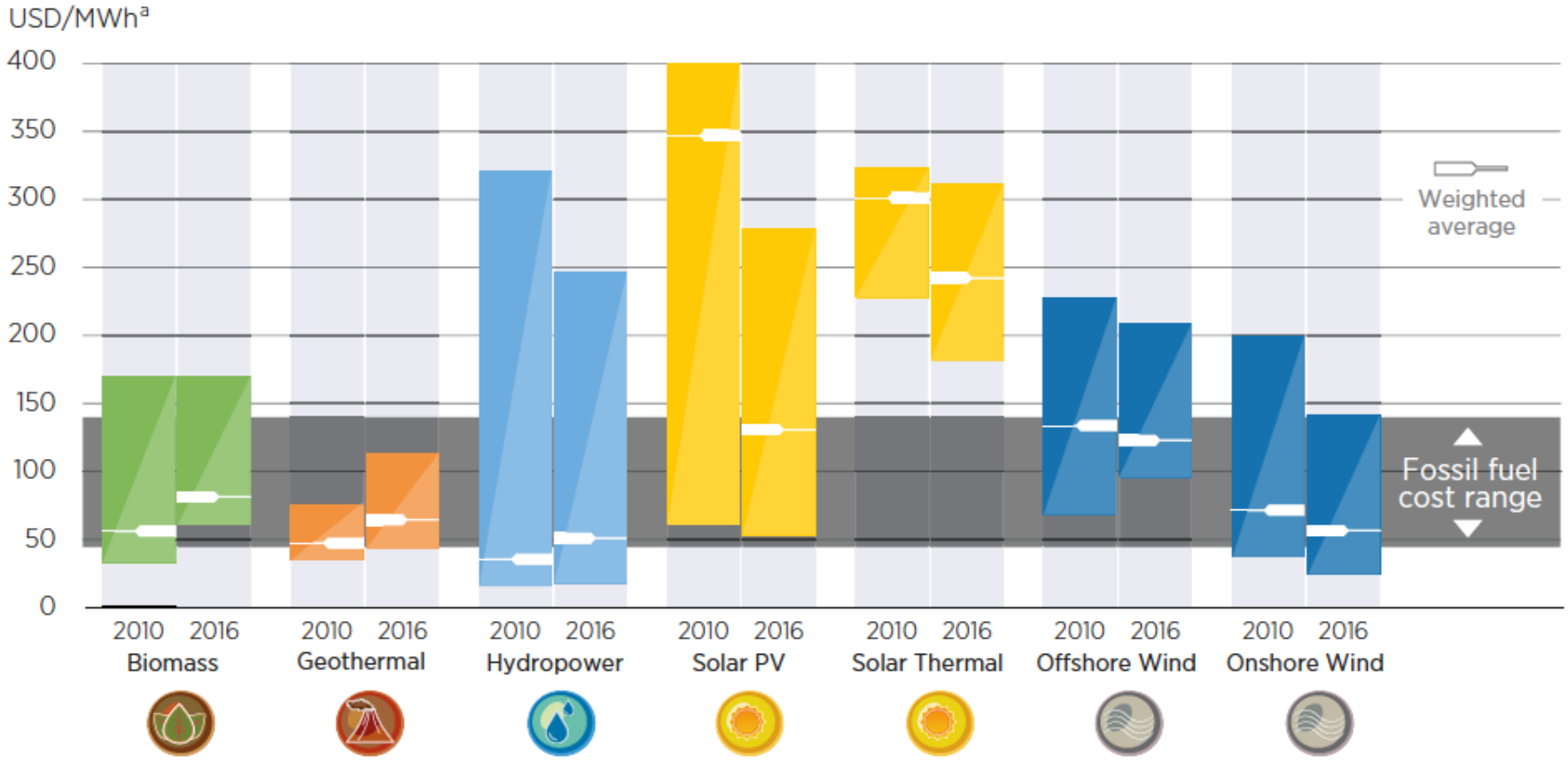
Source: IRENA 2017

Global electricity generation by source



Source: IRENA 2017

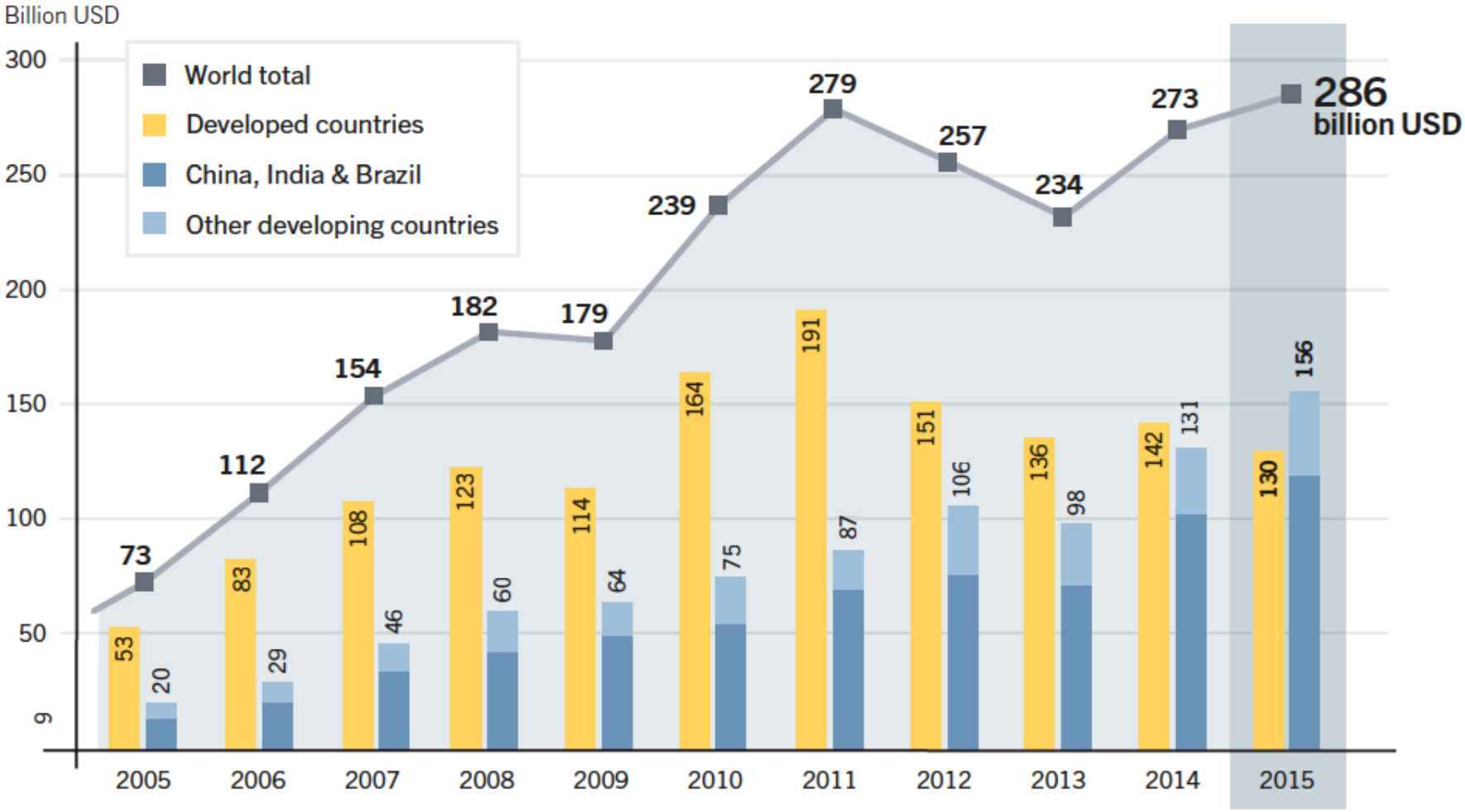
Increased cost-competitiveness: the power sector



Note: a) MWh: megawatt-hour
b) All costs are in 2016 USD. Weighted Average Cost of Capital is 7.5% for OECD and China and 10% for Rest of World

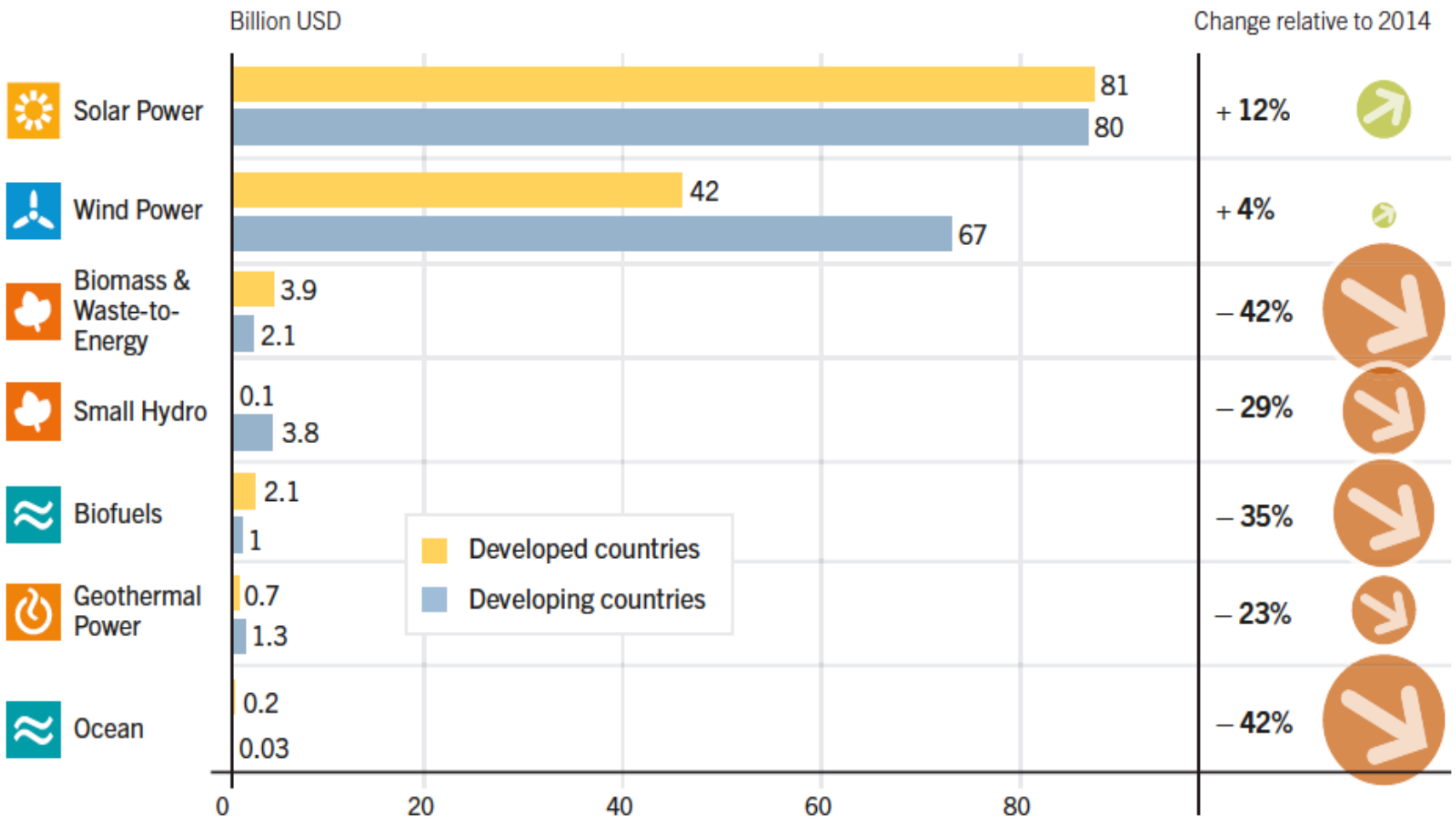
Source: IRENA 2017

Increased investment in the RE sector by country



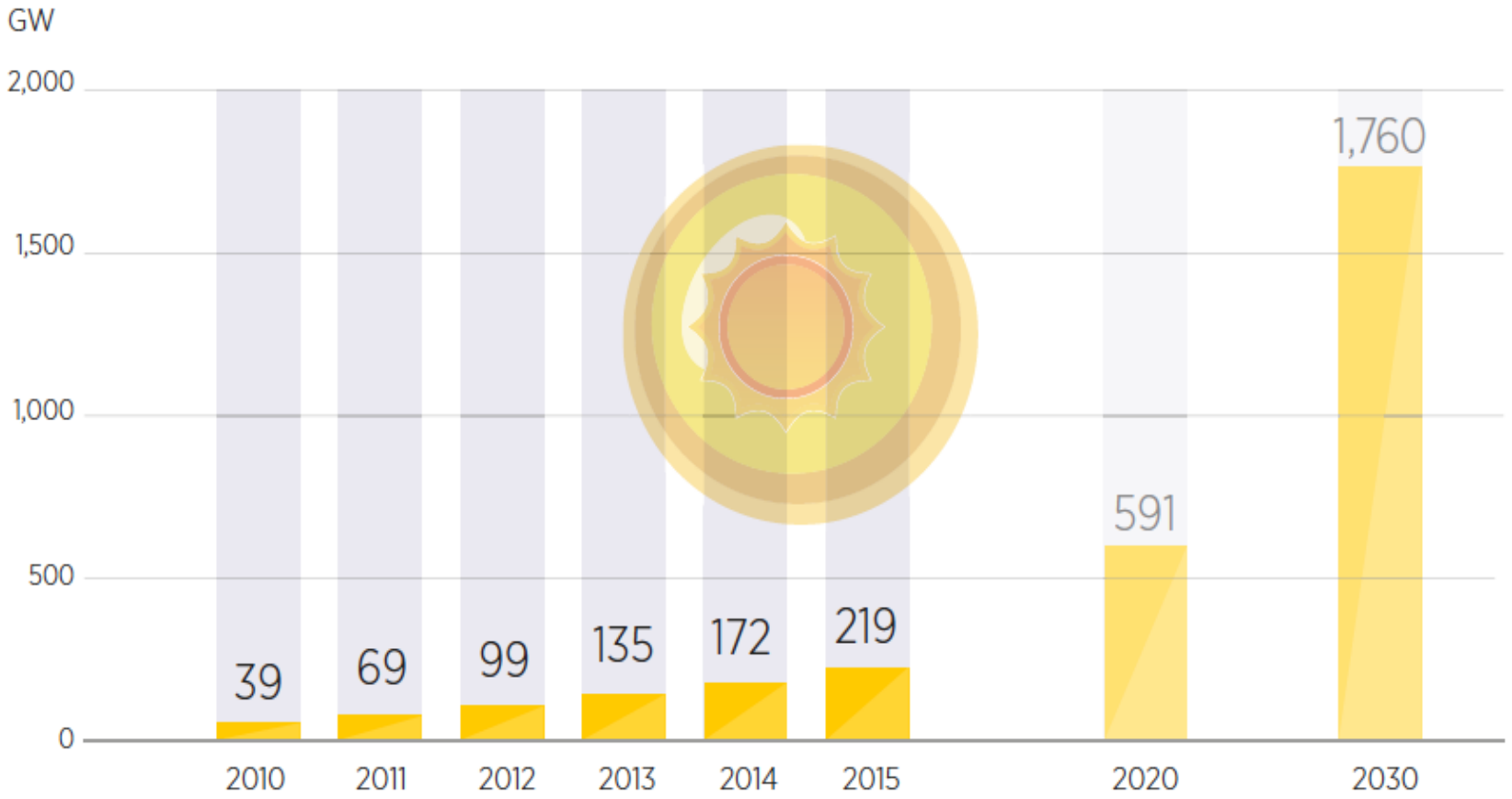
Source: REN21 2016

Increased investment in the RE sector by sector



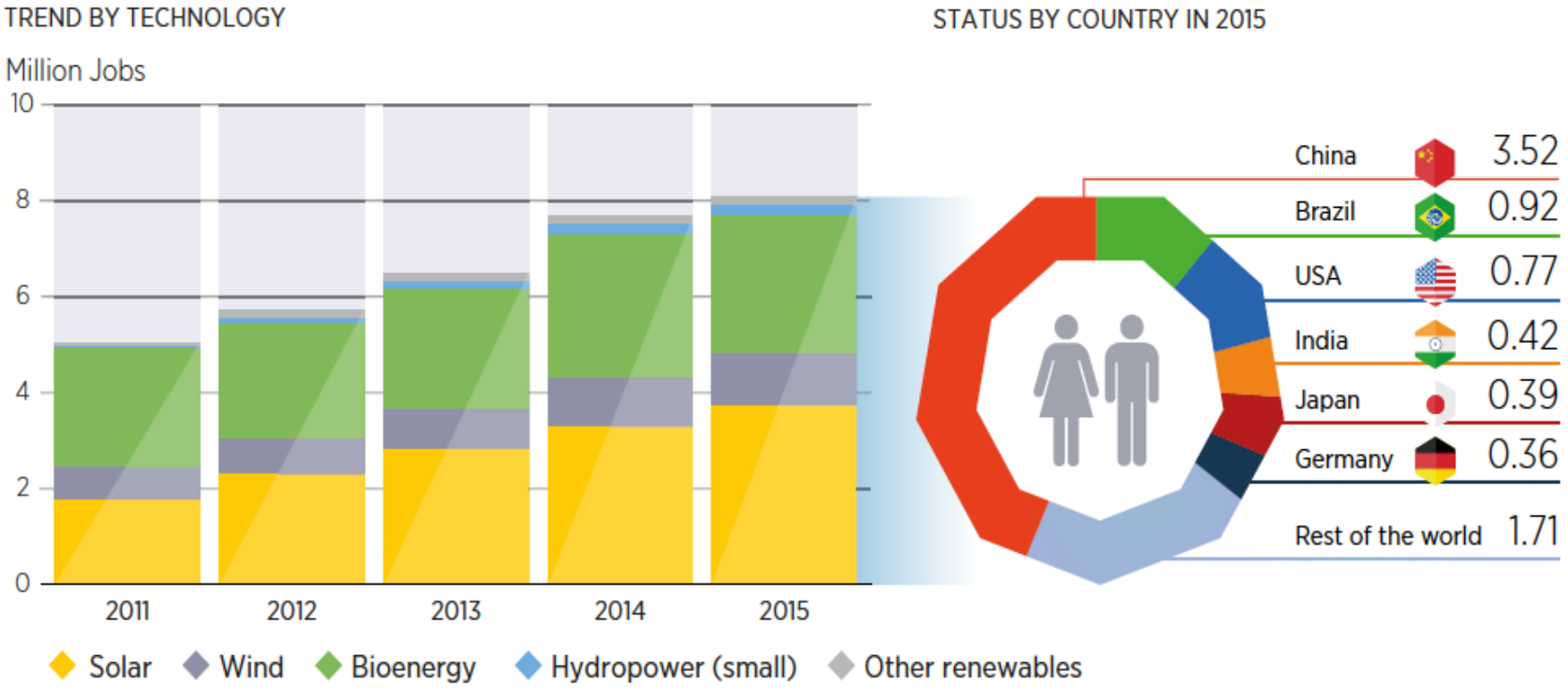
Source: REN21 2016

Focus: the solar sector



Source: REN21 2016

Jobs in the RE sector



Source: IRENA 2017

What made this all possible?

RE support policies and measures

Goals and rationale of RE policies and measures

GOALS

1. Facilitate RE technologies deployment through **market creation**
2. Enable cost reduction through **economies of scale**
3. Stimulate **technology innovation**

RATIONALE

1. Cost-barriers
2. Regulatory barriers
3. Markets barriers
4. Technical barriers

A taxonomy of RE support policies and measures

- Targets
- Regulatory instruments (including price support measures)
- Fiscal incentives
- Enabling conditions for the RE sector development

Targets

Most popular mechanism to develop a **clear vision** for the development of the sector, at the national or state/provincial level

173 countries

Political announcements and vision statements

Energy strategies and scenarios

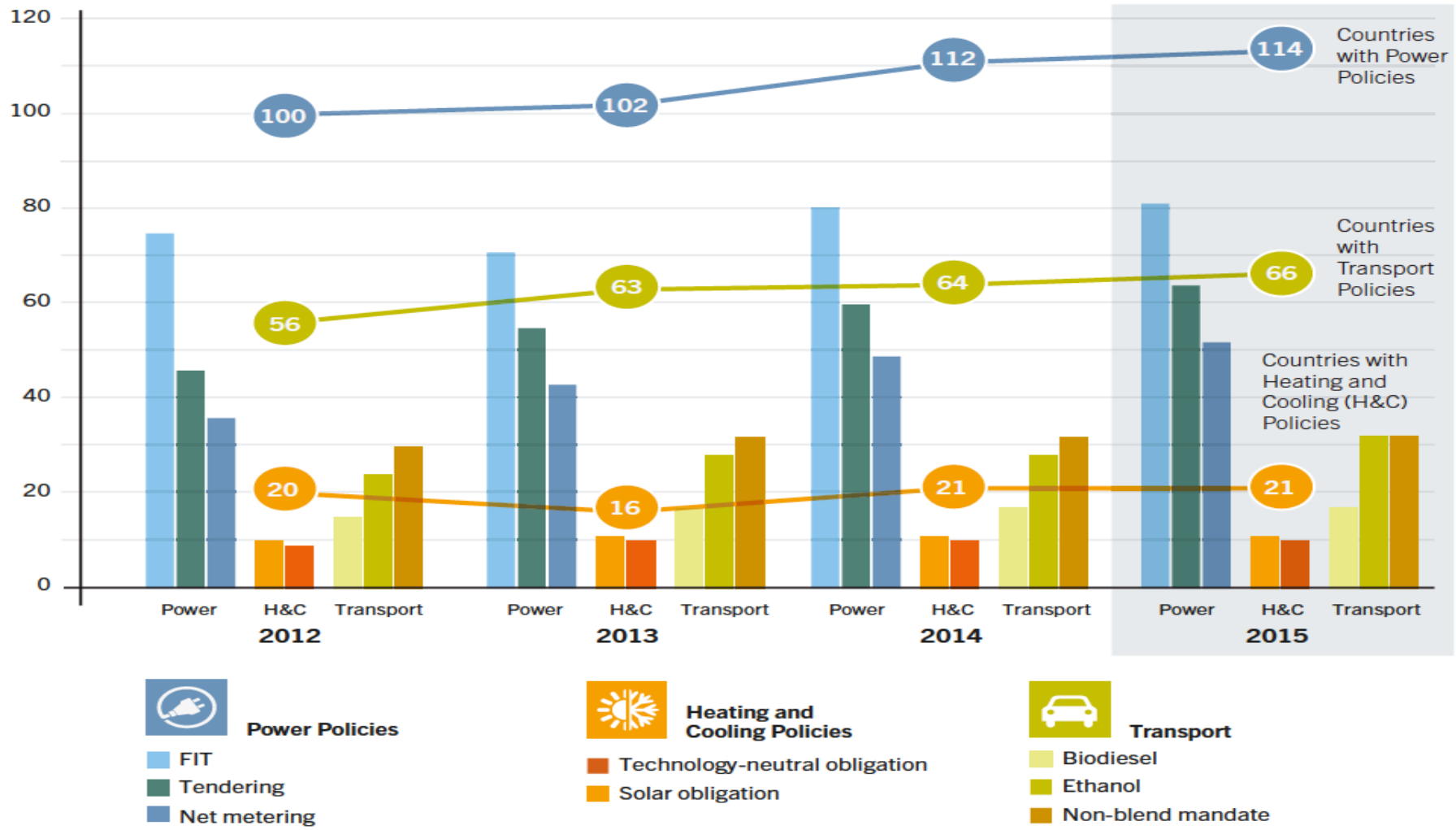
Detailed roadmaps and action plans

Legally binding RE targets

Whatever the form, they must be accompanied by *specific* policies and measures to be credible and yield energy transformation

Examples:
-27% of RE in final energy consumption by 2030 in the EU
-52% of RE in total power capacity by 2020 in Morocco
-RE targets included in the Nationally Determined Contributions (NDCs) submitted w/in the framework of the Paris Agreement (106/174 NDCs indicate national RE targets, 74/174 outline specific sectoral targets, mainly in the electricity sector and in the transport sector)

RE support policies in the world



Source: REN21 2016

Regulatory instruments

Overall, they aim at stimulating increased RE generation or increased RE capacity deployment

Feed-in tariff or feed-in premium

Min. guaranteed price per unit or premium on top of the wholesale electricity price over a fixed period of time

Auction/ tendering/ competitive bidding

Procurement mechanism by RE supply or capacity is competitively solicited from sellers, who offers bids at the lowest price

Net metering

A regulated arrangement by which utility consumers with on-site electricity generators receive credits for excess generation, which can be applied to offset consumption in other billing periods

Mandate/ obligation

Requires designated parties to meet a minimum and often gradually increasing RE target, such as percentage of total supply, a stated amount of capacity or required use of specified RE technology

Fiscal incentives

Overall, they aim at increasing consumption of RE technologies and facilitate investment in RE technologies

Income tax exemption and/or reduction

Investment tax credits

VAT tax exemption and/or reduction

Production tax credits

Examples:

-Chinese government's reduction of income taxes for producers of wind and biogas power projects
-US government's multi-year extension of production and investment tax credits for RE producers
-Reduction in value-added tax (VAT) for small hydroelectric, wind and biogas power generation plants in China

Enabling conditions for RE sector development

Investment support (i.e. access to finance)	**Aimed at reducing the capital cost of installing and deploying RE technologies**
Operational support (i.e. grid access)	**Aimed at integrating increasing shares of RE in the functioning of energy system**
Socio-economic benefits	**Aimed at seizing direct economic/social benefits from RE promotion *locally***

More or less dominant *national* dimension

Investment support (access to finance)

Capital grants	Percentage of costs incurred at for RE installations is returned to the investor as a capital grant, resulting in significant cost reductions
Favourable lending conditions	Low cost financing with subsidized interest rates for investors
Risk-mitigation instruments	Loan guarantees covering political, currency and power-offtake risks
Research and development	Direct support to fundamental and applied research in RE technologies

Overall, they lower the costs for producers, leading to lower RE prices

Lower costs boost RE technologies competitiveness

Yet, lower costs may reduce market access for foreign competitors or may increase exports of the subsidizing country

Operational support (grid access)

Priority access or transmission	Assurance given to connected generators of RE electricity that **they will be able to sell and transmit it in accordance with connection rules at all times**, whenever the source becomes available
Guaranteed access	when RE electricity is integrated into the spot market, ensures that **all electricity sold and supported obtains access to the grid**, allowing the use of a maximum amount of RE electricity from renewable energy sources from installations connected to the grid
Priority dispatch	transmission system operators give **priority** to generating installations using RE sources **when dispatching** electricity
Transmission discount	transmission system operators **lower and/or waive the network fees** due for use of transmission infrastructure

Overall, they avoid that RE generating installations are not penalized by infrastructure inadequacies and protect such installations from possible non-competitive behaviors linked to traditional market dominance of centralized large power producers

Socio-economic benefits

Local content requirements

Policy measures requiring a certain percentage of intermediate goods used in the production processes to be sourced from **domestic** manufacturers

Serve as either a **precondition** to receive government support or an **eligibility requirement** for government procurement in RE projects

Usually **coupled with other policy measures** to encourage green growth

***De facto* industrial policy instruments, meant to seize direct economic benefits from *domestic* RE industry development**

Encourage domestic RE manufacturing industries

Boost demand for domestically-produced products

Stimulate foreign investment (green jobs, technology transfer)

By inducing import substitution, they distort trade vs. *in*direct environmental benefit

Critical factors in choosing RE policies

1. Choice of technology
2. Maturity of the market
3. Market share
4. Trends in RE use

→ Continuous *adjustments* based on *evolving market conditions* in national/local contexts

Example:

From price support measures to **market-based instruments** in the electricity market (**FIT schemes -> competitive bidding**)

Preliminary conclusions

- **RE** are **crucial** for realizing the energy transformation at the core of climate change policies
- RE market is **expanding but** its full potential remains **untapped**
- Government support policies have critically contributed to increasing RE cost competitiveness, especially in the power sector, but their **environmental benefit** is often ***indirect***
- As the RE market reaches maturity, support policies are set to evolve towards **market-based mechanisms**

Climate change and WTO disputes on renewable energy

RE-related disputes in the WTO

Dispute Number	*Dispute Title*	*Consultation Request*	*Current Status*	*Industry or programme targeted*	*Claims*
412/426	*Canada – Renewable Energy* (Complainant: Japan)/ *Canada – Feed-In Tariff Program* (Complainant: EU)	13/092010 11/08/2011	Panel/AB reports adopted (24/05/2013) Implementation notified (5/06/2014)	Feed-in tariffs to renewable electricity generators	GATT/TRIMs, ASCM For wind- and solar PV-generated electricity, contingent upon use of domestically-produced generation equipment
419	*China – Measures Concerning Wind Power Equipment* (Complainant: US)	22/12/2010	In consultations	Grants, funds, awards to wind-power equipment manufacturers	ASCM Contingent upon the use of domestic over imported inputs
449	*US – Countervailing and Anti-Dumping Measures on Certain Products from China* (Complainant: China)	17/09/2012	Panel/AB reports adopted (22/07/2014),Reasonable period of time expired (25 August 2015)	Solar panels and wind turbines (among other products)	ADA/ASCM (CVD)
452	*European Union and Certain Member States – Certain Measures Affecting the Renewable Energy Sector* (Complainant: China)	05/11/2012	In consultations	Feed-in tariffs to renewable electricity generators (Italy and Greece)	GATT/TRIMs, ASCM For solar PV-generated electricity, contingent upon use of domestically-produced generation equipment
456	*India – Certain Measures Relating to Solar Cells and Solar Modules* (Complainant: US)	06/02/2013	Panel/AB reports adopted (14/10/2016) Compliance proceedings ongoing (23/01/2018)	Feed-in tariffs to solar power developers	GATT/TRIMs, (ASCM) Contingent upon use of domestically-produced solar cells and modules
459	*European Union and Certain Member States – Certain Measures on the Importation and Marketing of Biodiesel and Measures Supporting the Biodiesel Industry* (Complainant: Argentina)	13/06/2013	In consultations	Excise duty/internal consumption tax reductions for "sustainable biofuels" (Belgium and France)	GATT/TRIMs, ASCM Only EU-produced biofuels may qualify for reduction
473	*EU - Biodiesel* (Complainant: Argentina)	22/12/2010	Panel/AB reports adopted (26/10/2016). Implementation notified (13/10/2017)	Biodiesel	ADA
480	*EU – Biodiesel* (Complainant: Indonesia)	10/06/2014	Panel Report adopted (28/02/2018) , Reasonable period to expire (28 October 2018)	Biodiesel	ADA
510	*United States — Certain Measures Relating to the Renewable Energy Sector* (Complainant: India)	19/09/2016	Panel composed (24/04/2018)	Several fiscal and financial measures by eight US States, including to renewable energy generators, manufacturers of green technology equipment and biodiesel/ethanol distributors	GATT/TRIMs, ASCM Contingent upon use of domestically-produced components/technologies (California, Massachusetts, Michigan, Washington)
545	*US — Safeguard measure on imports of crystalline silicon photovoltaic products* (Complainant: Republic of Korea)	14/05/2018		Safeguards on crystalline silicon photovoltaic products	Safeguards Agreement In consultations

What does this mean for policy space?

RE trade disputes: key features

- Surge of RE disputes since early 2010s, reflecting the increasing market size of the RE market (especially wind and solar, and biofuels)
  - None about fossil fuel subsidies! -> 'selective enforcement' (Meyer 2016)
- Developed and developing countries are *both* complainants and defendants
  - Here, the theme is "green" industrial policies → no North/South divide
  - Emerging economies as leading RE actors
- Scope of applicable law is expanding
  - GATT, TRIMs, ASCM, ADA
- Forum choices for litigation are expanding, with frequent interconnections between the two
  - WTO multilateral dispute settlement
  - domestic administrative proceedings

Dissecting RE trade disputes

Overall, all RE trade disputes target **RE support programmes**

WTO disputes

- SCM Agreement and/or
- GATT/TRIMs for discriminatory programmes
- Lead to either programme withdrawal or benefit neutralization of subsidization

- CVD/AD cases challenging the lawfulness of trade remedies

Domestic administrative proceedings

- National CVD/AD investigations
- Lead to imposing higher duties as a means to offset the effects of legal subsidies
- Often carried in conjunction, but AD more flexible

- May be subject to WTO oversight

Dissecting WTO RE disputes

Overall, they always target *discriminatory* RE support programmes

SCM disputes

-Target the *overall* programme
-Strong evidentiary burden requested on the complainant for 'subsidy' claims
-Withdrawal or benefit neutralization

GATT/TRIMs disputes

-Target the *discriminatory component* of the programme only
-Easier challenge under NT rule
-Balancing test, but different exceptions invoked due to *indirect* environmental benefit

AD/CVD disputes

- Target the *CVD/AD duties* imposed to offset the effect of government support
- May be imposed in response to the same underlying set of facts
- Decided on technical matters re calculation rather than environmental considerations

Focus: RE-related unilateral CVD/AD actions

Date	Type of investigation	Complainant	Respondent	Industry or program targeted	
March 2009	AD/CVD	EU	USA	Biodiesel	Tariffs imposed
November 2011	AD/CVD	USA	China	Solar panels	Tariffs imposed
November 2011	AD/CVD	China	USA	State-level renewable energy support programmes	Programmes found to constitute prohibited subsidies but no tariffs imposed
January 2012	AD/CVD	USA	China; Vietnam	Wind components	Tariffs imposed, then challenged by China in a related WTO dispute
July 2012	AD/CVD	China	EU; South Korea; USA	Polysilicon	Tariffs imposed
July 2012	AD/CVD	EU	China	Solar panels	Price undertaking arranged, including an import quota and minimum price
November 2012	AD/CVD	India	China; Malaysia; Taiwan; USA	Solar panels	Price undertaking offered but rejected, tariffs recommended but eventually not imposed
November 2013	AD	EU	Argentina; Indonesia	Biodiesel	Tariffs imposed
January 2016	AD/CVD	China	USA	Ethanol	Tariffs imposed
October 2016	AD/CVD	Peru	Argentina	Biodiesel	Tariffs imposed

Dissecting RE-related CVD/AD actions

Solar- and wind-related

- Target much *wider set of* RE support *programmes* compared to WTO claims
- *China-centric*, with *tit-for-tat escalation* with USA
- AD investigations favoured by China's Non-Market Economy (NME) status (analogue country methodology: until 2016?)
- More CVD investigations excepted (out-of-country benchmarks)
- Problem of *double remedies* in parallel AD/CVD proceedings, brought before the WTO

Biofuels-related

- Target *different* types of support *programmes* (e.g. selective export tax imposed by Argentina and Indonesia)
- Hence, a rather stronger focus on AD investigations (see EU actions)

Overall, decided on the basis of *technical calculations*, not environmental considerations

Dealing with RE support policies under the SCM Agreement

The reach of the SCM Agreement

Financial contribution

By a *government* of public body

Conferring a *benefit*

Subsidies

Prohibited — **Must be eliminated outright**

Actionable — **Can be maintained if not trade distortive**

Permissible — **Permissible, but the category expired**

Definition of subsidies

"For the purpose of this Agreement, a subsidy shall be deemed to exist if:

a)(1) there is a **financial contribution** by a government or any public body within the territory of a Member, i.e. where:

(i) a government practice involves a **direct transfer of funds** (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

(ii) government **revenue** that is otherwise due is **foregone** or not collected (e.g. fiscal incentives such as tax credits)[(1)];

(iii) a government **provides goods or services** other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or **entrusts or directs a private body** to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

or

(a)(2) there is any form of **income or price support** in the sense of Article XVI of GATT 1994

and

(b) a **benefit** is thereby conferred.

Art. 1.1 ASCM"

Prohibited subsidies

“ 3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

(a) **subsidies contingent**, in law or in fact(4), whether solely or as one of several other conditions, **upon export performance**, including those illustrated in Annex I(5);

(b) **subsidies contingent**, whether solely or as one of several other conditions, **upon the use of domestic over imported goods**.

3.2 A Member shall neither grant nor maintain subsidies referred to in paragraph 1.

(Art. 3 ASCM) ”

Actionable subsidies

Specificity

Adverse effects

De iure or de facto, applies to specific enterprises or groups of enterprises, or industries or groups thereof

Injury to the domestic industry	Focus: effects of the subsidy in the *market of importing country*
Nullification or impairment	Focus: effects of the subsidy in the *market of subsidizer*
Serious prejudice	Focus: **volume effects** in the *market of subsidizer or third country market* or **price effects** in *any market*

Overall, SCM has a trade injury focus

No other negative externality is taken into account

Focus: the Canada – Renewable Energy *dispute*

The measure at issue

Ontario's (FIT) feed-in tariff programme

Scheme implemented by the Government of Ontario through which generators of **electricity produced from certain RE sources** are paid a **guaranteed price per KwH** of electricity delivered into the Ontario electricity system under 20-year or 40-year contract

For **wind and solar projects** with a capacity of up to 10Kw and 10 MW, respectively, a '**Minimum Required Domestic Content Level**' must be satisfied in the development and construction of the qualifying electricity generation facility

Participation is open to **facilities located in Ontario** that generate electricity exclusively from wind, solar PV, biomass, biogas, landfill gas or waterpower

FiT and micrFiT contracts

Under such contracts, the scheme is implemented for **large-scale and small-scale** projects, respectively

Parties and timeline of the dispute

- Parties:
  - Complainants: EU and Japan
  - Respondent: Canada
  - Third Parties: Australia, Brazil, China, Chinese Taipei, El Salvador, EU, Honduras, India, Japan, Korea, Mexico, Norway, Saudi Arabia, Turkey, US
- Timeline of the dispute

Panel established	Panel composed	Panel Report circulated	Panel Report appealed	Appellate Body Report circulated
Jul 20, 2011 (Japan) Jan 20, 2012 (EU)	Oct 6, 2012 (Japan) January 23, 2012 (EU)	July 20, 2011 (Japan) January 20, 2012 (EU)	Feb 5, 2013 (Japan) Feb 11, 2013 (EU)	May 6, 2013 **Approved** **May 24, 2013**

Claims

In essence, claims revolved around the **discriminatory nature** of the local content requirements enshrined in the FiT Programme

GATT/TRIMS

- **Art. 2.1 TRIMs**: national treatment
- **Art. III:4 GATT**: national treatment

SCM

- **Art. 3.1 :** prohibited import substitution subsidies
- **Art. 3.2**: to be eliminated outright

Ascertaining the existence of a subsidy: Step 1

Is Ontario's FiT Programme a '**financial contribution**'?

Factual characterization of the measure

The legal basis of the FiT Programme

The mandate and powers of the Ontario Power Authority (OPA)

The FiT and microFiT contracts

→

Legal characterization of the measure

What do such elements tell us of the measure as a financial contribution?

The *factual* characterization of a measure

> The complainants' assertions about the proper legal characterization of the challenged measures under Articles 1.1(a)(1) and 1.1(a)(2) of the SCM Agreement are largely in contrast to those advanced by Canada. Recent WTO jurisprudence suggests that when faced with such a situation, **a panel should first determine the proper factual characterization of the measures at issue, before turning to examine whether those measures, in the light of their proper factual characterization, fall within the scope of Article 1.1(a) of the SCM Agreement**. In undertaking the task of properly characterizing a challenged measure, a panel "must thoroughly scrutinize the measure before it, both in its design and in its operation, and identify its principal characteristics". Moreover, "[i]n making its objective assessment of the applicability of specific provisions of the covered agreements to a measure properly before it, a panel must identify *all* relevant characteristics of the measure, and recognize which features are the most central to that measure itself, and which are to be accorded the most significance for purposes of characterizing the relevant [measure] and, thereby, properly determining the discipline(s) to which it is subject under the covered agreements
>
> Panel Report, para. 7.194

The *factual* characterization of Ontario's scheme (2)

> The FIT Programme has very clearly two fundamental objectives: First, to **encourage** the participation of **new generation facilities using renewable sources** of energy into Ontario's electricity system in order to **diversify Ontario's supply-mix** and help replace the generation capacity that has been (and will be) lost as a result of the closure of Ontario's coal-fired facilities by 2014, and thereby also **reduce greenhouse gas emissions**; and secondly, to **stimulate local investment in the production of renewable energy generation equipment** needed to design and construct qualifying generation facilities using solar PV and windpower technologies. These objectives are pursued through the execution of the FIT and microFIT Contracts, which involve an **exchange of performance obligations** on the part of the OPA and qualifying Suppliers. There is no inherent grant element to the FIT and microFIT transactions.
>
> Panel Report, para. 7.198

The *legal* characterization of Ontario's FiT scheme

OPA pays for the **electricity** that is **delivered** into Ontario's electricity grid	**Exchange of obligations**
The Government of Ontario takes possesion over electricity and therefore **'purchase' electricity** (ie a good)	**Possession**
Legislative and regulatory framework leave no doubt that the challenges measures are perceived as **governmental activity that involved that procurement or purchase of electricity**	**Governmental activity**

> "**The appropriate legal characterization to be given to the FIT Programme, and the FIT and microFIT Contracts, is as "government purchases [of] goods" under Article 1.1(a)(1)(iii) of the SCM Agreement.**"
>
> Panel Report, para. 7.198; AB Report, para. 5.128

N.B. The AB clarified that a measure may fall under more than one type of financial contribution

AB Report, paras. 5.120-1

Ascertaining the existence of a subsidy: Step 2

Does the FiT Programme confer a '**benefit**'?

What is the relevant market?

Wholesale electricity market?

Markets for wind- and solar PV-generating electricity?

What is the right benchmark price for determining the existence of a benefit?

'Pure' market-based approach?

What about new-markets defined by government intervention?

Starting point

“

…any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be … consistent with the following guidelines:

…

d)the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for **less than adequate remuneration**, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined **in relation to prevailing market conditions** for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)

Article 14 SCM

”

Step 2 (a): definition of relevant market (Panel)

> …determining whether the challenged measures confer a benefit on the basis of a benchmark derived from a ***competitive*** **wholesale electricity market**, would mean that the FIT and microFIT Contracts could be legally characterized as subsidies by means of a comparison with a market standard that **has not been demonstrated to actually exist nor** one that could **be reasonably achieved in Ontario** - a market standard that the complainants have not contested will only rarely, if at all, attract sufficient investment in generation capacity to secure a reliable system of electricity supply even outside of Ontario. In our view, such an outcome would fail to reflect the reality of modern electricity systems, which by their very nature need to draw electricity from a range of diverse generation technologies that play different roles and have different costs of production and environmental impacts. As we have emphasized on a number of occasions, **it is only in exceptional circumstances that the generation capacity needed from all such technologies will be attracted into a wholesale market operating under the conditions of effective competition. Thus, the competitive wholesale electricity market that is at the centre of the complainants' main submissions cannot be the appropriate focus of the benefit analysis in these dispute.**
>
> Panel Report, para. 7.320

Step 2 (a): definition of relevant market (Panel)

> …Thus, one way to determine whether the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement would involve **testing them against the types of arm's length purchase transactions that would exist in a wholesale electricity market whose broad parameters are defined by the Government of Ontario**. In the present set of circumstances, this could be done by comparing the terms and conditions of the challenged FIT and microFIT Contracts with **the terms and conditions that would be offered by commercial distributors of electricity acting under a government-imposed obligation to acquire electricity from generators operating solar PV and windpower plants of a comparable scale to those functioning under the FIT Programme**. We are attracted by such an approach because not only does it take into account the complexities of electricity markets and the particular conditions of supply and demand that currently exist in Ontario, but it also evaluates the Government of Ontario's actions against a commercial benchmark.

Panel Report, para. 7.322

Absence of adequate evidence!

Step 2 (a): definition of relevant market (AB)

Supply-side factors prevent substitutability between wind- and solar PV-electricity and conventional electricity (ie the former cannot compete with the latter)

Market for wind and solar PV electricity can only come into existence as a matter of **government regulation**

Government's definition of energy supply mix reflects a variety of **policy imperatives**, including increasing the sustainability of electricity markets and addressing externalities linked to electricity generation

Wind/solar PV markets and the wholesale electricity market are *separate markets*

Step 2 (a): definition of relevant market (AB)

> In the present disputes, supply-side factors suggest that **windpower and solar PV producers of electricity cannot compete with other electricity producers** because of differences in cost structures and operating costs and characteristics. Windpower and solar PV technologies have very high capital costs (as compared to other generation technologies), very low operating costs, and fewer, if any, economies of scale. Windpower and solar PV technologies produce electricity intermittently (depending on the availability of wind and sun) and cannot be relied on for base-load and peak-load electricity. **Differences in cost structures and operating costs and characteristics** between windpower and solar PV technologies, on the one hand, and other technologies, on the other hand, make it very unlikely, if not impossible, that the former may exercise any form of price constraint on the latter. In contrast, conventional generators produce an identical commodity that can be used for base-load and peak-load electricity. They have larger economies of scale and exercise price constraints on windpower and solar PV generators.
>
> AB Report, para. 5.174

Step 2 (a): definition of relevant market (AB)

> In circumstances where the supply of electricity from different sources is blended and, for as long as the differences in costs for conventional and renewable electricity are so significant, **markets for wind- and solar PV-generated electricity can only come into existence as a matter of government regulation**. It is often the government's choice of supply-mix of electricity generation technologies that creates markets for wind- and solar PV-generated electricity. A government may choose the supply-mix by setting administered prices (based on the principles of cost recovery and reasonable margin) for technologies that would not otherwise be able to recover their costs on the spot market. Alternatively, a government may require that private distributors or the government itself buy part of their requirements of electricity from certain specified generation technologies. As we consider further below, in both instances, **the definition of a certain supply-mix by the government cannot *in and of itself* be considered as conferring a benefit within the meaning of Article 1.1(b) of the SCM Agreement**.
>
> AB Report, para. 5.175

Step 2 (a): definition of relevant market (AB)

> A government's definition of the energy supply-mix will generally reflect a variety of **policy imperatives** that inform governmental action. As we discuss further below, among these is **reducing reliance on fossil fuels to secure the sustainability of electricity markets in the long term**, as well as **addressing the negative and positive externalities that are associated with conventional and renewable electricity production**. Moreover, the government definition of the energy supply-mix may reflect the fact that consumers are ready to purchase electricity that results from the combination of different generation technologies, even if this is more expensive than electricity that is produced exclusively from conventional generation sources.

AB Report, para. 5.177

Step 2 (a): definition of relevant market (AB)

> In our view, not only should the Panel have defined the relevant market at the outset of its benefit analysis, but, in its analysis of the relevant market, it should also have considered that in Ontario the government definition of the energy supply-mix for electricity shapes the markets in which generators of electricity through different technologies compete. We recall that Canada had argued before the Panel that the relevant market for the purpose of the benchmark analysis should be the market for electricity produced from windpower or solar PV technology.680 Had the Panel more thoroughly scrutinized supply-side factors, it would have come to the conclusion that, even if demand-side factors weigh in favour of defining the relevant market as a single market for electricity generated from all sources of energy, supply-side factors suggest that important differences in cost structures and operating costs and characteristics among generating technologies prevent the very existence of windpower and solar PV generation, absent government definition of the energy supply-mix of electricity generation technologies. **This, in turn, would have lead the Panel to conclude that the benefit comparison under Article 1.1(b) should not be conducted within the competitive wholesale electricity market as a whole, but within competitive markets for wind- and solar PV-generated electricity, which are created by the government definition of the energy supply-mix**.

AB Report, para. 5.178

Step 2 (b): benchmark analysis (AB)

Market creation through **government intervention** does **not** in and of itself distort the market

Government's intervention ensures the **stability and sustainability of the electricity market** in the long term

New markets (ie markets shaped by market definition's of energy supply mix) can still provide appropriate benefit benchmarks

Benefit benchmarks should be found in the markets for wind and solar PV-generated electricity that result from the supply mix definition

Step 2 (b): benchmark analysis (AB)

> …while *introducing legitimate policy considerations into the determination of benefit cannot be reconciled with Article 1.1(b) of the SCM Agreement*, **we do not think that a market-based approach to benefit benchmarks excludes taking into account situations where governments intervene to create markets that would otherwise not exist**. For example, governments create electricity markets with constant and reliable supply. By regulating the quantity and the type of electricity that is supplied through the network (base-load, intermediate-load, or peak-load) and the timing of such supply, governments ensure that there is a continuous supply-demand balance between generators and consumers, thus avoiding imbalances that would destabilize the network and cause interruptions of power supply. **Although this type of intervention has an effect on market prices**, as opposed to a situation where prices are determined by unconstrained forces of supply and demand, **it does not exclude per se treating the resulting prices as market prices for the purposes of a benefit analysis under Article 1.1(b) of the SCM Agreement**. In fact, in the absence of such government intervention, there could not be a market with a constant and reliable supply of electricity.
>
> AB Report, para. 5.185

Step 2 (b): benchmark analysis (AB)

> … considerations relating to the choice of energy supply-mix by a government, including wind- and solar PV-generated electricity, may be crucial to the **viability and sustainability of the electricity market in the long term**. Governments intervene by reducing reliance on fossil energy resources and promoting the generation of electricity from renewable energy resources to **ensure the sustainability of electricity markets in the long term**. Fossil energy resources are exhaustible, and thus fossil energy needs to be replaced progressively if electricity supply is to be guaranteed in the long term. Government intervention in favour of the substitution of fossil energy with renewable energy today is meant to ensure the proper functioning or the existence of an electricity market with a constant and reliable supply of electricity in the long term. *Like the government regulation that ensures the stability and reliability of supply in the electricity market, a government's choice to include windpower and solar PV generation in the energy supply-mix should not be considered as preventing the identification or adaptation of competitive benefit benchmarks for purposes of an analysis under Article 1.1(b) of the SCM Agreement.*

AB Report, para. 5.186

Step 2 (b): benchmark analysis (AB)

> … Nevertheless, **a distinction should be drawn between**, on the one hand, **government interventions that create markets that would otherwise not exist and**, on the other hand, **other types of government interventions** in support of certain players in markets that already exist, or to correct market distortions therein. *Where a government creates a market, it cannot be said that the government intervention distorts the market, as there would not be a market if the government had not created it.* While **the creation of markets by a government does not in and of itself give rise to subsidies within the meaning of the SCM Agreement**, government interventions in existing markets may amount to subsidies when they take the form of a financial contribution, or income or price support, and confer a benefit to specific enterprises or industries.
>
> AB Report, para. 5.188

Analysis could not be completed!

In sum

RE markets and conventional energy markets are two separate markets due to supply-side factors

Governments' definition of energy supply mix cannot *in and of itself* be considered to confer a benefit

New markets shaped by market definition's of energy supply mix can still provide appropriate benefit benchmarks

De facto incorporation of policy considerations into the benchmark price determination?

The AB conclusion

Local content requirement

vs.

Ontario's feed-in tariff scheme

Violates Art. III:4 GATT and Art. 2.1 TRIMs

Does not qualify as a subsidy under SCM rules

A victory for green measures?

Ontario removed the programme altogether!

A few thoughts on the replicability of AB's approach

- **Non-substitutability based on supply-side factors** may not hold in light of RE increasing **cost-competitiveness**
- Depending on what would be considered to be the **determinants of market newness**, the same applies for the new/existing market distinction
- Convoluted benefit test still provides **guidance for future complainants**

Legal acrobatics do not provide a safe heaven for RE subsidies!

FiTs as textbook example of *subsidy*

FiTs as such archetypical *good green* subsidy

Is the ASCM ill-equipped to deal with RE subsidies?

Current rules

Uncertain legal status

- Likely qualify as ***actionable* subsidies**
- While proving adverse effect would not be obvious, '**boundary cases**' cannot be excluded
- Yet, **probability** of disputes in such cases are **minimal**

Legal reform

Clarity

- Re-establishment of a category of **permissible subsidies**
  - Article XX-modeled
  - Global public goods defense
- Expansion of **prohibited subsidies** including fossil fuel subsidies

Dealing with discriminatory RE support policies under the national treatment rule

Targeting discriminatory subsidies under the NT rule

Art. III:4 GATT	Discriminatory measures according **less favourable treatment** to **foreign** products
Art. 2.1 TRIMs	Discriminatory **investment measures** related to trade in goods that are **inconsistent with Art. III:4 GATT**
Art. XX GATT	Providing **justification for** discriminatory measures pursuing **legitimate goals**
Art. 3 TRIMs	Incorporates Art. XX GATT by express reference

Article III:4 GATT

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded **treatment no less favourable** 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, distributior or use

Article XX GATT – general exceptions

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

…

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

…

(j) **essential to the acquisition or distribution of products in general or local short supply**; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an **equitable share of the international supply of such products**, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. …”

Article 2 TRIMs

“

1. Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994.

2. An **illustrative list of TRIMs** that are **inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994** and the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 is contained in the Annex to this Agreement.

”

Illustrative list of TRIMs

“TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are **mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage,** and which require:

(a) **the purchase or use by an enterprise of products of domestic origin or from any domestic source**, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production; or….

Annex ”

Focus: the India – Solar Cells *dispute*

The measure at issue

Domestic content requirements(DCRs) imposed under India‘s Jawaharlal Nehru National Solar Mission Programme (JNNSM)

Scheme implemented by various **state-owned agencies appointed by the Indian Ministry of New & Renewable Energy** through which the Government of India enters into **long-term power purchase agreements (PPAs) with solar power developers (SPDs)** and pays them a **guaranteed price** per KwH per 25 years -> a feed-in tariff programme!

Mandatory DCRs enshrined in standard PPAs of various implementation phases, albeit not consistently, **on the use of domestic solar cells and modules**

Objective: “to establish **India as a global leader in solar energy**, by creating the policy conditions for its diffusion across the country as quickly as possible” -> overall target: 100,000 MW of grid-connected solar capacity!

Parties and timeline of the dispute

- Parties:
  - Complainants: US
  - Respondent: India
  - Third Parties: Brazil, Canada, China, Chinese Taipei, El Salvador, EU, Japan, Korea, Malaysia, Norway, Russian Federation, Saudi Arabia, Turkey
- Timeline of the dispute

Panel established	Panel composed	Panel Report circulated	Panel Report appealed	Appellate Body Report circulated
May 23, 2014	September 24, 2014	February 24, 2016	April 20, 2016	September 16, 2016 **Approved** **October 14, 2016**

Claims & defences

US claims

India defences

GATT/TRIMS

- **Art. 2.1 TRIMs**: national treatment
- **Art. III:4 GATT**: national treatment

- **Art. III:8 (a) GATT:** government procurement derogation from NT
- **Art. XX (d) GATT**: necessary to secure compliance
- **Art. XX (j) GATT**: general or local short supply

Ascertaining a NT violation of India's DCRs

India's DCR fall within **para. 1(a) TRIMs Illustrative List**

Violation of Art. 2.1 TRIMs

Violation of Art. III:4 GATT

> **TRIMs falling under para. 1(a) of the Illustrative List are necessarily inconsistent with Art. III:4 GATT…, thus obviating the need for separate and additional examination of the legal elements of Art. III:4**
>
> Panel Report, para. 7.54

India's DCRs as TRIMs in breach of para. 1(a) Ill. List

Is it an **investment measure**?	JNNSM's aim is to incentivize the production of solar power generation equipment in India, ie the promotion and development of a specific industry Panel Report, paras. 7.58-62
Is it **trade-related?**	India's DCRs **favour the use of domestic products over foreign goods**, therefore they affect trade Panel Report, paras. 7.63-4
Does it **mandatorily** require the **purchase or use** by an interprise of products of domestic origin?	Compliance with DCRs is necessary to obtain it Panel Report, paras. 7.65-7
Is it in line with **chapeau** requirements?	Compliance with DCRs is **necessary to obtain an advantage**, plus it is **mandatory or enforceable under domestic law** Panel Report, paras. 7.68-72

Is it already over for India's DCRs?

India's DCR fall within **para. 1(a) TRIMs Illustrative List**

Violation of Art. 2.1 TRIMs

Violation of Art. III:4 GATT

Is it justifiable under Art. XX GATT? (and, thus, Art. 3 TRIMs)?

India's general underlying argument: the 'emergency reserve'

India has an **obligation to take steps to achieve energy security, mitigate climate and achieve sustainable development**, and this includes steps to ensure to **adequate supply of clean electricity, generated from solar power, at reasonable prices**

This can only be done through an **adequate reserve of domestic manufacturing capacity** for solar cells and modules in case there is a disruption in supply of foreign cells and modules ('**emergency reserve**')

DCRs are the only means that India has to increase domestic manufacturing capacity of cells and modules, and thereby **reduce the risk of a disruption** in India SPDs' access to a continuous and affordable supply of solar cells and modules

India argues that the DCR measures are necessary/essential to the acquisition of solar cells and modules by SPDs that are engaged in solar power generation, in order to ensure realization of India's policy objectives of energy security, sustainable development and ecologically sustainable growth

Panel Report, paras. 7.189

Article XX (j) GATT: India's arguments

Solar cells and modules are **products in general or short supply**

↓

DCRs are **essential to the acquisition of solar cells and modules** by SPDs because they are the only means that India has to increase domestic manufacturing capacity of cells and modules

↓

DCRs do **not adversely impact the equitable entitlement** to the product by other Member and the conditions giving rise to the situation of short supply have not ceased to exist

In sum, India argues that the DCR measures are essential to the acquisition of solar cells and modules by SPDs that are engaged in solar power generation, in order to ensure realization of India's policy objectives of energy security, sustainable development and ecologically sustainable growth

Panel Report, paras. 7.189

Step 1: Products in general or short supply

Lack of domestic manufacturing capacity	✗	➢ Article XX (j) does not speak to the **source of the products concerned**, or to the question of **where those products are produced** ➢ India did not explained **what** would **constitute a lack of domestic manufactuing capacity** amounting to a short supply
Continued dependence on imports exposing India to **risks of disruptions** and, thus, shortages	✗	➢ India did **not** establish that SPDs were exposed to **imminent risks** of shortages
Need to examine DCRs in light of **India's overall objectives of energy security and ecologically sustainable growth**	✗	➢ While important, they do not relieve India from the burden of demonstrating that **importing products are not available**

Threshold legal element NOT met → **DCRs cannot be justified under Art. XX (j)**

Lack of domestic manufacturing capacity– Panel

> …we note that the words "products in general or local short supply" **do not refer to "products of *national origin* in general or local short supply".** Likewise, **the term "supply" appears to be neutral as between domestic production and importation**, in a way that Article XX(j) might not be if it instead referred to "products in general or local short production". The wording of Article XX(j) may thus be contrasted with other provisions of the GATT 1994 that contain rules that do relate, expressly, to the origin of the product concerned. For example, Article III:4 speaks of "products of the territory of any contracting party" and "like products of national origin"; Article II:1(b) refers to "products of territories of other contracting parties"; Article II:1(c) refers to "products of territories entitled under Article I to receive preferential treatment upon importation"; Article XX(g) refers to "domestic production or consumption"; and Article XX(i) speaks of "restrictions on exports of domestic materials". **We do not see any comparable language in Article XX(j) that speaks to the source of the products concerned, or to the question of where those products are produced.**
>
> para. 7.223

Lack of domestic manufacturing capacity– Panel

> We consider that the effect of adopting India's interpretation of Article XX(j) would be **tantamount to interpreting the words "products in general or local short supply", in the first part of Article XX(j), as though they meant "products in general or local short production**". We agree with India that the terms "supply" and "production" may be said to be "intrinsically linked", in the sense that the total supply of a product available will generally increase as the total level of production in that product increases. In our view, however, it does not follow that these two words are interchangeable, such that a product in "short supply" can be equated with a product in "short production". Likewise, we consider that the words "supply" and "production" are not interchangeable in the context of the proviso contained in the second part of Article XX(j), which provides that measures covered by this general exception are subject to the requirement that they "shall be consistent with the principle that all Members are entitled to an equitable share of the international supply of such products". If these words were treated as interchangeable in that context, then the principle that all Members are entitled to an equitable share of the international supply of products in short supply would be tantamount to a far-reaching principle that all Members are entitled to an equitable share in the international production of products in short supply. This provides further support for the view that the word "supply" cannot, in the context of Article XX(j), be equated with the term "production".

para. 7.223

Lack of domestic manufacturing capacity– Panel

"In our view, India's alternative interpretation of Article XX(j) does **not** present any **objective point of reference to serve as the basis for an objective assessment** of whether a product is in "short supply" within the meaning of Article XX(j) **. India has not adequately explained what would constitute a "lack" of domestic manufacturing capacity amounting to a "short supply"** under its interpretation of Article XX(j) . We note that India refers to its need for "sufficient manufacturing capacity".555 In emphasizing that there is "short supply" by virtue of its lack of domestic manufacturing capacity, India might be understood to argue that domestic manufacturing is not "sufficient", and a product is in "local short supply", if the level of domestic manufacturing capacity does not meet the level of domestic demand. However, it appears that this is not India's position, as throughout these proceedings India has stressed that it "does not seek to maximize" either "self-sufficiency" or "self-reliance". India maintains there is no need for the Panel to undertake "a quantification of its degree of self-reliance". We consider that India has not itself articulated what would constitute "sufficient" manufacturing capacity for the purposes of Article XX(j) under its alternative interpretation of this provision. It is also not clear whether India is arguing that it would fall under the discretion of each Member concerned to determine what "sufficient" manufacturing capacity would be, or whether the **point of reference for assessing the level of "sufficient" manufacturing capacity** would vary from case-to-case, depending on the policy objective being pursued"

para. 7.226

Lack of domestic manufacturing capacity– AB

> Based on the foregoing, we consider that the terms "products in general or local hort supply" refer to a situation in which **the quantity of available supply of a product, *from all sources*, does not meet demand in a relevant geographical area or market**. We do not consider that India's manufacturing capacity for solar cells and modules is irrelevant to the question of whether those are "products in general or local short supply" in India. Rather, our view is that a product is "in general or local short supply" when the quantity of available supply of that product, from all sources, does not meet demand in the relevant geographical area or market in question. This includes **all available sources of supply, including both foreign and domestic sources.** Domestic manufacturing capacity is therefore one variable that must be taken into account to assess whether solar cells and modules are products in short supply in India. In other words, our view is that a **lack of domestic production in the products at issue is a necessary, but not sufficient, condition for finding that supply of that product**, from all sources, does not meet demand in the relevant geographical area or market in question.
>
> para. 7.234

Lack of domestic manufacturing capacity– AB

> As we have explained above, an assessment of whether a Member has identified "products in general or local short supply" requires a case-by-case analysis of the relationship between supply and demand based on a **holistic consideration of all relevant factors**. We agree with India to the extent that it suggests that an increase in domestic manufacturing "capacity" may lead to an increase in the total quantity of available supply of a product. However, **we disagree that a lack of "sufficient" domestic manufacturing "capacity" will necessarily constitute a product "shortage" in a particular market, as India appears to suggest. Nor does it follow from an increase in domestic production capacity that domestic manufacturers will necessarily sell their production to domestic buyers, rather than exporting to buyers abroad.**
>
> para. 5.74

Lack of domestic manufacturing capacity – AB

> Based on the foregoing, we disagree with India to the extent that it argues that "short supply" can be determined without regard to whether supply from all sources is sufficient to meet demand in the relevant market. Rather, as noted, we read Article XX(j) of the GATT 1994 as reflecting a balance of different considerations to be taken into account when assessing whether products are "in general or local short supply". **This analysis may, in appropriate cases, take into account not only the level of domestic production of a particular product and the nature of the products that are alleged to be "in general or local short supply", but also such factors as the relevant product and geographic market, potential price fluctuations in the relevant market, the purchasing power of foreign and domestic consumers, and the role that foreign and domestic producers play in a particular market, including the extent to which domestic producers sell their production abroad. Due regard should be given to the total quantity of imports that may be "available" to meet demand in a particular geographical area or market.** Whether and which factors are relevant will necessarily depend on the particularities of each case.
>
> para. 5.83

Risks of disruption – Panel

“Assuming for the sake of argument that products at risk of being in "short supply" could be "products in general or local short supply" within the meaning of Article XX(j), which we have found is not the case, **we consider that only imminent risks of shortage would be potentially covered.** Accordingly, we have applied the standard of "imminent" risk in the context of assessing whether solar cells and modules are "products in general or local short supply" within the meaning of Article XX(j). **Based on our review of India's evidence, we conclude that India has not established any imminent risk of a disruption in supply of foreign solar cells and modules to India SPDs**. We therefore find that the risk of solar cells and modules becoming products in general or local short supply in India does not amount to solar cells and modules being "products in general or local short supply" in India within the meaning of Article XX(j).

para. 7.264 ”

Risks of disruption – AB

“We understand India's arguments regarding the alleged risks inherent to the continued dependence on imported solar cells and modules to relate to the **issue of supply availability**, and agree that such considerations could, in principle, be relevant in assessing whether a situation of "short supply" exists. While a consideration of potential risks of disruption in supply of a given product may inform the question of whether a situation of "short supply" exists, we note the Panel's finding that **India "ha[d] not identified any actual disruptions in imports of solar cells and modules to** date", and that SPDs in **India had not "experienced an actual disruption in the supply of affordable foreign solar cells and modules**”.

para. 5.76

India‘s overall objectives - AB

“We further note that, during the present dispute, India has sought to justify its DCR measures on the basis of the policy objectives underlying them. India has argued that the **DCR measures should be seen in light of the policy objectives** of: "(i) Energy Security and Sustainable Development; and (ii) Ecologically sustainable growth, while addressing the challenges of climate change.” … India further argues that the DCR measures are consistent with Article XX(j) because they "need to be examined in the context of the overall objectives **of energy security and ecologically sustainable growth for which acquisition or distribution of indigenously manufactured solar cells and modules is essential**.”

While policy considerations such as those referred to by India may inform the nature and extent of supply and demand, they do not relieve the responding party invoking the exception in Article XX(j) from **the burden to demonstrate that imported products are not "available" to meet demand and that the products at issue are "in general or local short supply**”.

paras. 5.78-9 ”

Article XX (d) GATT: India's arguments

India has the **obligation to ensure ecologically sustainable growth** while addressing India's security challenge, and ensuring compliance with its **obligations relating to climate change** in accordance with four international instruments* and four domestic instruments**

Both sets of instruments qualify as '**law and regulations**'

DCRs '**secure compliance**' with these law and regulations

DCRs are **necessary** to secure compliance because they are the **only means it** has **to incentivize local manufacturing** of solar cells and modules, and thereby rdeuce supply disruptions

*

(1) the preamble of the WTO Agreement
(2) UNFCCC
(3) Rio Declaration 1992
(4) Rio+20 Document: "The Future We Want"

**

Section 3 of India's Electricity Act 2003
read together with
(2) National Electricity Policy, para. 5.12.1
(3) National Electricity Plan, subsec. 5.2.1
(4) National Action Plan on Climate Change

Step 1: Are identified instruments law or regulations?

International instruments

1. Such instruments do not form part of India's domestic legal system (namely, they do **not** have **direct effect**)
2. The fact that they establish principles that are part of **customary international law** does not speak to the question of whether such obligations have direct effect
3. The direct effect is **not established** by the fact that the principles of sustainable development under international environmental law have been recognized by the **Supreme Court of India** to be part of the **environmental and developmental governance in India**

Domestic instruments

1. Section 3 of the Electricity Act 2003 constitutes a **legally enforcable rule of conduct**
2. The other instruments only contain **hortatory, aspirational, declaratory provisions**

Step 2: Do DCRs secure compliance with Section 3?

1. Section 3 of the Electricity Act 2003 bears **no link or nexus with DCRs**
2. Section 3 of the Electricity Act 2003 does **not address the content or substance of the other instruments**

Threshold legal elements NOT met → **DCRs cannot be justified under Art. XX (d)**

Step 1: International instruments – Panel (1)

> We have taken careful note of India's explanation of how its domestic legal system functions. We accept India's explanation of the allocation of powers under the Constitution of India, and we accept its explanation that the executive branch may take implementing actions to secure compliance with India's international law obligations under the afore-mentioned instruments. We also accept India's explanation that the executive branch may take implementing actions without express sanction by the legislative branch, provided those implementing actions do not run into conflict with laws enacted by the Parliament.
>
> However, in our view, **these explanations fail to demonstrate that the international instruments identified by India have "direct effect" in India**. **To the contrary, they seem to demonstrate that international agreements do not have "direct effect" in India.** Specifically, India's explanations all suggest that either the executive branch and/or the legislative branch, as appropriate, must take "implementing actions" to incorporate and implement India's international obligations into its domestic legal system. By definition, this suggests that those obligations do not have "direct effect"; India's own explanations establish that international law obligations are not "automatically incorporated" into Indian law, but rather that they may possibly be acted upon and implemented by certain domestic authorities.

paras. 7.297-8

Step 1: International instruments – Panel (2)

“…India emphasizes that its Supreme Court has held that **principles of international environmental law, and the concept of sustainable development, "are fundamental to the environmental and developmental governance**, and "has also noted that the concept of sustainable development is a part of **customary international law**”. However, **this does not in our view speak to the question of whether international obligations are automatically incorporated into domestic law and have "direct effect" in India**.”

paras. 7.298

Step 1: International instruments – AB (1)

> We emphasize that, **even if a particular international instrument can be said to form part of the domestic legal system of a Member, this does not, in and of itself, establish the existence of a rule**, obligation, or requirement within the domestic legal system of the Member that falls within the scope of a "law or regulation" under Article XX(d) . Rather, as set out above, an assessment of whether an instrument operates with a **sufficient degree of normativity and specificity under the domestic legal system of a Member so as to set out a rule of conduct or course of action**, and thereby qualify as a "law or regulation", must be carried out on **case-by-case basis**, taking into account all the other relevant factors relating to the instrument and the domestic legal system of the Member.
>
> para. 5.141

Step 1: International instruments – AB (3)

> While these Decisions and observations by the Supreme Court may serve to highlight the **relevance of the international instruments and rules identified by India for purposes of interpreting provisions of India's domestic law**, as well as for guiding the exercise of the decision-making power of the executive branch of the Central Government, **we do not consider that this is sufficient to demonstrate that the international instruments India identified are rules that form part of its domestic legal system and fall within the scope of "laws or regulations" under Article XX(d)**. To the extent that India relies on these Decisions by the Supreme Court to reinforce its point that the executive branch, by enacting the DCR measures, was "executing", or giving effect to, the international instruments identified by India, we recall that **the mere fact that the executive branch takes actions in pursuance of the international instruments at issue is not sufficient, in and of itself, to demonstrate that such international instruments fall within the scope of "laws or regulations" under Article XX(d)**.
>
> para. 5.148

Step 1: Domestic instruments – Panel (1)

> The Electricity Act was enacted by India's Parliament, and received the "assent" of the President on 26 May 2003. It has **formal characteristics that are normally associated with a statute**. For example, it contains a date of entry into force746 , a section defining the terms used in the instrument, and throughout it is divided into numbered parts, sections and subsections that consist of rules cast in binding language. **Section 3, the provision identified by India, appears to constitute a legally enforceable rule of conduct under the domestic legal system of India**. As elaborated above, it mandates that the Central Government **"shall" perform certain conduct**, i.e. prepare and publish the National Electricity Policy and tariff policy from time to time. It further mandates that the Central Electricity Authority referred to in sub-section (1) of section 70 "shall" perform certain conduct, most notably that it must prepare a National Electricity Plan in accordance with the National Electricity Policy and notify such plan once in five years. Based on the foregoing, we find that the Electricity Act, and in **particular Section 3 thereof, constitutes a "law" for the purposes of Article XX(d).**
>
> para. 7.312

Step 1: Domestic instruments – Panel (2)

“There are **striking contrasts** between the Electricity Act, on the one hand, and the National Electricity Policy, the National Electricity Plan, and the National Action Plan on Climate Change, on the other. First, **each is expressly entitled a "policy" or "plan", and the language of the provisions and passages in these documents identified by India, which we have set out above, does not suggest the existence of any legally enforceable rule**s. Rather, these extracts appear to consist of language that is **hortatory, aspirational, declaratory, and at times solely descriptive**….

Second, apart from the hortatory, aspirational, and declaratory language in the provisions and passages identified**, India has not suggested that these "policies" and "plans" are legally binding, or that they are substantively similar to Acts or other instruments under its domestic legal system**. To the contrary, in seeking to argue that **Article XX(d) should not be interpreted in a manner that attaches undue significance to the distinction between "legally binding and non-binding instruments",** India states that "[s]uch an interpretation would mean that if India had a Climate Change Act, instead of a National Action Plan on Climate Change, it would have been able to justify [the] DCR [measures], but since it is only seeking to implement the National Action Plan on Climate Change and the UNFCCC, it cannot claim the exception under Article XX(d) .” This appears to be an acknowledgement that the National Action Plan on Climate Change is not legally binding.

para. 7.313-4”

Step 2: Domestic instruments – Panel (1)

> Therefore, even assuming for the sake of argument that Article XX(d) could potentially cover measures taken by India to secure its own compliance with its laws or regulations, which is a legal issue we consider it unnecessary to resolve, it would have to be demonstrated that the DCR measures secure compliance, by the Central Government of India or the Central Electricity Authority, with their obligations set out in Section 3 of the Electricity Act. India has advanced no such argument, and **we see no link or nexus between the DCR measures and Section 3 of the Electricity Act**. In this regard, **we fail to see how the DCR measures could be said to secure compliance with the obligations in Section 3 of the Electricity Act, which are to periodically prepare the National Electricity Policy and the National Electricity Plan.** India has not suggested that the DCR measures are aimed at preventing the Central Government of India or the Central Electricity Authority from acting inconsistently with their obligations to periodically prepare the National Electricity Policy and the National Electricity Plan.
>
> para. 7.329

Step 2: Domestic instruments – AB (2)

> We recall that the Panel analysed each of the domestic instruments that India had identified to assess whether they qualify as "laws or regulations" within the meaning of Article XX(d) . The Panel found that, whereas the passages and provisions of the National Electricity Policy, the National Electricity Plan, and the National Action Plan on Climate Change are not "laws or regulations" within the meaning of Article XX(d), Section 3 of the Electricity Act, 2003 is a "law" for purposes of that provision. In our view, **given how India presented its case alleging the existence of the obligation of ensuring ecologically sustainable growth deriving from several instruments, it may have been appropriate for the Panel to have begun by assessing whether the passages and provisions of the domestic instruments that India had identified, when considered together, set out the rule alleged by India.** Were the Panel satisfied that India had established the existence of such a rule, it could then have considered whether this rule embodied in the domestic instruments identified by India qualified as a "law or regulation" under Article XX(d).
>
> para. 5.128

Step 2: Domestic instruments – AB (2)

> Looking at the passages and provisions of the National Electricity Policy, the National Electricity Plan, and the National Action Plan on Climate Change identified by India, **we fail to see how these instruments, taken together, could be read to set out a "rule" to ensure ecologically sustainable growth that India alleges.** The National Electricity Policy states that it "aims at laying guidelines" for the attainment of certain objectives.The National Electricity Plan is described as a "reference document". The National Action Plan on Climate Change "updates India's national programmes relevant to addressing climate change"; it "identifies measures that promote [India's] development objectives, while also yielding co-benefits for addressing climate change effectively"; and it "lists specific opportunities to simultaneously advance India's development and climate related objectives of both adaptation as well as greenhouse gas (GHG) mitigation." **We note that there are differences in the substantive content of the passages and provisions of these three instruments, on the one hand, and the substance of the rule that India alleges they contain, on the other hand. In addition, the relevant texts of these instruments, whether seen in isolation or read together, do not set out, with a sufficient degree of normativity and specificity, a "rule" to ensure ecologically sustainable growth, as alleged by India. Instead, we note, as did the Panel, that the text of these passages and provisions "is hortatory, aspirational, declaratory, and at times solely descriptive".**

para. 5.133

Step 2: Domestic instruments – AB (2)

> Section 3(1) of the Electricity Act, 2003 thus stipulates that the Central Government "shall" prepare the National Electricity Policy. Section 3(2) requires the Central Government to publish this policy from time to time. Section 3(3) allows the Central Government to review and revise this policy. Section 3(4) requires that the Central Electricity Authority "shall" prepare a National Electricity Plan in accordance with the National Electricity Policy and notify such plan once in five years. **Section 3 therefore sets out the obligation, and empowers the relevant entities to periodically prepare, publish, and review the National Electricity Policy, and the National Electricity Plan. This obligation is different in content from the rule that India seeks to derive from Section 3 of the Electricity Act, 2003, i.e. to ensure ecologically sustainable growth while addressing India's energy security challenge, and ensuring compliance with its obligations relating to climate change**.
>
> **While Section 3 sets out the legal basis and authority for the development of the National Electricity Policy and the National Electricity Plan, it does not speak to the degree of normativity of these instruments.** Thus, for example, Section 3 does not speak to the extent to which these instruments are to be observed or complied with under the domestic legal system of India. Whereas the National Electricity Policy and the National Electricity Plan may well have been enacted by the authorities competent to do so under India's domestic legal system, **it is not clear to us how Section 3 of the Electricity Act, 2003 would have the effect of adding to the degree of normativity of these otherwise "non-binding" domestic instruments**.

paras. 5.135-6

Looking forward: essentialness/necessity

…it appears to us that the fundamental issue in dispute for the purpose of determining whether the DCR measures are "essential" or "necessary" under Articles XX(j) and XX(d) is whether the DCR measures ensure, or reduce this risk of a disruption in, Indian SPDs' access to a continuous and affordable supply of the solar cells and modules needed to generate solar power.

Panel Report, para. 7.342

Limited **factual analysis** performed by the Panel

Panel Report, paras. 7.351-81

Importance of India's objective	1. **Access to a continuous and affordable supply** of the solar cells and modules is an **important objective** 2. Yet, India did **not** provide have specific information or **evidence on what the consequences would be in the event of a disruption** in Indian SPDs' access to affordable supply of the solar cells and modules
Trade-restrictiveness and contribution of the declared objective	1. In the short-term, the DCR measures are **unlikely to contribute to the stated objective** 2. Information on the effect of the DCR measures on increasing domestic manufacturing capacity of solar cells and modules casts **doubt on whether such effect is positive** 3. India has not identified any related measures that it is taking to ensure the supply of the raw materials necessary to domestically produce and utilize solar cells & modules 4. It is **not clear that any increase in domestic manufacturing capacity** for solar cells and modules **would ensure Indian SPDs access to a continuous and affordable supply of the solar cells and modules**, because t is not clear that domestic manufacturers ... would sell solar cells or modules to Indian SPDs in the event of a shortage or other disruption

A few final considerations

- The new stream of RE-related disputes has targed ***discriminatory* RE support policies**

- **High technicality** has made WTO Members eschew SCM claims and focus on challenging the discriminatory component (*only*) of such measures under the **NT rule**, causing a ‚return' to Art. XX GATT exceptions

- **Indirect environmental benefit** of local content requirements is reflected in the choice of (alternative) Art. XX exceptions

- What does it all tell us about the **adequacy of the WTO rules** to deal with RE support policies?

Latest developments

Dispute	Type of dispute	Complainant	Responder	Industry or programme targeted	Status
DS510: *US – Renewable Energy*	GATT/TRIMs, SCM	India	USA	Subnational renewable energy measures, contingent on local content	Panel composed on 24 April 2018

GATT/TRIMS

- **Art. 2.1 TRIMs**: national treatment
- **Art. III:4 GATT**: national treatment

SCM

- **Art. 3.1 :** prohibited import substitution subsidies
- **Art. 3.2**: to be eliminated outright

In light of the foregoing, what do you predict?

Infant industry exception?

Article XVIII: Governmental Assistance to Economic Development

4. (a) Consequently, **a contracting party, the economy of which can only support low standards of living and is in the early stages of development**, shall be free to deviate temporarily from the provisions of the other Articles of this Agreement, as provided in Sections A, B and C of this Article.

Section C

13. If a contracting party coming within the scope of paragraph 4 (a) of this Article finds that **governmental assistance is required to promote the establishment of a particular industry** with a view to raising the general standard of living of its people, but that no measure consistent with the other provisions of this Agreement is practicable to achieve that objective, it may have recourse to the provisions and procedures set out in this Section.

14. The contracting party concerned shall notify the CONTRACTING PARTIES of the special difficulties which it meets in the achievement of the objective outlined in paragraph 13 of this Article and **shall indicate the specific measure affecting imports which it proposes to introduce in order to remedy these difficulties**…..

THANK YOU VERY MUCH!

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