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Renewable Energy Disputes Before International Economic Tribunals: A Case for Institutional 'Greening'?

by A. Kent

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Renewable energy disputes before international economic tribunals: A case for institutional 'greening'?

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I. Introduction:

In recent years several disputes relating to renewable energy (RE) were, and are, being resolved by international trade and investment tribunals (hereinafter "economic tribunals"), in accordance with trade and investment laws.[2] However, disputes related to RE are highly related also to *Environmental Law and Policy.* The problem of "pigeon-holing" complex and multifaceted conflicts into one specific area of law has been addressed by the International Law Commission in its iconic report on the fragmentation of international law:

> "Everything would be in fact dependent on argumentative success in pigeon-holing legal instruments as having to do with "trade", instead of "environment", "refugee law" instead of "human rights law", "investment law" instead of "law of development".

Addressing RE disputes from one perspective alone – the economic perspective – might well result in a biased result, one that ignores other important policy objectives and takes into consideration only one particular set of objectives, knowledge and theory. Moreover, this state of affairs is aggravated by the fact that in many instances, the individuals encircling and

[2] See for example the following WTO disputes: *Canada - Certain Measures Affecting the Renewable Energy Sector*, WT/DS412/R, WT/DS426/R, Report of the Panel,19 December 2012, , available at <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds412_e.htm> (22 October 2013) [*Canada FIT*]; *Canada — Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS412/AB/R and WT/DS426/AB/R, Report of the Appellate Body, 6 May 2013, available at <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds412_e.htm> (22 October 2013) [AB Report]*United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WTO Doc. WT/DS449 (2012), available at <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds449_e.htm> (22 October 2013); *India – Certain Measures Relating to Solar Cells and Solar Modules*, Request for consultations by the United States, WTO Doc. WT/DS456/1 (2013), available at <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds456_e.htm> (22 October 2013); *European Union and a Member State – Certain Measures Concerning the Importation of Biodiesels*, Request for consultations by Argentina, WTO Doc. WT/DS443/1 (2012), available at <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds443_e.htm> (18 November 2013). See also the following ongoing, and concluded, investment disputes: *Antaris and other v. Czech Republic* (UNCITRAL); *Natland Investment Group and others v. Czech Republic* (UNCITRAL)*; I.C.W. Europe Investment Ltd v. Czech Republic* (UNCITRAL); Voltaic Network GmbH v. Czech Republic (UNCITRAL); Photovoltaik Knopf Betriebs-GmbH v. Czech Republic(UNCITRAL); WA Investments-Europa Nova Limited v. Czech Republic (UNCITRAL); CSP Equity Investment S.a.r.l. v. Spain (Stockholm Chamber of Commerce rules); Isolux Infrastructure Netherlands B.V v. Spain (Stockholm Chamber of Commerce rules); InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain (ICSID Case No. ARB/14/12); NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Spain (ICSID Case No. ARB/14/11)Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italy (ICSID Case No. ARB/14/3); *EVN AG* ***v. Bulgaria***, ICSID Case No. ARB/13/17.

acting within each particular field of law share very similar backgrounds, expertise, perspectives and even the same 'ethos'. As David Kennedy has remarked in this respect:[3]

> "When we public international lawyers look out the window, we see a world of nation states and worry about war. We remember the great wars of the twentieth century. We were traumatized by the holocaust, fear totalitarianism and are averse to ideology. […] Trade lawyers, by contrast, look out the window and see a world of buyers and sellers struggling to deal. Their trauma was the great depression."

Koskenniemi adds in this regard:[4]

> "To be doing "trade law" or "human rights law", or "environmental law" or "European law" – as the representatives of those projects repeatedly tell us – is not just to operate some technical rules but to participate in a culture, to share preferences and inclinations shared with colleagues and institutions who identify themselves with that "box"."

The fact that also the communities surrounding each field of law may be isolated from one another in such a fundamental manner,[5] may aggravate this problem. It is doubtful, for example, whether those involved in the resolution of these disputes, whether counsels, investment arbitrators or WTO panellists, all experts in *economic law*, are capable of dealing with the complexity of RE disputes, including their environmental aspects. They may simply be lacking the knowledge, or interest, to consider such issues.

One way in which this fragmentation can be resolved is through the use of an integrated ***process***; one that enables, and even encourages, the flow of ideas, specialised knowledge and perspectives from one policy-area (e.g. environment) into another (e.g. economy). In this paper, the author will contend that through the "greening" of the economic dispute settlement processes and their enrichment with environmental perspectives and specialised knowledge, a better balance between economic and environmental policy-objectives will be achieved in the resolution of RE-related disputes.

In the first part of this paper the author will discuss the reasons in favour of "greening" international economic dispute settlement processes, in the case of RE-related disputes. It will be claimed that the resolution of RE-focussed trade and investment disputes impact the

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[3] David Kennedy, "One, Two, Three Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream" (2007) 31 (3) N.Y.U. Rev. L. & Soc. Change 641 [Kennedy] at 650.

[4] Martti Koskenniemi, "International Law: Between Fragmentation and Constitutionalism", Canberra, 27 November 2006, online: The Australian National University <http://cigj.anu.edu.au/cigj/link_documents/KoskenniemiPaper.pdf> [Koskenniemi, "International Law: Between Fragmentation and Constitutionalism"] at 4.

[5] Many have written about the fundamental different existing between the communities surrounding each field of international law, whether differences in culture, ethos or expert knowledge, see for example Oren Perez, "Multiple Regimes, Issue Linkages, and International Cooperation: Exploring the Role of the WTO" (2005) 26(4) University of Pennsylvania Journal of International Economic Law 735 [Perez, "Multiple Regimes"]; Jaye Ellis, "Sustainable Development and Fragmentation in International Society", in Duncan French, ed., *Global Justice and Sustainable Development* (Boston: Martinus Nijhoff, 2010); See also Haas research on epistemic communities Peter M. Haas, "Introduction: Epistemic communities and international policy coordination" (1992) 46(1) International Organization 1 ["Haas"].

effectiveness of other regimes, notably environmental regimes. It will further be asserted that the "greening" of the dispute settlement process could result with a more balanced outcome, *inter alia*, by allowing arbitrators/panellist to better understand the impact of their decision, and enable them to reach a more balanced resolution through evolutive, 'holistic' interpretation of the (economic) law.

In the second part of this paper, the author will suggest several mechanisms through which economic tribunals may be "greened". The author will discuss both existing models (e.g. the optional 'environmental' rules of the Permanent Court of Arbitration, or rules on amicus participation), models that existed in the past (e.g. the International Court of Justice's "green" Chamber), as well as some other models which could be considered in the future (e.g. the appointment of "green" arbitrators/Panellists).

Although the discussion presented in this paper will be focussed on RE-related disputes, the conclusion drawn from it may be relevant for much broader debates, namely concerning the fragmentation of international law, the need for systemic integration, and the challenge of resolving multi-faceted disputes by very specialised, single-dimensioned dispute settlement processes. While the focus of this paper will be on the interaction between economic law and the environment (in the context of RE-related disputes), the models suggested in it could be easily modified to any interaction, between any two fields of policy-making.

II. Greening international economic law dispute settlement mechanisms – why?

A. Greening institutions: Connecting the spheres

The first part of this paper will explain *why* dispute settlement tribunals dealing with RE-related disputes should be "greened". The idea that the environmental and the economic spheres must be connected is far from novel; it stands at the heart of terms such as 'sustainable development' and 'green economy'. One highly accepted expression of this idea can be found in the sustainable development principle of integration which emphasises the interdependence of policy-areas such as environmental protection, economic development, human rights, and social development. The principle of policy integration further prescribes that the design and the implementation of policies from the different areas should be done in an integrated manner. It was defined by Schrijver as "possibly the most innovative of all international law principles concerning sustainable development",[6] and by Ellis as "the heart of sustainable development".[7]

The principle of integration was widely acknowledged by the international community, and can be found in documents such as the 1987 United Nations World Commission on Environment and Development's Brundtland Report, the 1992 Rio Declaration, the 1992 Climate Change Convention, the 2002 ILA New Delhi Declaration of Principles of

[6] Nico Schrijver, *The evolution of sustainable development in international law: Inception, meaning and status* (Leiden: Martins Nijhoff, 2008) [Schrijver] at 203.

[7] Jaye Ellis, "Sustainable development and the fragmentation in international society", in Duncan French (ed.), *Global justice and sustainable development* (Leiden: Martins Nijhoff, 2010), p. 57. See more about this principle in Cordonier Segger & Khalfan (2003), p. 103; Rieu-Clarke (2005), p. 84.

International Law Relating to Sustainable Development, and the 2012 (Rio+20) United Nations Conference on Sustainable Development's outcome document ("The future we want").

The implementation of the principle of policy integration in the work of international institutions, in which international policies are being created, is also not novel. It has been discussed by International Relations ("IR") academics (including in the context of trade and climate change)[8] and applied, to a certain extent, by international organizations.[9]

Economic institutions are also making an effort to apply the principle of policy integration. The WTO, for example, includes subsidiary bodies such as the WTO Committee on Trade and Environment ("CTE"), which was established in order to deal with the contentious interactions between international trade and environmental protection. The Energy Charter Treaty ("ECT") also includes an equivalent body – the ECT Working Group on Energy Efficiency and Related Environmental Aspects (also known as the 'Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects Working Group', or the 'PEEREA Working Group').[10]

Therefore, it can be understood that concept of "greening" international tribunals, fits within this wider context and currents in international law and politics, as an implementation of the principle of policy integration, and as part of the broader effort of international institutions to "green" themselves. As reviewed in Part III(D) of this paper, some efforts are already taking place in this respect.

B. Greening Tribunals

The focus of this paper is the "greening" of the dispute settlement mechanisms of trade and investment institutions dealing with RE-related disputes. Why should investment and trade tribunals be "greened"? International trade and investment, as demonstrated in many studies, affect issues such as human rights, environmental protection, labour standards, IP and competition.[11] Therefore, it is only to be expected that trade and investment tribunals will have to resolve cross-disciplinary disputes, in which more than just economic-related questions are involved. Indeed, in the past economic tribunals have been called upon to resolve disputes concerning the regulation of sustainable fishing/shrimping techniques,

[8] See for example the author's discussion, in Avidan Kent, "Implementing the principle of policy integration: Institutional interplay and the role of international organizations" (2014) 14 International Environmental Agreements: Politics, Law and Economics 203 (Kent, "Implementing the principle of policy integration); see also in Frank Biermann, Philipp Pattberg, Harro van Asselt & Fariborz Zelli, "The fragmentation of global governance architecture: A framework for analysis" (2009) 9(4) Global Environmental Policies 14 [Biermann et al.]; Sebastian Oberthür, "Interplay management: Enhancing environmental policy integration among international institutions" (2009) 9 International Environmental Agreements: Politics, Law and Economics 371 [Oberthür, "Interplay management"].

[9] See examples reviewed in Kent, "Implementing the principle of policy integration", *supra* note 8.

[10] The WTO's CTE and the ECT's PEEREA are not the only "greening" efforts made by these organizations. More similar actions were discussed by the author elsewhere, see in Kent, "Implementing the principle of policy integration", *supra* note 8.

[11] Marie-Claire Cordonier Segger, Markus Gehring & Andrew Newcombe, *Sustainable development in world investment law* (Kluwer: 2010)[Cordonier Segger, Gehring & Newcombe]; Markus Gehring & Marie-Claire Cordonier Segger (eds.), *Sustainable Development in World Trade Law* (The Hague: Kluwer, 2005) [Cordonier Segger et al.].

polluting fuel additives, nature reservations, and most recently also climate change abatement policies.

Tribunals' decisions often explain, interpret and even create the normative framework that regulates institution members' behaviour, and therefore can be considered as a part of the institution's 'output' (i.e. "norms, including institutional arrangements and decisions as well as knowledge"[12]). According to IR authors who research the interactions between institutions ("institutional interplay"),[13] the institutional output of one legal regime may affect, either positively or negatively, the effectiveness of other regimes.

Tribunals' decisions can, for example, increase the cost of complying with the rules of other institutions, or even the cost of pursuing their objectives. Such an interaction between different regimes was defined by IR authors as 'utilitarian interaction', or 'behavioural interaction'.[14] As explained below, such interactions take place also through RE disputes that are resolved by economic tribunals, as the results of these disputes may influence (both positively and negatively) the effectiveness of other legal regimes.

C. The impact of economic RE-related disputes on environmental law and policy

Philippe Sands describes the relationship between environmental law and economic law as interconnected in two possible ways.[15] First, economic law might conflict with, and therefore frustrate, the objectives of certain environmental law regimes. Second, the objectives of certain environmental and economic legal regimes may also be mutually-supportive. One prominent area in which both of these issues are evident is the regulation of RE policies, which are intended to achieve *inter alia* the objectives of the United Nations Framework Convention on Climate Change (UNFCCC), through the engagement of economic markets and commercial actors in the effort to combat climate change.[16]

The need to significantly increase the production of energy from renewable sources, as a means for achieving *environmental* policy objectives, has been recognised by the European

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[12] Sebastian Oberthür & Thomas Gehring, *Institutional Interaction in Global Environmental Governance* (Cambridge MA: MIT Press, 2006) [Oberthür & Gehring, "Institutional Interaction"] at 34.

[13] Oberthür & Gehring, "Institutional Interaction", *supra* note 12; Oran Young, *Science Plan: Institutional Dimensions of Global Environmental Change* (Bonn: IHDP, 1999, revised edition 2005), online: <http://www2.bren.ucsb.edu/~idgec/publications/IHDP-IDGECreport16.pdf> [Young, "Science Plan"]; Olav Schram Stokke, "The Interplay of International Regimes: Putting Effectiveness Theory to Work" (2001) FNI Report 14/2001, online: Fridtjof Nansen Institute <http://www.fni.no/doc&pdf/FNI-R1401.pdf> [Stokke]

[14] See for example Stokke's 'utilitarian interaction' Stokke, *supra* note 13 at 13;and Oberthür & Gehring's 'behavioural interaction' Gehring & Oberthür, "Institutional Interaction" *supra* note 12 at 8-9.

[15] Philippe Sands, "Litigating environmental disputes: Courts, tribunals and the progressive development of international environmental law" OECD Global Forum on International Investment, online: OECD http://www.oecd.org/investment/globalforum/40311090.pdf [Sands, "Litigating environmental disputes"] at 7.

[16] With respect to the interaction between RE policies an international trade law, see for example Thomas Cottier, Olga Nartova & Sadeq Bigdeli, eds. *International Trade Regulation and the Mitigation of Climate Change* (CUP, 2009) [Cottier, Nartova & Bigdeli]; With respect to the interaction between RE Policies and international investment law, see for example Anatole Boute, "Combating climate change through investment arbitration" (2012) 35 Fordham International Law Journal 613 [Boute].

and the international communities on numerous occasions.[17] These environmental policy objectives are public in nature. The tool by which these policy-objectives are to be achieved, however, is private and commercial in essence, namely the use of economic markets and the incentivization of the private sector.

More specifically, many of the support schemes currently in place rely on the provision of economically attractive benefits to private sector actors.[18] The private sector is induced into investing its resources for the sake of achieving a public, environmental goal, through the use of long-term deals and the promise of future benefits. The two spheres in this respect - the public/environmental and the private/commercial - are mutually supportive, as each are used for the promotion of the other's interests. Without the environmental goals there would be no private profits, and without the (prospect of) private profits, environmental goals will not be achieved.

These policies are, by definition, a mixture of both worlds: the public-environmental, and the private-commercial. Why, then, should disputes based on these policies be settled only by commercially-dominated tribunals? Why should the environmental side to these policies disappear once disputes arise?

D. The impact of economic RE-related disputes on environmental law and policy: examples

The interactions between international investment law and climate change law and international trade law and climate change law, including the various potential conflicts and compatibilities, have both been the topic of many studies, including by the author of this paper.[19] This paper therefore, will not review these legal interactions, but will rather rely on the assumption that, at least to a certain extent, these legal regimes are not isolated from each other's reach and impact. It is nevertheless important to refer to several RE-related examples in order to demonstrate the impacts that such decisions may have on environmental policy making.

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[17] See for example UNCSD, *'The Future We Want'; outcome document adopted at Rio+20*, (2012), online: http://www.uncsd2012.org/content/documents/727The%20Future%20We%20Want%2019%20June%201230pm.pdf [UNCSD, The Future We Want] at paras 127-129; "Communication from the Commission: 2020 by 2020: Europe's climate change opportunity" (COM(2008) 13 final), online: http://ec.europa.eu/energy/climate_actions/doc/com_2008_030_en.pdf , and in a "Communication from the Commission – Energy Efficiency: Delivering the 20% target" (COM/2008/0772 final), online: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008DC0772.

[18] See for example the variety of Feed-in Tariffs programmes around the world, see in Paul Gipe, "Tables of Feed-in Tariffs Worldwide", wind-works.org, online: http://www.wind-works.org/cms/index.php?id=92

[19] Luca Rubini, Ain't wastin' time no more: Subsidies for renewable energy, the SCM Agreement, policy space, and law reform, (2012) 15(2) Journal of International Economic Law 525; Cottier, Nartova & Bigdeli, supra note 16; Boute, supra note 16; Gary Clyde Hufbauer, Steve Charnovitz & Jisun Kim, Global *Warming and the World Trading System* (Peterson Institute for International Economics, 2009) [Hufbauer, Charnovitz & Kim]; Kate Miles, "Arbitrating Climate Change: Regulatory Regimes and Investor-State Disputes", presented at *Climate Change in the Courts: Emerging Patterns*, (2010) 1 Climate Law 63 [Miles, "Arbitrating Climate Change"]; Kate Miles, "Investing in adaptation: Mobilising private finance for adaptation in developing states" (2011) 2 Carbon and Climate Law Review 190 [Miles, "Investing in adaptation"]; Freya Baetens "The Kyoto Protocol in Investment-State Arbitration: Reconciling Climate Change and Investment Protection Objectives", in Cordonier Segger, Gehring & Newcombe, *supra* note 11; Kent, "WTO law on subsidies and climate change, *infra* note 29.

One example of the manner in which economic tribunals' decisions in RE-related disputes impact environmental goals and policies can be found within the contentious relationship between the WTO's restrictive approach towards subsidies, on the one hand, and the United Nations Framework Convention on Climate Change's (UNFCCC) frequent appeal to governments to increase their public spending on climate change mitigation and adaptation programmes,[20] on the other.

The WTO's *Canada FIT* case[21] is interesting in this context. In this case, the WTO's Appellate Body ("AB") cleared a previously ambiguous legal situation by determining that certain climate change mitigation support-schemes (a Feed-in Tariff programme) are generally not inconsistent with the WTO's law on subsidies.[22] However, the AB also held that the presence of a 'local-content' requirement in such schemes, which is often necessary for political reasons,[23] is inconsistent with WTO Law.

The WTO's Panel and AB's decisions in this case were criticised as "activist" and "evolutive",[24] as it seemed to depart from the clear words of the law. In terms of institutional interplay, the AB decision impacted the UNFCCC's objectives in two significant manners. First, it granted a "green light" for states wishing to adopt climate change support-schemes by clarifying that these are not, in essence, conflicting with WTO law.[25] Such an impact can undoubtedly be seen as positive.

Secondly, following the WTO's AB ruling on the illegality of 'local content' requirements, Ontario, where the disputed programme existed, decided to significantly cut its obligation to buy electricity from RE generators,[26] and hence also its efforts to cut emissions. This

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[20] See notably in UNFCCC, 'Bali Action Plan', (2008) FCCC/CP/2007/6/Add.1, online: http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf.

[21] *Canada - Certain Measures Affecting the Renewable Energy Sector (Complaint by Japan); Canada – Measures Relating to the Feed-in Tariff Program (Complaint by the EU)* [2012] WTO Doc. WT/DS412/R, WT/DS426/R (Panel Report) [*Canada FIT Panel Report*].; *Canada - Certain Measures Affecting the Renewable Energy Sector (Complaint by Japan); Canada – Measures Relating to the Feed-in Tariff Program (Complaint by the EU)* [2013] WTO Doc WT/DS412/AB/R; WT/DS426/AB/R (Appellate Body Report) [*Canada FIT AB Report*].

[22] *Canada FIT AB Report*, *supra* note 21.

[23] Avidan Kent and Vyoma Jha, "Keeping up with the changing climate: The WTO's evolutive approach in response to the Trade and Climate Conundrum" (2014) 15 The Journal of World Investment & Trade 245 [Kent & Jha] at 269.

[24] Liesbeth Casier & Tom Moerenhout, "WTO Members, not the Appellate Body, need to clarify boundaries in renewable energy support" (2013) IISD Commentary, online: http://www.iisd.org/pdf/2013/wto_members_renewable_energy_support.pdf ; Kent & Jha, *supra* note 23; See also Luca Rubini's criticism of this decision in Luca Rubini, "What does the recent WTO litigation on renewable energy subsidies tell us about methodology in legal analysis? The good, the bad, and the ugly" (2014) EUI Working Paper RSCAS 2014/2015, available online: http://cadmus.eui.eu/bitstream/handle/1814/29518/RSCAS_2014_05.pdf?sequence=1 .

[25] elsewhere I argued that this "activist" approach was aimed to support the public interest in order to avoid creating conflicts between WTO law, and the numerous climate change mitigation support schemes currently in place. See in Kent & Jha, *supra* note 23.

[26] Such policies are consistent with WTO Law as long as they are executed in a non-discriminatory manner, and the prices are based on a competitive process. See *Canada – Measures Relating to the Feed-in Tariff Program* (2013) WTO Doc. WT/DS412/AB/R, WT/DS426/AB/R, (AB Report), online: WTO <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds426_e.htm> [*Canada FIT AB Report*]

outcome can be seen as conflicting with the objectives of the UNFCCC, as it resulted with reduced incentives for the production of RE.

A further example for similar externalities can be found in the WTO's *China-Wind Power* case, in which the WTO law's prohibition on the granting of certain subsidies (according to some publications, between USD 6.7-22.5 billion [27]) has led to the withdrawal of governmental grants for renewable energy producers.[28]

While the withdrawal of subsidies in both cases (i.e. *Canada FIT* and *China-Wind Power*) can be regarded as beneficial from a long-term free-market, free trade perspective, it is conflicting with the more immediate environmental goals, including the (environmental) need to urgently boost public investment in RE production, and to assimilate RE infra—structure on wide scales.[29]

Another example of the manner in which economic decisions can (positively) impact environmental policies, albeit not one that some states will approve of, is through the enforcement of RE-support schemes by international economic tribunals. Many climate-change policies, such as Feed-in Tariffs schemes, are based on a simple exchange – a heavy initial investment made by the private sector, in exchange for a prospect of long-term economic returns. Such an exchange is based on certainty and predictability; the lack of which will inherently frustrate the prospect of future engagement between the private sector and governments, and consequently, the objectives of the UNFCCC. In several instances, European states decided to withdraw from previously-made promises through the unilateral amendment of existing support-schemes. The impact of such actions was described by UK's Caroline Lucas MP (Green Party):

> "Investors need to know whether a government commitment to support them can be trusted, or if retrospective changes can be made at any point after investments start. A lack of trust is a huge disincentive to invest. The CBI describes the government's decision to slash subsidies for solar panels as an "own goal", stating that "moving the goalposts doesn't just destroy projects and jobs, it creates a mood of uncertainty that puts off investors." In light of the court's decisions and the strong industry calls for certainty, you might expect DECC to want to bring the solar situation to a swift conclusion and do what it can to inspire investor confidence for the future."[30]

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[27] Jonathan Watts, "Wind direction unchanged by US trade victory over China, The Guardian, 9 June 2011, online: http://www.theguardian.com/environment/blog/2011/jun/09/china-us-trade-dispute-wind-power-subsidies

[28] *China – Measures concerning wind power equipment (Complaint by the United States)* WTO Doc. DS419, online: WTO <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds419_e.htm> [*China Wind power equipment*]; see media reports in BBC, "China ends wind power subsidies after US challenge", 8 June 2011, available online: http://www.bbc.co.uk/news/business-13692255 .

[29] I discussed these issues in more details in Kent & Jha, *supra* note 23, and in Avidan Kent, "The WTO law on subsidies and climate change: Overcoming the dissonance?" (2013) V(2) Trade, Law and Development 344 [Kent, "WTO law on subsidies and climate change].

[30] Caroline Lucas, "The solar industry needs to know the UK government can be trusted" The Guardian, 27 January 2012, online: The Guardian <http://www.guardian.co.uk/environment/2012/jan/27/feed-in-tariffs-appeal>.

At least in some cases,[31] investment tribunals' decisions could support the environmental objectives, through enforcing foreign investors' property rights and upholding their legitimate expectations.[32] Such decisions could potentially reduce policy uncertainties and promote green investment in the future.[33] Furthermore, through evolutive interpretation of the law, investment tribunals could do even more to protect such investments. Ideas for potential developments in this respect, such as the recognition of 'partial expropriation' by investment tribunals with respect to investments made under the Kyoto Protocol, or the wide interpretation of 'umbrella clauses' in the case of contractual breaches in this context, were discussed by authors.[34]

A final example of the manner in which international economic tribunals' decisions may impact the objectives of environmental regimes is the often discussed "regulatory chill" theory.[35] According to some,[36] the threat of heavy compensation and the prospect of high legal expenses[37] can be enough to 'chill' a state from regulating in the first place. Such arguments have been made in the past with respect to both investment and trade law.[38] Although the existence of the 'regulatory chill', as a phenomenon, is a highly debated topic,[39]

[31] Where foreign investors are involved and a valid investment treaty is in place.

[32] See in Anatole Boute, "Combating climate change through investment arbitration" (2012) 35 Fordham International Law Journal 613 [Boute].

[33] Indeed the idea of linking the Kyoto Protocol's foreign investment mechanisms (the Clean Development Mechanism and the Joint Implementation system) to an investment treaty was mentioned by several authors. See Edna Sussman, "The Energy Charter Treaty's Investor Protection Provisions: Potential to Foster Solutions to Global Warming and Promote Sustainable Development", in Cordonier Segger et al., at 528, and Boute, *supra* note 32 at 654.

[34] Boute, *supra* note 32 at 631.

[35] See a general discussion on this topic in Kyla Tienhaara, "Regulatory chill and the threat of arbitration: A view from political sciences" in Chester Brown and Kate Miles, eds., *Evolution in investment treaty law and arbitration*, at 606 (CUP, 2011) [Tienhaara].

[36] See Gus Van Harten, "Submission to the Productivity Commission, Bilateral and Regional Trade Agreement Study" 23 September 2010, online: Australia Government Productivity Commission <http://www.pc.gov.au/__data/assets/pdf_file/0017/102842/subdr099.pdf> [Van Harten's Submission to the Productivity Commission].

[37] On average, legal expenses of investment disputes amounts to US $8 million, and on some cases can be as high as US$30 million. See OECD, "Investor-State Dispute Settlement Public Consultation: 16 May – 9 July 2012", online: OECD <http://www.oecd.org/daf/internationalinvestment/internationalinvestmentagreements/50291642.pdf> at para 32.

[38] With respect to trade law, the existence of regulatory chill was discussed (including anecdotes/examples) Robyn Eckersley, "The big chill: The WTO and multilateral environmental agreements" (2004) 4(2) Global Environmental Politics 24; Tania Voon & Andrew Mitchell, "International Trade Law", in Tania Voon, Andrew Mitchell and Jonathan Liberman (eds.) *Regulating Tobacco, Alcohol and Unhealthy Foods* (Routledge, 2014) 86, at 100; more specifically with respect to WTO Law and climate change policies, xxx. With respect to investment law, see Van Harten's Submission to the Productivity Commission, *supra* note 36; Tienhaara, *supra* note 35; Kyla Tienhaara, "What you don't know can hurt you: Investor-State disputes and the protection of the environment in developing countries" (2006) 6(4) Global Environmental Politics 73 [Tienhaara, ""What you don't know can hurt you"] at 85; David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge: Cambridge University Press, 2008) at 70-71.

[39] Jack J. Coe & Noah Rubins, "Regulatory Expropriation and the *TECMED Case*: Context and Contribution" in Todd Weiler, ed., *International Investment Law and Arbitration: Leading Cases from ICSID, NAFTA, Bilateral Treaties and Customary International Law* (London: Cameron May, 2005) at 597 [Coe & Rubins] at 599-600.

documented case-studies reveal that at least in some instances, it can take place and impact decisions.[40]

Although often discussed as a negative phenomenon, in the context of RE-related disputes, the 'regulatory chill' created by tribunals may in fact cause positive outcomes. It may 'freeze' states' intentions to revoke long term RE support schemes, thus increasing certainty and predictability for investors in this field.

To summarise, the examples provided above demonstrate that the decisions made by international economic tribunals in RE-related disputes, have affected in the past, and can affect in the future, environmental policy decisions. The "greening" of international tribunals in this respect, will ensure that international tribunals are first and foremost aware of the environmental impact of their decisions. Once understanding the economic-environmental linkage embedded in this relationship, international tribunals could choose the legal interpretation that fits most with the promotion of environmental policies, or even engage in the development of the law through an 'evolutive' interpretation, as in fact was done in the *Canada FIT* case.

E. The greening of economic tribunals: enhancing legitimacy

A further reason for the "greening" of international economic tribunals relates to their legitimacy and public image. Despite efforts to improve the situation,[41] international trade and investment tribunals are suffering from a very poor public image. They are often perceived by the public as secretive and commercially-biased. Examples for such attitude are abundant; following the currently negotiated Trans-Atlantic Trade and Investment Partnership, titles such as "US firms could make billions from UK via secret tribunals"[42] or

[40] See examples reviewed in studies presented in FN 38. See also the Vattenfall incident, in which the launching of a 1.4 EUR billion investment claim against Germany led the latter to decide to settle the dispute and drop environmentally-related requirements. See also cases in which, according to media reports, industrial actors attempted to 'chill' governments from regulating, for example reports on cases concerning plain-packaging: the government of Uruguay intended to relax its planned anti-smoking regulation following the initiation by Philip-Morris of an investment dispute against this country, an incident that according to 'The Guardian' has prompted "accusations of corporate bullying." (see in Rory Carroll, "Uruguay bows to pressure over anti-smoking law amendments", guardian.co.uk, 27 July 2010, online: The Guardian < http://www.guardian.co.uk/world/2010/jul/27/uruguay-tobacco-smoking-philip-morris>.), and according to another media publications, Philip-Morris attempted a similar strategy also during its dispute with Australia over the application of anti-smoking policies, as the following headline was published at 'The Australian': "International tobacco giant Philip Morris will launch legal action today aimed at forcing the Gillard government to back down on its plain-packaging legislation or face a compensation bill of "billions of dollars"" (see in Chris Kenny, "Big Tobacco ignites legal war", (2011) The Australian, 27 June 2011, online: The Australian <http://www.theaustralian.com.au/national-affairs/big-tobacco-ignites-legal-war/story-fn59niix-1226082403380>.

[41] See for example the wide reforms performed with respect to transparency and public participation in investment disputes, such as the amendment of the ICSID Rules of Arbitration in 2006, or the adoption of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration in 2014.

[42] Jim Armitage, "US firms could make billions from UK via secret tribunals" The Independent, 9 October 2014, available online: http://www.independent.co.uk/news/business/news/us-firms-could-make-billions-from-uk-via-secret-tribunals-9785924.html .

"the transatlantic trade deal is a full-frontal assault on democracy"[43] are flooding the UK media.

The demonstration of sensitivity towards environmental issues can improve the economic tribunals' image, at least to a certain extent. Notably, it may alleviate concerns that economic tribunals are considering only commercial interests, while public interests (such as environmental protection) go unrepresented. As reviewed in Part III(D) of this paper, the methods in which the "greening" of international tribunals could be made are not necessarily costly, and the expected gains (in terms of enhanced public legitimacy) could be significant.

F. Interim conclusion

To summarise, the first part of this paper asked *why* the "greening" international economic tribunals dealing with RE-related disputes is worth considering. It was claimed that such an effort can be placed within the greater context of sustainable development, the principle of policy integration, as well as the more concrete effort to "green" international institutions that already takes place in organizations such as the WTO and the ECT. It was further argued that RE policies, as well as RE-related disputes, are dual-faceted by nature and include both commercial, and environmental objectives. Lastly, it was asserted that the "greening" of international economic tribunals may be beneficial for other reason as well, notably as it will improve the public image of these tribunals and enhance their democratic legitimacy.

Whilst the first part of this paper asked *why* should the "greening" of international economic tribunals be considered, the next part of this paper will ask *how* such a "greening" could to be conducted.

III. Mechanisms for greening international economic tribunals: How?

The process of "greening" international tribunals, as discussed in this paper, is based on a rather simple concept. The basic idea is to allow the flow of environmental information, perspectives and technical knowledge into the dispute settlement mechanisms of economic regimes, in order to enable adjudicators to make fully-informed decisions. Unlike other types of "greening" processes (e.g. the "greening" of the law itself) this process does not involve any coercive elements. Rather, it is based on persuasion, dialogue and education, and can be described as "soft" in nature.

The models for "greening" economic tribunals are based on a wider theoretical framework developed by IR scholars, broadly defined as 'institutional interaction'. The following part provides a brief theoretical review of this conceptual framework, as well of other two key terms: (1) "interplay management" – which describes the efforts to actively manage the interaction between institution; and (2) ideational interplay - which describes the specific mode of institutional interplay that will be used in this paper. Below is a brief review of these terms.

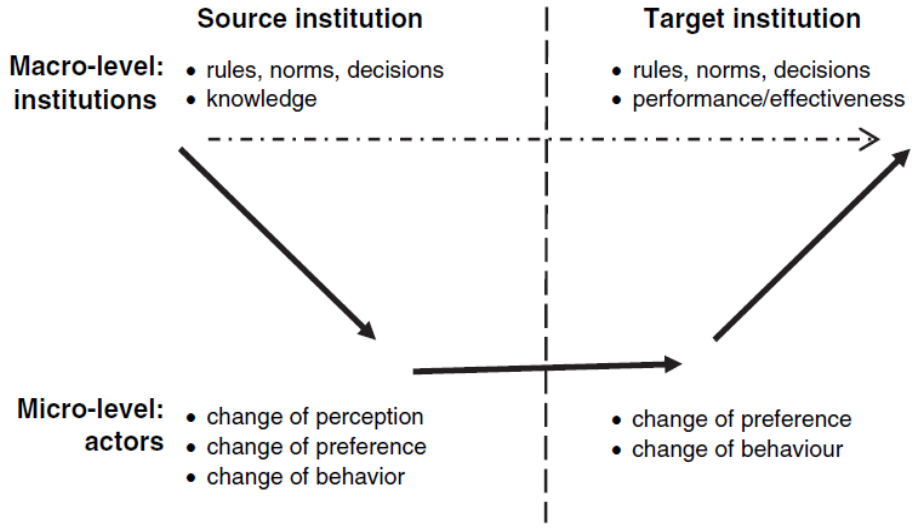
[43] George Monbiot, "the transatlantic trade deal is a full-frontal assault on democracy" The Guardian, 4 November 2013, available online: http://www.theguardian.com/commentisfree/2013/nov/04/us-trade-deal-full-frontal-assault-on-democracy .

A. 'Institutional interaction' and 'interplay management'

Since the end of World War II, the regulation of international law has proliferated at an unprecedented rate. The increasing regulation of international social activity is mirrored by a growing density of specialised, issue-specific institutions. As the 'density' of international institutions increases, the linkage between the different institutions become more complex.[44] The growing institutional density results on many occasions in an 'overlap' between institutions, i.e. cases in which "the functional scope of one regime protrudes into the function of others".[45] Where one institution affects the development or the effectiveness of another, 'institutional-interaction' takes place.[46]

Based on the examination of over 150 singular interactions, Oberthür & Gehring designed certain models of institutional-interaction. According to their models, in order to analyse institutional interaction it is first important to identify a 'source institution' (the influencing institution), a 'target institution' (the influenced institution), and a 'cause-effect' relationship between them ('cause-effect relationship' means that without the influence of the source institution, the target institution would not have been affected).[47]

The source institution's influence, it is important to say, flows into the target institution via actors (i.e. states, NGOs, IGOs, individuals, etc.). In essence, rules, knowledge or perspectives associated with the source institution, travels via actors into the target institution, and influence its operation.[48] These steps were described in the following scheme:



[44] Oran R. Young, "Institutional Linkage in International Society: Polar Perspective" (1996) 2(1) Global Governance 1 [Young, "Institutional Linkage"].
[45] Kristin Rosendal, "Overlapping International Regimes: The case of the intergovernmental Forum on Forests (IFF) between Climate Change and Biodiversity" (2001) 1(4) International Environmental Agreements: Politics, Law and Economics 447 [Rosendal, "Overlapping International Regimes"] at 458 (presenting Young's definition).
[46] Sebastian Oberthür & Thomas Gehring, *Institutional Interaction in Global Environmental Governance* (Cambridge MA: MIT Press, 2006) [Oberthür & Gehring, "Institutional Interaction"] at 6.
[47] Thomas Gehring & Sebastian Oberthür, "The Causal Mechanisms of Interaction between International Institutions" (2009) 15 European Journal of International Relations 125 [Gehring & Oberthür, "The Causal Mechanisms"] at 127; Oberthür & Gehring, "Institutional Interaction" *supra* note 46 at 6.
[48] Gehring & Oberthür, "The Causal Mechanisms", *supra* note 47 at 129-130.

Source: Gehring & Oberthür, "The Causal Mechanisms".[49]

An example of the manner in which 'institutional interplay' operates is the 'regulatory chill' phenomenon described above. The rules created by the source institution (e.g. WTO) affect actors (e.g. chilling members of a certain parliament from regulating a certain environmental problem), and thus affect the target institution's effectiveness (e.g. the objectives of the UNFCCC are not achieved as national legislators are 'chilled' from adopting necessary reforms). Another example can be found in the attempts of an environmental NGO to intervene in an investment dispute as amicus. In this case, the source institution is an environmental institution, whose objectives certain actors (the NGOs in this example) attempt to promote by informing economic tribunals and attempting to influence their decisions.

B. Interplay management

The effort to design and affect the ways in which institutions' operations interact in order to promote better systemic-integration, is referred to as 'interplay-management'.[50] This process focuses on improving, or the management of, the interaction existing between international institutions.[51] The models suggested in this part are in fact 'interplay management' models. These models attempt to control, or facilitate, the impact that environmental institutions could have on economic institutions' outcome.

This process, in the context of this paper, is focussed on the dispute settlement mechanism of economic regimes, notably the WTO dispute settlement process, and the Investor-State Dispute Settlement ("ISDS") process. It will focus on the ways in which one, specific interplay (ideational interplay) can take place, and "green" the operation of these tribunals.

C. Ideational-interplay

There are numerous ways in which institutions can impact each other's effectiveness. Indeed, IR authors identified several types of institutional interplays, some of which are based on rules (e.g. 'interaction through commitments'[52]), others on externalities such as costs of implementation ('utilitarian interplay'[53]), or on political trade-offs (defined as 'political linkages'[54]). However, the most relevant model of institutional interaction is the 'ideational interplay' model (or 'cognitive interaction' as defined by others[55]), described by Stokke as "a process of learning."[56] This process basically involves the transfer of information, expert knowledge or perspectives from a source institution, through actors, into the target institution's decision-making processes. Once reaching the target institution, such

[49] Gehring & Oberthür, "The Causal Mechanisms", *supra* note 47 at 130; see also in Oberthür & Gehring, "Institutional Interaction", *supra* note 46 at 33.
[50] Oberthür, "Interplay management", *supra* note 8 at 373; Stokke, *supra* note 13 at 11.
[51] Oberthür, "Interplay management", *supra* note 8 at 374.
[52] Gehring & Oberthür, "Institutional Interaction", *supra* note 46 at 8.
[53] Stokke, *supra* note 13 at 13.
[54] Oran Young, *Science Plan: Institutional Dimensions of Global Environmental Change* (Bonn: IHDP, 1999, revised edition 2005) [Young, "Science Plan"] at 61-62.
[55] Gehring & Oberthür, "Institutional Interaction", *supra* note 46 at 8; Gehring & Oberthür, "The Causal Mechanisms", *supra* note 47 at 132.
[56] Stokke, *supra* note 13 at 10.

knowledge/perspectives may alter the perspectives of the target institution's decision-makers, and consequently impacts the output produced by them.[57]

The ideational/cognitive interplay model fits well with the models presented in this paper. As mentioned above, these models are 'soft' in nature, and include non-coercive elements, such as persuasion and education. The objective is to inform adjudicators, to convince and to engage in a cross-disciplinarian dialogue. On the importance of knowledge and expertise in the resolution of environmental disputes, it was said "It could be argued that nowhere more than in international environmental law are jurists and scientist with expert knowledge needed".[58] This issue was recently emphasised also in a document issued by the PCA concerning its experience with environmental disputes:

> "Generally, many types of cases engage experts to shed light on particular subjects relevant to the resolution of the dispute, but the use of experts perhaps is a more readily used practice in disputes involving the environment and/or natural resources. That is because these types of disputes typically require an understanding of different technical fields that may be beyond the purview of the lawyers' or arbitrators' legal expertise. It is therefore important from an advocate's perspective to make use of experts who can clarify key points in their client's case theory, or from the tribunal's perspective, to work with impartial experts who can provide the arbitrators a clear, technical understanding of facts and data that may be relevant to the award or decision."[59]

Indeed, the ideational interplay process describes the flow of perspectives and information across the different 'islands' of international law. As such it can create a cross-sectoral dialogue also in places such as economic tribunals, in which only one, very limited perspective often rules.

The importance of ideational/cognitive interplay is emphasised especially if we are to accept that, as mentioned by Kennedy and Koskenniemi above, the people adjudicating international disputes are "locked" in certain epistemic communities, in which most share very similar backgrounds, expertise and perspectives. Therefore, it is possible that arbitrators/panellists are simply unaware of environmental elements, or otherwise lacking the expertise to address RE-related disputes as *multi-faceted* disputes,[60] rather than as simply commercial/economic disputes. The cognitive/ideational interplay leads to learning and increased dialogue. It can therefore address this problem, by enabling adjudicators to make better-informed and better-balanced decisions.

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[57] Gehring & Oberthür, "The Causal Mechanisms", *supra* note 47 at 133.
[58] Ratliff, *infra* note 90 at 894. Judith Levine & Nicola Peart, "Information about the activities of the Permanent Court of Arbitration in disputes relating to the environment and/or natural resources", prepared by the PCA, with the author [Levine & Peart] at 9.
[59] Judith Levine & Nicola Peart, "Information about the activities of the Permanent Court of Arbitration in disputes relating to the environment and/or natural resources", (January 2015) prepared by the PCA, with the author [Levine & Peart] at 9.
[60] Levine & Peart, *supra* note 58, at 9.

The importance of the ideational interplay process for the resolution of disputes related to sustainable development (i.e. disputes in which economic, environmental and social considerations interact) was, implicitly, recognised by the world's nations, notably in the 'Agenda 21' document that followed the conclusion of the Rio Earth Summit in 1992. Paragraph 39.10 of Agenda 21 states:

> "In the area of avoidance and settlement of disputes, States should further study and consider methods to broaden and make more effective the range of techniques available at present, […] This may include mechanisms and procedures for the exchange of data and information, notification and consultation regarding situations that might lead to disputes with other States in the field of sustainable development […]"[61]

D. The models:

The "greening" models described below are in fact an attempt of 'interplay-management', or of the designing and managing ideational-interplays, so as to increase the flow of information/perspectives from the 'environmental' spheres into the operation of economic dispute settlement mechanisms. As already mentioned, they are based on the "soft" powers of education and persuasion. Their final objective is to inform and enable adjudicators to make balanced decisions, rather than to enforce one perspective on another.

These models are based mostly on existing models which were, and are, being attempted by international institutions. Some of these models were enacted in rules, while other represent unofficial practices which could be codified in the future. In the following part, the author will review and assess these models, including commenting on their suitability for RE-related economic disputes.

i. Specialised environmental chambers/tribunals:

The first, and perhaps most far-reaching model, is the "green tribunals/chambers" model. This model prescribes the establishment of specialised chambers/tribunals consisting of adjudicators who possess expertise in environmental law. These chambers/tribunals are to be appointed to sit on disputes in which questions related to environmental protection arise.

The most well-known example in which this model was tested, is the International Court of Justice's ("ICJ") Chamber for Environmental Matters, which existed between 1993-2006. The ICJ's Chamber for Environmental Matters consisted of seven ICJ judges, all of whom had a background/specialization in international environmental law. As such, the judges sitting in any dispute in which environmental matters arise, were in a position to understand the position of environmental law regarding any given dispute, and to apply it when necessary.

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[61] *Agenda 21*, Report of the United Nations Conference on Environment and Development, Adopted at Rio de Janeiro, 14 Jun. 1992 UN Doc. A/CONF.151/26/Rev. 1, 31 I.L.M. 874 (1992), online: Division for Sustainable Development, http://www.unep.org/documents.multilingual/default.asp?documentid=52 [*Agenda 21*].

According to an ICJ's communiqué from 1993, the decision to establish this Chamber was made following "developments in the field of environmental law and protection",[62] and the ICJ's desire to "be prepared to the fullest possible extent to deal with any environmental case falling within its jurisdiction".[63] The communiqué did not specify which events it referred to. It can be assumed, however, that the "developments" referred to by the communiqué are the surge in international environmental treaty-making that took place during late 1980s and the early 1990s.[64]

The ICJ's experience was not very successful. After 13 years of existence, with no cases ever to be referred to it by states, the Chamber for Environmental Matters was eventually dissolved.[65] According to Sands, one possible explanation for this lack of interest could have been the litigant states' fear from over-emphasising one element of a given dispute (environmental protection), possibly on the account of others.[66] Environmental disputes, it was argued, will rarely be isolated from other, non-environmental legal regimes. The labelling of a tribunal as 'environmental', therefore, could be interpreted as the granting of a priority to the environmental perspective in a given dispute.[67]

For similar reasons, the author believes that this model is unlikely to succeed in the context of RE-related disputes resolved by economic tribunals. First, following the ICJ's experience, and in light of the political realities surrounding organizations such as the WTO, the ECT or the numerous bilateral and regional trade and investment agreements, the prospect of appointing an 'environmental' permanent panel is realistically unfathomable.

Secondly, RE-disputes are, as mentioned several times, multi-faceted. While the environmental aspects are indeed important, there are other complex elements which require high levels of expertise, such as the operation of energy markets or the rules on subsidies. Labelling these disputes as 'environmental' in essence, will commit the original sin that this paper attempts to address – the pigeon-holing of RE-related disputes and ignoring their complexity.

The establishment of "green" tribunals under economic institutions, therefore, may be both unrealistic and unwise.

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[62] See ICJ Press Communique 93/20, "Constitution of a Chamber of the Court for Environmental Matters, 19 July 1993, available online: http://www.ruhr-uni-bochum.de/www-public/fischhcy/ICJ/E269.htm [ICJ Press Communique 93/20].
[63] ICJ Press Communique 93/20, *supra* note 62.
[64] See for example the Rio-Declaration and Agenda 21, as well as the negotiations and the conclusion of key global treaty-regimes such as the UNFCCC, CBD, OSPAR, OPRC, The Montreal Protocol and more.
[65] ICJ Website, "Chambers and Committees", http://www.icj-cij.org/court/index.php?p1=1&p2=4
[66] Philippe Sands, "Litigating environmental disputes: Courts, tribunals and the progressive development of international environmental law", (2007) OECD Global Forum on International Investment, available online: http://www.oecd.org/investment/globalforum/40311090.pdf [Sands, "Litigating environmental disputes"] at 4, 6-7.
[67] Sands, "Litigating environmental disputes", *supra* note 66 at 6.

ii. The "mixed" tribunals model

The second model for the "greening" of economic tribunals is a somewhat reduced, and more realistic, version of the above discussed "green" chambers/tribunals model. In essence, it is suggested that when dealing with RE-related disputes, one out of the (often) three[68] appointed arbitrators/panellist will possess some level of environmental expertise. According to Sands, the creation of such "mixed" tribunals may achieve the objective of benefiting from the appointed adjudicator's environmental expertise, while avoiding the burdening labelling of the tribunal as essentially "environmental".[69]

On the importance of adjudicator's environmental expertise in environmental disputes, it was stated in a document recently issued by the PCA (reviewing the PCA's experience with environmental disputes):

> "[G]iven the technical nature of the issues that arise in disputes that involve the environment or natural resources, it may be indispensable to the effective resolution of such disputes to have, adjudicating or arbitrating the dispute, individuals with specific expertise."[70]

The 'ideational-interplay' process, as mentioned above, takes place via actors. The actor in this model, will be a dual-expertise international lawyer, whose fields of expertise include both environmental law and the type of economic law that is relevant for each dispute. Such a lawyer's contribution for the 'ideational-interplay' process will not end with her/his awareness of the relevant environmental law: as a member of *both* social communities, he/she may also be more aware of the manner in which the environmental community views a certain dispute, including the voices of environmental experts and civil society organizations. As such, the dual-expertise adjudicator is in a position to act as a 'channel', through which environmental expertise and perspectives may flow into the work of economic tribunals.

A recent example of an RE-related case in which this model was attempted is the WTO *Canada FIT* trade dispute, in which Professor Thomas Cottier was appointed as the Panel's chairman. Professor Cottier has published widely on the interaction between international trade law and climate change,[71] and is considered to be one of the world's leading experts in the field. Indeed the Panel in this case addressed at great length such issues as the market distortions and failures existing with respect to RE production, and rejected the traditional market price benchmark due to the unique circumstances of such energy sources. While the author has no knowledge of the internal workings of the Panel in this case, it is suspected that

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[68] Most WTO and investment tribuanls include three panellists/arbitrators.
[69] Sands, "Litigating environmental disputes", *supra* note 66 at 4.
[70] Levine & Peart, *supra* note 58 at 9.
[71] See for example Thomas Cottier, Olga Nartova & Sadeq Z. Bigdeli, eds. *International Trade Regulation and the Mitigation of Climate Change* (Cambridge: Cambridge University Press, 2009) [Cottier *et al.*]; Aerni, Boie, Cottier, *et al.* "Climate Change and International Law: Exploring the Linkage between Human Rights, Environment, Trade and Investment" (2011) nccr trade regulation Working Paper No 2011/50 [Aerni, Boie, Cottier, *et al.*]; see also Thomas Cottier's presentation in this event online: <http://www.encharter.org/fileadmin/user_upload/Conferences/2011_Sept/Prof_Thomas_Cottier_WTI.pdf> [Cottier, presentation].

Cottier's expertise and perspectives were highly influential in reaching such a contentious, activist conclusion.

This model should not be too difficult to apply. There is a significant pool of international lawyers who possess the relevant dual-expertise (i.e. environmental law and economic law), including several prominent academics who have been routinely appointed as investor arbitrators, or as WTO panellists.[72]

In order to facilitate the use of this model, international institutions could prepare a list of recommended lawyers who possess the relevant mix of expertise. The practice of a recommended experts lists is hardly novel, and can be found in institutions such as the WTO and the ICSID. Another example can be found in the Permanent Court of Arbitration, which provides a specialised list of arbitrators who are experts in environmental law, from which parties may chose for disputes relating to environmental matters.[73] To the best of the author's knowledge, no similar list of *dual-experts* is currently available. The preparation of one such list, however, does not seem to be an exceptionally challenging task.

iii. Liberal rules on amici participation

Environmental information and perspectives can flow into the dispute settlement process not only by the adjudicators, or the parties to the dispute, but also through third parties, notably *amici curiae*, whose involvement in international litigation have drastically increased in the last two decades. The information presented by *amici curiae* can affect tribunals' decisions in several ways.

For instance, the ideational-interplay can take place when *amici* such as NGOs, academics, or even international organizations, present a tribunal with knowledge such as facts and perspectives that were unknown to the tribunals, or which are not within the realm of the tribunal's expertise. This assumption of, or recognition in, the powers of *amici* to bring external knowledge into a dispute and impact its decision has been widely accepted and adopted in the field of international investment law.

For example, one of the conditions of Rule 37(2) of the 2006 ICSID Rules of Arbitration instructs investment tribunals to consider accepting *amicus curiae* briefs where these:

> "[A]ssists the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties."[74]

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[72] With respect to investment arbitrators, see for example James Crawford, Philippe Sands, Lawrence Boisson de Chazournes and others. With respect to WTO panellists, the appointment of environmental experts is more common in disputes that are indeed somewhat related to environmental protection – see for example the above discussed appointment of Thomas Cottier in the *Canada FIT* case, or the appointment of Franz Perrez in the WTO's Tuna-Dolphin case (*United States – Measures concerning the importation, marketing and sale of tuna and tuna products* (2011) WTO Doc WT/DS381/R (Panel Report) [*Tuna Dolphin* case].

[73] Permanent Court of Arbitration, Environmental Dispute Resolution, online: http://www.pca-cpa.org/showpage.asp?pag_id=1058 .

[74] Rule 37(2) of the ICSID Rules of Procedure for Arbitration Proceedings, online: ICSID <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp> [*ICSID Rules*].

Another example can be found in the rules regulating NAFTA investment disputes, which instructs tribunals to consider whether:

> "[T]he non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;".[75]

Recently, a new set of highly liberal rules on transparency, including the participation of *amici*, was adopted by the UNCITRAL, in which it was stated that tribunals should indeed consider accepting *amicus* briefs when these:

> "[W]ould assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties."[76]

The world's nations, so it seems, are highly committed to the notion that *amici* are capable of contributing external perspectives and knowledge to the work of investment tribunals.[77]

The ways in which *amici* contributions can promote the ideational interplay vary. *Amici* submissions can, for example, emphasise the effects that a dispute may have in other areas. Furthermore, *amici* submissions may also specifically include the objectives of other institutions, and how these can be influenced by the dispute.[78] Indeed *amicus* briefs concerning the objectives of human rights, environmental and sustainable development regimes, and even the EU, have been filed by third parties (mostly NGOs) in investment disputes in order to inform tribunals of states' obligations under these regimes.[79]

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[75] Article 6(a), NAFTA Free Trade Commission, *Statement of the Free Trade Commission on non-disputing party participation* (2003), online: Foreign Affairs and International Trade Canada, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf> [*NAFTA Statement*].

[76] Article 4(3) of the *UNCITRAL Rules on Transparency in Treaty-based Investor-States Arbitration* (2014).

[77] Other international rules on *amici* participation can be found in the recent interpretation granted to the UNCITRAL Rules on Arbiteration (see in *Methanex Corporation v. United States of America (Decision of the tribunal on petitions from third persons to intervene as "Amici Curiae")* (2001), UNCITRAL, (North American Free Trade Agreement) [*Methanex Amici Curiae decision*]; *United Parcel Services of America Inc. v. Canada (Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae)* (2001) UNCITRAL, [*UPS, Amici Curiae Decision*]); see also the rules of the CAFTA-DR, as well as a variety of investment agreements (e.g. Article 28 of the US Model BIT (2012), Article 28 of the US-Rwanda BIT, Article 28 of the US-Uruguay BIT).

[78] See more broadly about the methods by which tribunals may address the objectives and rules of other treaties in Duncan French "Treaty interpretation and the incorporation of extraneous legal rules" (2006) 55(2) International & Comparative Law Quaterly 281 [French].

[79] See *amicus curiae* brief, filed by four NGOs in *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal S.A. v. The Republic of Argentina,* (2007) ICSID Case No. ARB/03/19 [*Suez, "Amicus* submission"]; *amicus curiae* brief, filed by five NGOs in *Biwater Gauff (Tanzania) Ltd. V. United Republic of Tanzania* (2007), ICSID Case No ARB/05/22 [*Biwater Gauff, "Amicus* submission"]; *amicus curiae* brief, filed by two NGOs (CIEL & Bluewater Networks) in *Methanex Corporation v. United States of America* (2004), UNCITRAL, (NAFTA); *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary,* ICSID Case No. ARB/07/22, Award, 23 September 2010 [*AES*]; More on the EU as *amici*, see Andrea Bjorklund, "The participation of sub-national government units as *amici* in international investment disputes", in Chester Brown & Kate Miles, *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011), at 298.

The effectiveness of ideational-interplay, via *amici* participation, is highly dependent on how open a dispute settlement is for such participation. As can be learned from the above, despite common criticism, the field of investment law is becoming increasingly open to *amici* participation. The same however cannot be said about WTO-based litigation, in which no rules on *amici* participation currently exist, and tribunals seem to accept such interventions only sporadically.[80] This state of affairs certainly restricts the ideational interplay process in WTO tribunals, as it limits one of the most important (certainly the most motivated) channels, through which information can flow into the dispute settlement process.

In summary, in order to "green" the work of economic tribunals in RE-related economic disputes, it is recommended that a liberal approach towards *amici* participation should be adopted in such disputes. Although this conclusion may be somewhat banal, it is nevertheless important. Recent RE-related disputes have been attracting a significant amount of *amici* briefs from a varied group of *amici*, including academics, private companies and international organization. This demonstrates that there is a high level of public interest in these disputes, as well as numerous actors who are interested in contributing information. This fact also demonstrate the multi-faceted nature of these disputes, and their potential impact on numerous policy-areas. Opening these disputes therefore, can increase the number of views and perspectives presented to tribunals, and enable them to make better-informed decisions.

iv. Solicited amicus/experts briefs:

In some domestic legal systems, courts are entitled to appoint neutral experts at their own initiative, in order to deal with matters that are beyond the court's knowledge or expertise. In the UK for example, courts may appoint such independent "specially qualified advisers to assist the Court as assessors on any technical matter."[81] This concept can be incorporated into the work of economic tribunals, in which RE-related disputes are being litigated.

Notably, environmental experts can be appointed in order to confirm whether environmental issues are indeed relevant to a certain dispute, and if so, to provide an unbiased explanation, and advice, to economic tribunals. This model was adopted by the below discussed Permanent Court of Arbitration ("PCA") procedures with respect to the resolution of environmental disputes. More specifically, the PCA provides a list of scientific and technical experts in environmental matters,[82] who may be appointed by the PCA's tribunals in order to assist them where environmental matters arise.[83] The PCA's list is available to the public and could be consulted by economic tribunals adjudicating RE-related disputes. More specific lists, which could be tailored to RE-related disputes (e.g. of dual-experts, such as in the fields of energy, climate change, EU competition law, etc.) could also be prepared. The PCA's list is indeed being updated at the time of writing, and is intended to reflect the need for expertise

[80] A unique example in which WTO tribunals *de facto* accepted, and probably also considered an *amicus* brief was the *Tuna-Dolphin* case, *supra* note 72.
[81] Supreme Court of the United Kingdom, The Supreme Court Rules 2009, No. 1603 (L.17), available online: http://www.legislation.gov.uk/uksi/2009/1603/made?view=plain ["The UK Supreme Court Rules 2009"], Rule 35.
[82] The list can be found on the PCA's website: http://www.pca-cpa.org/showpage.asp?pag_id=1058.
[83] PCA Optional Rules, *infra* note 90, Art 27.

in climate change related matters,[84] which seem to be the most litigated environmental disputes under the PCA.[85]

Naturally, the hiring of external experts may prolong the dispute resolution process and increase its costs to the parties, who may not be interested in receiving such an advice in the first place. These considerations are important, and should not be overlooked.[86] A potential, partial, solution, could be the limitation of experts' fees, as well as the timeframes allocated for such consultations. Another possible solution would be to allow the appointment of external experts, but subject to the parties' *ad hoc* consent.

v. The use of secretariats/legal assistants

The ideational interplay process can also take place in RE-related disputes through the, somewhat unofficial, contribution of legal assistants who are appointed in order to support the work of tribunals. As a matter of practice, both investment and trade tribunals tend to appoint such assistants, whether privately hired, or provided by the supporting institution.

The practice of the WTO is especially interesting in this respect. In WTO disputes which are related to environmental protection, secretariat members from the WTO's Trade and Environment Division ("TED") are appointed to provide panels with information on legal, historical and procedural issues in case of environment-related disputes.[87] As such, they are in a position to facilitate the ideational interplay process by providing 'environmental' knowledge and perspective to the panel. The work of the WTO's secretariat in this capacity seems to be especially important, as commented by WTO Panellist, Professor Thomas Cottier:

> "It [the secretariat] plays an important role in the process, and informally, often even a leading one. An *Ad Hoc* dispute settlement system provides an informal avenue for the Secretariat to influence the process, albeit necessarily in a non-transparent manner."[88]

A somewhat similar unofficial practice can be found also at the PCA. The PCA appoints legal counsels to assist arbitrators in their work. In environmental disputes, the practice is to appoint legal counsels with background in environmental law.[89]

This model could easily be adopted by other institutions. As mentioned before, legal assistants are being appointed by tribunals as a matter of practice. The only challenging aspect, therefore, is to identify those legal assistants who possess the right specialisation(s). International institutions can support this effort by providing lists of appropriate candidates.

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[84] Notably the Kyoto Protocol's flexible mechanisms.
[85] Interview with a PCA official.
[86] Indeed until the time of writing, the PCA's list was never used in any of the PCA's environmental disputes.
[87] See Article 27(1) of the WTO's Dispute Settlement Understanding, as well as an interview conducted by the author.
[88] Thomas Cottier, *The Challenge of the WTO Law: Collected Essays* (London: Cameron May, 2007) [Cottier, "The Challenge of the WTO"] at 210.
[89] It should be noted that the PCA's counsels are far less influential than WTO secretariat members, in terms of involvement and impact on the final award.

vi. Specialised procedural rules:

Another method in which institutional interaction could take place is the adoption of specialised procedural rules, whereby special attention is given to unique environmental circumstances. Potentially, these rules could incorporate any of the above discussed models; including rules on the appointment of suitable adjudicators, the facilitation of *amici* participation, and the appropriate use of secretariats/legal assistants.

An example of such a set of rules, are the Permanent Court of Arbitration's Optional Rules of Arbitration of Disputes relating to Natural Resources and/or the Environment ("PCA Optional Rules").[90] These rules were designed to support the settlement of disputes that are related to natural resources and environment (although need not necessarily be characterized as such).[91] At the time of writing, the PCA Optional Rules were used in 5 disputes, all of which in the context of climate change (more specifically, investments made in accordance with the Kyoto Protocol Flexible Mechanisms).

The PCA Optional Rules are in fact a modification of the UNCITRAL Rules of Arbitration, based on which numerous investment disputes are being resolved.[92] It can be therefore argued that these rules are suitable, as-is, for the resolution of investment claims related to RE. As mentioned above, indeed all 5 cases resolved according to the PCA Optional Rules concerned investments that were made under the Kyoto Protocol.[93]

The PCA Optional Rules include certain modifications, or flexibilities, which are supposed to grant the parties with access to environmental expertise.[94] In other words, these rules include mechanisms for the enhancement of the ideational interplay. For example, they provide a list of "environmental" arbitrators as well as technical expert witnesses which the parties may use.[95] According to Art 27, tribunals are further entitled to appoint technical experts who may inform the tribunals on environmental issues that are beyond the tribunals' expertise.

A potential problem with the PCA Optional Rules is their lack of instructions regarding the participation of *amici curiae* in environmental cases. Investment jurisprudence, however, has somewhat resolved this problem. In a series of cases, investment tribunals have read the text of Art 17 of the UNCITRAL Rules on Arbitration (based on which the PCA Optional Rules are designed), according to which tribunals "may conduct the arbitration in such manner as it

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[90] Permanent Court of Arbitration, *Optional rules of arbitration of disputes relating to natural resources and/or the environment*, adopted in 2001, online: http://www.pca-cpa.org/showpage.asp?pag_id=1058 [PCA Optional Rules]. For a review of these Rules, see Dane Ratliff, "The PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment" (2001) 14 Leiden Journal of International Law 887 [Ratliff].

[91] PCA Optional Rules, *supra* note 90, in 'Introduction', and Art 1.

[92] See in the Introduction to the PCA Optional Rules.

[93] See for example *Naftrac Ltd v National Environmental Investment Agency (Ukraine)*, PCA Arbitration (Optional Environmental Rules), Decision 4 December 2012. The details of this case, as well as the other cases that were resolved according to these rules, are unavailable to the public.

[94] Ratliff, *supra* note 90 at 894.

[95] See in PCA, "Environmental Dispute Resolution", online: http://www.pca-cpa.org/showpage.asp?pag_id=1058 [PCA, "Environmental Dispute Resolution"].

considers appropriate", as a permission to allow *amici* participation.[96] As the same text can be found in Art 15 of the PCA Optional Rules, it can be assumed that *amici* participation will not be limited in disputes based on these rules. Furthermore, as the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration just recently entered into force (2014), in future disputes these highly liberal rules could be used in tandem with the PCA Optional Rules (as indeed they are expected to be used in investment arbitration). These rules, as discussed above, include specific instructions concerning the participation of *amici curiae.*

The use of specialised procedural rules can be useful in RE-related disputes. Notably, these rules are mindful of the need for ideational interplay, and facilitates the flow of environmental information into the dispute. Possible necessary modifications, however, can be made in order to tailor these rules for RE-related disputes. First, as discussed below, RE-related disputes are multi-faceted in nature. Accordingly, these rules should address more than just environmental expertise. The existing mechanisms therefore, should enable also the incorporation of experts from fields such as energy law and competition law. As mentioned above, it is advisable that also the participation of *amici curiae* will be explicitly included in these rules. Furthermore, the possibility of "mixed" tribunals (as discussed in part III(D)(ii)), as well as the appointment of external experts (as discussed in part III(D)(iv)) should be addressed.

IV. Conclusion

There is no doubt that the importance of the sustainable development principle of policy integration is on the rise. Governments and international institutions are recognising the benefits embedded in the application of this principle, *inter alia* with respect to policies related to RE. It is time for scholars to shed some light on the potential existing in the application of this principle, also with respect to dispute resolution mechanisms.

This paper's main aims were to present the multi-layered nature of RE-related economic disputes, notably their linkage to *environmental law and policy*, and to equip decision makers with a line of suitable tools, through which they will be able to adjust those economic dispute settlement mechanisms in which RE-related disputes are being litigated. By applying these tools, or these models, it is argued, economic tribunals will increase their level of competency, and their suitability for resolving RE-related economic disputes. The models presented in this paper need not be applied as-is. They can be used as a starting point, on which decision-makers may build and adjust, or as a pool of ideas, from which decision-makers may pick and choose.

[96] *Methanex Corporation v. United States of America (Decision of the tribunal on petitions from third persons to intervene as "Amici Curiae")* (2001), UNCITRAL, (North American Free Trade Agreement) [*Methanex Amici Curiae decision*]; *United Parcel Service of America Inc. v. Canada* (Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001) UNCITRAL (NAFTA) *[UPS, Amici Curiae Decision*].