

CANADA – FEED-IN TARIFF : ARE FITS DESIRABLE, OR EVEN LEGAL? A CASE COMMENT

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This article summarizes the World Trade Organization Appellate Body's report in *Canada – Feed-in Tariff*. It focuses the report's three main issues: (1) the application of the *Agreement on Trade-Related Investment Measures'* Illustrative List to the minimum required domestic content levels in light of article III:8(a) *GATT*; (2) the article III:8(a) *GATT* derogation to a violation of national treatment; and (3) the determination of whether a “benefit” has been conferred under article 1.1(b) of the *SCM Agreement*. It will mainly be argued that the article III:8(a) analysis is overly simplistic and that the subsidy benefit determination technique employed by the Appellate Body is both overly complex and poorly suited for government-regulated markets. Each of these issues comports novel components: it is the first time the *TRIMs Agreement's* Illustrative List is applied in relation to an article III:4 *GATT* violation; it is the first time the article III:8(a) derogation is applied in jurisprudence and the article 1.1(b) of the *SCM Agreement's* benefit determination gives new perspectives regarding government-created markets. The discussion will ultimately move to an analysis of a possible defence under the *GATT XX* general Exceptions.

Cet article résume le rapport de l'Organe d'appel de l'Organisation mondiale du commerce dans *Canada – Certaines mesures affectant le secteur de la production d'énergie renouvelable*. L'article se concentre sur les trois points focaux de l'affaire : (1) l'application de la Liste exemplative des *Mesures concernant les investissements et liés au commerce* aux exigences de contenu local à la lumière de la dérogation de l'article III:8(a) *GATT* concernant les violations au traitement national; (2) l'application de la dérogation de l'article III:8(a) *GATT* concernant les violations au traitement national; et (3) l'évaluation de « l'avantage » selon l'article 1.1(b) SMC. Ce texte argumentera principalement que l'analyse de l'article III:8(a) est simpliste et que l'analyse de « l'avantage » selon l'article 1.1(b) SMC est à la fois inutilement complexe et inappropriée dans le contexte de marchés créés par l'État. Chacune de ces questions comporte des caractéristiques novatrices: il s'agit de la première fois que la Liste exemplative des *Mesures concernant les investissements et liés au commerce* est appliquée en relation à une violation du traitement national selon l'article III:4 du *GATT*; il s'agit de la première fois que la dérogation de l'article III:8(a) *GATT* est appliquée en jurisprudence; et l'analyse de « l'avantage » selon l'article 1.1(b) SMC apporte une nouvelle perspective quant aux marchés créés par l'État. La discussion évoluera ultimement vers une analyse d'une possible défense sous les exceptions générales de l'article XX du *GATT*.

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A feed-in tariff, or FIT, is a governmental measure aimed at fostering the development of sustainable energy production by guaranteeing certain resale prices for sustainable energy producers.¹ A common feature of FITs is the local content requirement (LCR), wherein a FIT contract will only be awarded if a certain percentage of the production equipment is produced locally. As of 2013, 99 jurisdictions in the world use FITs to foster renewable energy development.² FITs are the most widely utilized strategy worldwide for increasing renewable energy use.³ In a context where renewable energy production techniques are still not developed enough to compete in an open market with other conventional generation methods, FITs prove to be an interesting option. The use of LCRs in FIT contracts is the object of criticism and, in a short amount of time, several countries have started requesting consultations before the WTO about programs involving LCRs. In November 2012, China challenged the FIT programs of several European Union (EU) member States, including Greece and Italy.⁴ The US also recently objected to India's Jawaharlal Nehru National Solar Mission on the same grounds.⁵ It is against this backdrop that the Dispute Settlement Body recently rendered its first two reports (one panel and one Appellate Body report) on the matter in *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*. The fact that arguments were given by eight different third parties in the Appellate Body's (AB) report is emblematic of the particularly international character of this issue.⁶ This case comment will analyze the AB report.

In a context where it is argued that there is an important need for new and more permissive legislations regarding green energy policy and where the renegotiation of multilateral trade treaties is unlikely to occur in the near future,⁷ it is to be expected that the World Trade Organisation (WTO) jurisprudence on this topic will have an extensive impact on national jurisdictions. In fact, some even argue that in the contexts of such "legislative drought", as this, tribunals have a tendency to become more imaginative and to "fill in the gaps" left by politicians.⁸ This case comment will first summarize and comment on the AB's reasoning with regard to the

¹ Daniel Peat, "The Perfect FIT: Lessons from Renewable Energy Subsidies in the World Trade Organization" (2012) 43 *LSU J Energy L & Resources* [Peat].

² REN21, "Renewables 2013 Global Status Report" Renewable Energy Policy Network for the 21st Century (2013) online: <http://www.ren21.net> [REN21].

³ *Ibid.*

⁴ WTO, *Request for Consultations by China, European Union and Certain Member States – Certain Measures Affecting the Renewable Energy Generation Sector* (2012), WTO Doc WT/DS452/1 [Request Renewable Energy].

⁵ WTO, *Request for Consultations by the United States, India – Certain Measures Relating to Solar Cells and Solar Modules* (2013), WTO Doc WT/DS456/1 [Request Solar Cells].

⁶ *Canada – Certain Measures Affecting the Renewable Energy Generation Sector (Complaint by the European Communities and Japan)* (2013)/ *Canada – Measures relating to the feed-in tariff program (complaint by the European Union)* (2013), WTO Doc DS426/AB/R, DS412/AB/R at para 5.30 (Appellate Body Report) [*Canada – Energy (AB)*]. Section 2.7 of the report mentions arguments by Australia, Brazil, China, India, Norway, Saudi Arabia, Turkey and the United States.

⁷ Elizabeth Whitsitt, "A Modest Victory at the WTO for Ontario's FIT Program" (2013) online: Social Science Research Network <<http://ssrn.com>> at 93 [Whitsitt].

⁸ Krzysztof J Pelec, "The Politics of Precedent in International Law: a Social Network Application" (2013) 108 *Am Pol Science Rev* 547 [Pelec].

report's three main issues: (1) the application of the *Agreement on Trade Related Investment Measures (TRIMS Agreement)* Illustrative List to LCRs in light of article III:8 of the *General Agreement on Tariffs and Trade (GATT)*⁹; (2) the article III:8(a) *GATT* derogation to a violation of national treatment; and (3) the determination of whether a “benefit” has been conferred under article 1.1(b) of the *Agreement on Subsidies and Countervailing Measures (SCM Agreement)*¹⁰. Each of these issues comport novel components: it is the first time the *TRIM Agreement's* Illustrative List is applied in relation to an article III:4 *GATT* violation, it is the first time the article III:8(a) derogation is applied in jurisprudence and the article 1.1(b) of the *SCM Agreement's* benefit determination gives new perspectives regarding government-created markets. It will mainly be argued that the article III:8(a) analysis is overly simplistic and that the subsidy benefit determination technique employed by the AB is both overly complex and poorly suited for government-regulated markets. The discussion will ultimately move to an analysis of a possible defence under the *GATT* article XX general exceptions. This issue, along with that of the *TRIMS Agreement* will both serve as examples of “when may *GATT*-inherent concepts apply to out-of-*GATT* Agreements?” This article will finally conclude that, taking the into consideration the report's impact, the AB indeed tried to “fill in the gaps” left by politicians.

In short, the relevant facts are the following: Ontario's FIT programme began in 2009 and is a scheme through which generators of electricity produced from certain forms of renewable energy were paid a guaranteed price per kilowatt hour of electricity supplied to the government under contracts lasting either 20 or 40 years. Electricity generation facilities utilizing windpower and solar PV technologies had to comply with “Minimum Required Domestic Content Levels” (an LRC) in the development and construction of these facilities.

I. The Application of *TRIMS Agreement's* Illustrative List in Light of Article III:8 *GATT*

A. The Issue's Technical Legal Context

While the panel found that the LCR was a violation of the national treatment obligation enshrined in article III:4 *GATT 1994*,¹¹ the AB's report began by examining

⁹ *Agreement on Trade Related Investment Measures*, 15 April 1994, 1868 UNTS 186 [*TRIMs*]; *General Agreement on Tariffs and Trade*, 15 April 1994, 1867 UNTS 187 [*GATT 1994*].

¹⁰ *Agreement on Subsidies and Countervailing Measures*, 15 April 1994, 1867 UNTS 14 [*SCM Agreement*].

¹¹ It found that “certain foreign “like” renewable energy production materials were given “less favourable treatment” through the use of a “law affecting their internal sale” by being excluded from the opportunities created by the FIT programme”. *Canada – Renewable Energy (panel)*, supra note 6 at para 7.167. Accordingly, the three criteria that need to be satisfied for a violation of the national treatment obligation as enshrined in *GATT 1994* at article III: 4 follow from a close reading of the provision: “(i) the imported and domestic product must be “like products”, (ii) the measure must be a ‘law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use’, and (iii) the imported product must be accorded “less favourable” treatment than

the European Communities' (EC) claim regarding the inapplicability of the article III:8(a) derogation to national treatment to a measure falling within the *TRIMs Agreement's* "Illustrative List". This analysis is worthwhile as it is the first time the *TRIMs Agreement* is being applied in jurisprudence. The *TRIMs Agreement* applies to investment-related measures and is more or less of an expansion of article III:4 *GATT's*¹² "national treatment" principle.¹³ The *TRIMs Agreement's* main feature is its "Illustrative List", which bans LCRs and quantitative measures. Articles 2 of the *TRIMs Agreement* and 1(a) of its "Illustrative List" are of particular relevance:

Article 2 *TRIMs*

National Treatment and Quantitative Restrictions

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

1. *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 (emphasis added)

the like domestic product. *Korea – Measures Affecting Imports of Fresh Chilled and Frozen Beef (Complaint by the US)* (2000) WTO Doc WT/DS169/AB/R at para 133 (Appellate Body Report) [*Korea – Beef (AB)*].

¹² "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, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product." (emphasis added)

¹³ Oliver Morrissey, "Investment and Competition Policy in the WTO: Issues for Developing Countries" (2002) online: Social Science Research Network <<http://ssrn.com>>; Thomas L. Brewer & Stephen Young, "Investment Issues at the WTO: The Architecture of Rules and the Settlement of Disputes" (2008) online: Social Science Research Network <<http://ssrn.com>>.

Under article III:8(a) *GATT*,¹⁴ however a derogation to the national treatment principle exists for government procurement¹⁵. In the present case, the measure's LCR was found to be in violation of article III:4 *GATT*¹⁶ (the national treatment principle) and to be encompassed in article 1(a) of the *TRIMs Agreement*'s "Illustrative List". The measure however also possibly fell under article III:8(a) *GATT*'s derogation to the national treatment principle for government procurement, as the electricity was to be sold to the government of Ontario. The issue therefore was the following: "can article III:(8)(a)'s derogation to the national treatment principle also apply to a violation of the *TRIM Agreement*'s "Illustrative List?" In other words, is the *TRIMs Agreement* closer to being an entirely independent agreement or is it closer to being an appendix of the *GATT*, where the *GATT*'s derogations would also apply?

B. The AB's Findings: is the *TRIMs Agreement* an Entirely Autonomous Agreement?

The EC contended that article III:8(a)'s derogation did not apply, as the *TRIMs Agreement* is an agreement adding to the parties' obligations under the *GATT*:

The European Union emphasizes the language in the first paragraph of the preamble of the *TRIMs Agreement*, stating that "the object and purpose of the *TRIMs Agreement* was precisely to "elaborate" "further" or "additional" provisions to the already existing ones".¹⁷

Hence, the *TRIMs Agreement* would add more obligations to its party members by disallowing any derogation to a violation of its "Illustrative List". Moreover, the EC contended that such a reading of the "Illustrative List" would prevent it from being redundant by "stating the obvious", i.e. that LCRs and quantitative measures are discriminatory.¹⁸ It is convincing to interpret treaties as indeed creating new obligations,¹⁹ and especially when this objective is stated in the preamble. The EC's interpretation is appealing in that it gives the *Agreement* a distinct identity, by creating distinct obligations; parties to the *GATT* would have a national treatment obligation with certain derogations while parties to the *TRIMs Agreement* would have pushed the national treatment obligation further by disallowing derogations for the two typical national treatment violations contained in the "Illustrative List". Importantly, if given an interpretation contrary to that of the EC, this Agreement would add next to nothing to the already-existing obligations under

¹⁴ "The provisions of this article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale." (emphasis added)

¹⁵ The analysis of this derogation is the object of the following section.

¹⁶ *Canada – Renewable Energy (Panel)*, *supra* at note 6 at para 7.167.

¹⁷ *Canada – Renewable Energy (AB)* *supra* note 6 at para 5.30.

¹⁸ *Ibid.*

¹⁹ J H H Weiler, "The Interpretation of Treaties – A Re-examination Preface" (2010) 21:3 Eur J Int Law 507; Richard Gardiner, *Treaty Interpretation*, Reprint edition ed (Oxford: Oxford University Press, 2010).

GATT article III:4.²⁰

Notwithstanding these arguments, the AB rightly concluded that article III:8(a)'s derogation also applies to the *TRIMs Agreement's* "Illustrative List". The AB grounded its analysis on a sound interpretation of the *Agreement's* wording. The AB firstly noted that article 2(1) of the *TRIMs Agreement* refers to article III in its entirety: "no Member shall apply any *TRIM* that is inconsistent with the provisions of article III [...] of *GATT* 1994" [emphasis added]. According to the AB, "the cross-reference in the latter part of article 2.1 to article III of the *GATT* 1994 is unqualified. [...] Importantly, the cross-reference to article III also includes paragraph 8(a) of that provision"²¹ [emphasis added]. Moreover, article 1 of the "Illustrative List" states in its *chapeau* that it pictures "*TRIMs* that are inconsistent with the obligation of national treatment provided for in paragraph 4 of article III" [emphasis added].

The *chapeau* does not suggest that a violation of the "Illustrative List" *de facto* constitutes a violation under international law. The only ban contained in the *TRIMs Agreement* is the violation of article III *GATT* as a whole and the "Illustrative List" merely pictures two violations of article III:4, which is a section of article III *GATT*. The *Agreement's* wording therefore seems to indicate that its drafters merely wanted to clarify some applications of the national treatment principle and therefore did not wish to create a whole new set of obligations.

The AB therefore found that the LCR was not only a violation of article III:4 *GATT*, but also of the *TRIMs Agreement's* article 2, by reference to the "Illustrative List's" article 1(a). These violations are then subject to the article III:8(a) derogation, which will be the subject of the following section.

II. The Article III:(8)(a) Derogation to National Treatment

A. Introduction to Governmental Procurement

This is the first time the AB has interpreted article III:8(a).²² This provision reads as follows:

²⁰ Jurisprudence on article III:4 already being developed, it already seems clear that LCRs and quantitative restrictions would be illegal even in the existence of the *TRIMs Agreement*. *Japan—Taxes on Alcoholic Beverages (Complaint by the European Communities)* (1996), WTO Doc WT/DS8/AB/R (Appellate Board), *Chile—Taxes on Alcoholic Beverages (Complaint by the European Communities)* (1999), WTO Doc WT/DS87/AB/R (Appellate Board), *United States—Taxes on Automobiles (Complaint by the European Communities)* (1994), WTO DS87 (circulated but not adopted), *Korea—Beef*, *supra* note 11, *Dominican Republic—Measures Affecting the Importation of and Internal Sale of Cigarettes (Complaint by Honduras)* (2005), WTO Doc WT/DS302/AB/R (Appellate Board) and *European Communities—Measures Affecting Asbestos and Products Containing Asbestos (Complaint by Canada)* (2001), WTO Doc WT/DS135/AB/R (Appellate Board).

²¹ *Canada—Renewable Energy (AB)*, *supra* note 6 at para 5.20.

²² *Ibid* at para 5.54.

Article III *GATT*

National Treatment on Internal Taxation and Regulation

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

The center of the debate was situated under the interpretation of “for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale” (emphasis added).

Article III:8(a) safeguards a practice otherwise known as “buy national” governmental procurement. This is where the government will favor its domestic industry when purchasing goods. Needless to say, governments and public monopolies are major purchasers of goods and services.²³ Although this practice has significant trade-distorting effects,²⁴ the negotiating parties chose to preserve their right to discriminate in this respect. The rationale usually will be, amongst other things: “maintaining independence in defence production, supporting employment in declining industries; supporting high technology sectors”, etc.²⁵

B. “For governmental purposes”

Article III:8(a) requires the goods to be purchased “for governmental purposes”. In its interpretation, the AB began by comparing this wording to that of the French and Spanish versions of the Agreement, which respectfully read as “les besoins des pouvoirs publics” and “las necesidades de los poderes publicos”. The AB consequently noted that “for governmental purposes” is to be interpreted as meaning “for the discharge of public functions”, which is the direct translation of the French and Spanish versions.²⁶ The AB finally noted that the scope of public functions had to be specified on a case by case basis.

²³ Public contracting accounts for between 7 and 10 per cent of the European Community GDP in 1994. M R H Uttley & K Hartley, “Public Procurement in the Single European Market: Policy and Prospects” (1994) 94:2 Eur Bus Rev 3 at 3 [Uttley & Hartley].

²⁴ In the absence of foreign competition there has been little incentive for domestic firms supplying the public sector to invest in new technology and so keep costs down. The outcome has been artificially high prices as “the public sector pays more than it should for the goods it needs”; Stephen Martin, Keith Hartley & Andrew Cox, “Public purchasing in the European Union: some evidence from contract awards” (1997) 10:4 Int’l J Pub Sect Mgmt 279 at 280.

²⁵ Uttley & Hartley *supra* note 23 at 3.

²⁶ The AB came to this conclusion using the statutory interpretation principle following which, out of the many official translations of a statute, the most specific is to be retained.

C. “With a view to commercial resale or to use in the production of goods for commercial resale”

In addition to being purchased “for governmental purposes”, the goods must not be purchased “with a view to commercial resale or to use in the production of goods for commercial resale”. Turning to this latter issue, the AB affirmed that one must look at whether the transaction is consistent with an intent to generate profit in the future.²⁷ The resale must also be done at arm's length. According to the AB, profit-orientation generally will be an indication that a resale is at arm's length. The AB noted that one must examine the relationship between the buyer and the seller to determine if the transaction is made at arm's length; both parties must take part in the transaction in a purely self-interested way. It isn't entirely clear why the AB stressed that sales must be done “at arm's length” because, in most cases where governments will sell products to consumers, it will be done in the context of a quasi-monopoly. For example, Québec's Loto-Québec has a monopoly over lottery tickets, the Société des Alcools du Québec (SAQ) has a virtual monopoly over most wines and spirits, and Hydro-Québec has a monopoly over the production of electricity in the province. While all of these governmental agencies do act in a self-interested manner and generate profit, one could hardly argue that these operations take place at arm's length. In any case, it seems like this “arm's length” criterion is to be interpreted broadly since, as stated earlier, the AB sees “profit-orientation generally as an indication that a resale is at arm's length”.²⁸

D. Quashing of the Panel's “close relationship to the product” Criterion

Finally, after having commented on every component of article III:8(a), the AB concluded that this provision could not apply in the present case. It affirmed that when reading article III *GATT 1994* in a holistic manner, one understands that the entire provision only refers to the word “product” as meaning “the product being discriminated against”. In this case, the product being discriminated against was renewable energy production material and not electricity. In the AB's view, only renewable energy production material could be encompassed by article III:8(a), and this is why it deemed this provision as inapplicable to the present dispute. This finding is contrary to the panel's view on the issue. The panel had established that the existence of “a close relationship” between the product discriminated against and the procured product would suffice for the exception to apply.²⁹

The ending of this part of the report is somewhat surprising; after commenting on article III:8(a) for over 6 pages, the AB laconically answered the question in one paragraph,³⁰ without even justifying why it decided not to follow the

²⁷ In a certain situation where sales are done without profit, one must also look at the seller's long-term strategy, for it is not uncommon for a seller to sell without profit during a certain period in order to achieve certain objectives, such as gaining access to a new market.

²⁸ *Canada – Renewable Energy (AB)*, *supra* note 6 at para 5.71.

²⁹ *Ibid* at para 5.76.

³⁰ *Canada – Renewable Energy (AB)*, *supra* note 6 at para 5.79.

panel's reasoning. On the one hand, the AB's report does seem reasonable as it is based on two fundamental statutory interpretation principles: (1) that the same word should be given the same meaning each time it is mentioned in a provision; and (2) that a provision creating an exception³¹ is to be interpreted narrowly. Having this in mind, the panel's interpretation could be seen as somewhat too generous. This interpretation would have been generous enough to, for example, allow a government willing to buy police cars to apply to LCR to the car factory instead of the very cars. It is uncertain that the member States intended to give this effect to this provision. One should however keep in mind that these traditional *statutory* interpretation principles have no officially binding character when it comes to *treaty* interpretation.³²

On the other hand, by carefully reading article III:8(a) one notices that “laws, regulations or requirements governing” do not refer directly to the “products purchased”; rather, it refers to the “procurement” of these products. One could therefore convincingly argue that the wording of this provision is sufficiently broad to encompass all of the important steps of the process of acquiring such products, as opposed to the direct act of purchasing the end product. Moreover, the AB's interpretation prevents governments from applying a percentage of LCR to the purchase of electricity or of any raw material. While a government purchasing fighter planes could formulate a 25% LCR, a government purchasing electricity or timber could not formulate such a requirement, for such products simply do not have any components. It is in this sense that it would have been logical to at least extend the panel's reasoning (of the “close relationship”) to such “component-free” products. Moreover, it is of interest to note that the AB's single paragraph rejecting the application of the article III:8(a) derogation has the enormous effect of prohibiting all FIT contracts containing a LCR. This, alone, has a tremendous financial impact. In this sense, it would have been expected that the AB should elaborate more extensively. Given that other countries are expected to contest FIT measures before the WTO in the future³³, the AB's one-paragraph reasoning regarding LCR will likely be challenged. Finally, judicial economy has prevented the AB from completing its article III:(a) analysis, thus leaving open many questions, on a provision that had never been interpreted previously.

E. Suggesting an Interpretation of the Article III:8(a) Test

What “governmental purposes” should mean and whether it should encompass electricity distribution is a rich question. The AB's reasoning on this issue

³¹ One should however note that article III:8(a) is technically a derogation, rather than an exception. Notwithstanding this difference, one could argue that the aforementioned statutory interpretation technique still applies to a certain extent.

³² In this case, the only official principles are contained in articles 31 and 32 of the *Vienna Convention on the Law of Treaties*, United Nations, 23 May 1969, 1155 UNTS 331 [*Vienna Convention*], which do not comport the aforementioned principles. See the WTO's website's page on directives governing treaty interpretation, online: WTO <<http://www.wto.org>>.

³³ As stated earlier, China and the US have already requested consultations. *Request Renewable Energy supra* note 4; *Request Solar Cells supra* note 5.

is of little help. In a nutshell, it noted that “article III:8(a) is limited to products purchased for the use of government, consumed by government, or provided by government to recipients in the discharge of its public functions,”³⁴ that “a commercial resale would be one in which the buyer seeks to maximize his or her own interest”³⁵ and that these two elements are cumulative components.³⁶ Many aspects of the question are left out. In paragraph 5.69 and in the article III:8(a) analysis more generally, the AB seems to expose an understanding of the issue so simple that there actually exists a risk that it could degenerate into something similar to “anything relating to a government would be “for governmental purposes” and anything involving profit would be “with a view to commercial resale”. Such an interpretation would fall short of reflecting the provision's spirit.

An important question is whether “for governmental purposes” is an objective or a subjective standard. The objective interpretation is the responsibilities governments traditionally carry, such as defending the territory, minting money and controlling inflation, ensuring law and order, building and maintaining roads, etc. The subjective interpretation, on the other hand, is the responsibilities the government itself deems it should carry. At first, one may want to opt for the subjective interpretation, as WTO, in essence, should seek to interfere as little as possible with domestic policymaking.³⁷ A subjective interpretation would however most likely lead to abuses, where article III:8(a) could be invoked excessively. It seems that just any purchase done by the government could then be said to be “for governmental purposes” – thus making this expression meaningless. For instance, the Québec government could argue that taking control of the alcohol and gambling markets was made to protect the public and that the significant profit this generates only is incidental.

Considering that an objective interpretation must be adopted poses a certain challenge with regard to responsibilities that are not common to all governments throughout the world, such as energy production and healthcare. In other words, the objective interpretation leaves a certain amount of uncertainty with regard to functions the private sector can assume (and does assume in many countries). A sensible interpretation should balance the two following factors: (1) just how necessary for the public good, from an objective standpoint, the government's intervention is; (2) how much profit is generated by this intervention, in light of the

³⁴ *Canada – Renewable Energy (AB)*, *supra* note 6 at para 5.74.

³⁵ *Ibid* at para 5.71.

³⁶ *Ibid* at para 5.69.

³⁷ This has been emphasized many times by jurisprudence. One of the many examples is in *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (2010)*, WTO Doc WT/DS363/AB/R (Appellate Body Report) at para 222 [*China – Periodicals*]: “we see the ‘right to regulate’, in the abstract, as an inherent power enjoyed by a Member’s government, rather than a right bestowed by international treaties such as the *WTO Agreement* (...) With respect to trade, the *WTO Agreement* and its Annexes instead operate to, among other things, discipline the exercise of each member's inherent power to regulate by requiring WTO Members to comply with the obligations that they have assumed thereunder”; *Canada – Certain Measures Concerning Periodicals (Complaint by the United States)* (1997), WTO Doc WT/DS31/AB/R (Appellate Body report).

importance of the service it delivers to the population and of the total it represents.³⁸ It is important to note that the fact that the private sector traditionally assumes the responsibilities at hand in certain countries, is one factor to take into account. The central idea is the comparison between how necessary or helpful the measure is and the profit it generates. In short, one must conclude that the measure's socially-beneficial component is important enough so as to nearly eclipse its profit-generation component.

Having these considerations in mind, it seems that supplying electricity should be “for governmental purposes”. Firstly, the main reason why the Ontario government set up this program is to ensure that Ontarians benefit from reasonable and stable energy pricing.³⁹ Indeed, very few economies have experienced stable energy prices in a laissez-faire context.⁴⁰ Therefore, government regulation of energy markets does seem necessary for the public good. Even if profits do occur, they were not the main reason why this program was established, and are not significant in comparison to the total investment this program represents.⁴¹ As to the second limb of the test (profit-orientation), “The (Ontario Power Agency) was established under the *Electricity Restructuring Act of 2004* as “(a) corporation without share capital”, and operates its business and affairs on a not-for-profit basis”.⁴² Here statistics on the total investment represented by the Ontario Power Agency, its profits and Ontario's yearly budget would have been particularly helpful, if not necessary, to diligently complete the article III:8(a) test. Assuming the profits generated by this agency are minor, compared to the service it delivers to the population, the measure should be encompassed by article III:8(a).

III. Does a Fit Measure Qualify as a Subsidy?

The following section of the report discussed the potential qualification of a FIT measure as a “subsidy” under article 1 of the *SCM Agreement*. The relevant provisions of this article read as follows:

Article 1 SCM

Definition of a Subsidy

1.1 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 (referred to in this Agreement as “government”), i.e. where:

³⁸ The more important the intervention, the more likely it will be “for governmental purposes”. The more profitable the intervention, the less likely it will be “for governmental purposes”.

³⁹ *Canada – Renewable Energy (AB)*, *supra* note 6 at para 5.70.

⁴⁰ This information comes from the *Hogan Report*, who was Canada's expert witness. *Canada – Renewable Energy (AB)*, *supra* note 6 at para 4.5.

⁴¹ *Ibid* at para 5.70.

⁴² *Canada – Renewable Energy (Panel)*, *supra* note 11 at para 7.37, referring to *Ontario's Electricity Act* of 1998, Exhibit JPN-5, Sections 25.2(1)(c) and (d).

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

(...) and

(b) a benefit is thereby conferred.

1.2 A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2.

Both the panel and the AB recognized that FITs are a “financial contribution” within the meaning of article 1.1(a)(1)(iii) of the *SCM Agreement* as governments commit to “purchase goods” (i.e. electricity). This comment will focus on the very core⁴³ of this report, which is the determination of the existence of a “benefit” with respect to article 1.1(b) of the *SCM Agreement*.

A. Article 14(d) Calling for the Establishment of a Benchmark

The AB firstly discussed the method by which a benefit is to be determined. Here the AB followed the panel's reasoning:

It is well established that the existence of any such advantage is to be determined by comparing the position of the recipient with and without the financial contribution, and that “the marketplace provides an appropriate basis for [making this] comparison”.⁴⁴

The AB noted that article 14(d) of the *SCM Agreement*⁴⁵ can offer guidance in the determination of a benefit when a government is deemed to “purchase goods” under article 1.1(a)(1)(iii) of the *SCM Agreement*.⁴⁶ This article calls for the establishment of a certain benchmark with respect to which the existence of a benefit

⁴³ The AB's analysis of the claims under the *SCM Agreement* is significantly longer (over 30 pages long) than its analysis regarding the *TRIMs Agreement* and article III:8(a) *GATT* (about 15 pages long altogether). While one may argue that the “benefit” determination under the *SCM Agreement* is a very intricate assessment, one may still wonder why the AB focused so predominantly on this issue. A possible answer is that the “benefit” determination has an impact on FITs in general, contrarily to the *TRIMs Agreement* and the article III:8(a) determinations, which were only geared towards FITs with an LCR. The AB may have thought that the legality of FITs, not of LCRs, is the pivotal issue for the development of green energy.

⁴⁴ *Canada – Renewable Energy (panel)*, *supra* at note 11 at para 7.271; also referring to *European Communities and certain member States – Measures Affecting Trade in Large Civil Aircraft (Complaint by the United States)* (2010), WTO Doc WT/DS316/AB/R at para 1121 (Appellate Body Report) at para 157 [*EC and certain member States – Aircraft*].

⁴⁵ 14(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).”

⁴⁶ While this provision is meant to help quantify the amount of an actionable subsidy, it can certainly be of some help in the determination of the existence of a benefit as well.

will be determined. Finally, the AB affirmed that, in the present situation, one must determine whether the remuneration obtained by renewable energy generators under the FIT programme is “more than adequate” when compared to the remuneration the same generators would otherwise have received in normal market conditions.

B. Identifying the Proper Market for the Benchmark

The AB then moved to defining the proper market in which the benchmark is to be determined. It noted that the relevant criteria had already been defined in *EC and certain member States – Large Civil Aircraft*.⁴⁷ This report considered that one had to assess both demand-side and supply-side substitutability; Demand-side substitutability is when consumers consider the two products to be substitutable. Supply-side substitutability may be demonstrated when a supplier could more or less easily switch its production from one product to another in a reasonable period of time. Even if both factors have to be considered, it seems that demand-side substitutability is the most determinant.⁴⁸ This technique “requires the identification of a “market” in which the subsidized product [...] and the like product compete [...], so as to determine whether the effect of the subsidy is displacement or impedance”.⁴⁹

When applying this test to the present dispute, both the panel and the AB concluded that, “[the benefit...] cannot be found by applying a benchmark that is derived from the conditions for purchasing electricity in a competitive wholesale electricity market”⁵⁰. The AB however reversed the panel's finding that the relevant market was that of energy production in Ontario from all sources.⁵¹ The AB affirmed that the relevant market definition must be based on the government's definition of the supply-mix, and not on the consumers' preferences. The AB underscored that electricity is sold from producers at the wholesale level to the government and that the latter has the discretion to shape its definition of the energy supply-mix it wants to resell to consumers. Demand-side substitutability does change because certain government decisions require that a certain supply-mix be established, which prevents different generation technologies from being interchangeable. In other words, it is the government, not the people of Ontario, who have the choice of the type of electricity it wished to purchase. The AB also noted that the products were not substitutable on

⁴⁷ In this report, the AB had to determine the relevant market for the purposes of articles 6(3)(a) and 6(3)(b) of the *SCM Agreement*, which is a very similar assessment to that called upon by articles 1.1(b) and 14(d) of the *SCM Agreement*; *EC and certain Member States – Aircraft* supra note 44 at para 1121.

⁴⁸ This seems to follow from the wording used in *EC and certain Member States – Aircraft*: “a consideration of substitutability on the supply-side may also be required”(emphasis added), supra note 44 at para 1121.

⁴⁹ Rajib Pal, “Has the Appellate Body's Decision in *Canada – Renewable Energy/Canada – Feed-in Tariff Program* Opened the Door for Production Subsidies?” (2014) 17:1 *J Int'l Econ L* 125 at 130 [Pal].

⁵⁰ *Canada – Renewable Energy (panel)*, supra at note 11 at para 7.313.

⁵¹ *Canada – Renewable Energy (AB)* supra at note 6: The panel came to this conclusion by observing that the demand does not distinguish electricity on the basis of its generation technology. Consumers will use the same quantity of energy, no matter its origin.

the supply-side, for windpower and solar PV energy production have very important differences in cost structures and operating costs to conventional electricity production.⁵² The AB therefore came to the conclusion that the relevant market would be that of windpower and solar PV energy in Ontario.

Both the AB's assessment of the demand-side and supply side substitutability are interesting here. The AB's assessment of the demand-side does not mention why this criterion should be evaluated with respect to the government instead of consumers. The AB's view should probably not be understood as meaning that the proper market necessarily would be the first entity to which the product is being sold. A sensible interpretation could be that demand-side substitutability should be evaluated with respect to both wholesale and retail levels. While "wholesale demand" usually nearly perfectly reflects consumers' demand, certain (often government-distorted) markets do contain a discrepancy between both levels. This interpretation would therefore truly reflect the "body of demand constraints" a certain producer is facing. In any case, it seems that the general idea is to deem the "consumer" to be the one who will have the choice between product X and Y.⁵³ The supply-side substitutability assessment is also interesting. Requiring that a supplier be "more or less easily able to switch its production from one product to another" seems like a very high burden of proof. It even seems improbable that windpower and solar PV energy producers, which were deemed by the AB to be in the same market, would be able to satisfy this criterion by "somewhat easily" switching from windpower to solar PV and vice versa. The AB therefore seems to interpret this criterion broadly.

C. Identifying the Benefit Benchmark within the Proper Market

The AB finally turned to the identification of a benefit benchmark within the market of windpower and solar PV energy generation in Ontario. In doing so, the AB firstly stated that the fact that a government is highly involved in the market does not constitute in and of itself an advantage (and therefore a subsidy). Especially in cases where a market would not exist without government intervention, one must prove that this intervention does not reflect competitive pricing. In this case, the AB affirmed that the benchmark is to be found when comparing to a situation where the government has also created a market for windpower and solar PV-generated electricity by having a similar energy supply-mix definition for these forms of energy. "In other words, find a similarly distorted market, and compare your situation to that

⁵² In contrast to conventional electricity production, windpower and solar PV have very high capital costs, very low operating costs, and virtually no economies of scale.

⁵³ An example could be an aircraft electric systems manufacturer selling his products to a carrier like Bombardier Aeronautics. In this case, the passengers (i.e. the ones that would normally be called "consumers" according to the ordinary meaning of this word) will not differentiate with regard to planes with electric system X or Y. The main considerations when purchasing the flight ticket will be the flight departure date, the price and the level of comfort on board. On the other hand, Bombardier Aeronautics will in fact differentiate between electric system X or Y as they have a measurable impact on the aircraft's overall price and efficiency. In this sense, Bombardier Aeronautics, and not the passengers, should be understood as the electric systems' "consumer".

situation. If your situation is more distorted than other distorted markets, then there is a benefit. If it's not, there is no benefit".⁵⁴ The AB ultimately noted that it could not apply this “benchmark test” to the present case because none of the parties have presented a “similarly distorted market” before the panel and that the AB was not authorized to look for one on its own. For this reason, the AB refused to qualify the measure as a “subsidy” under article 1 of the *SCM Agreement*.

IV. Are we not Entangled in the Details Here? A Comment on Benefit Determinations

A. Would an Alternative Benefit Determination be Possible?

The need for a comparison with the market is what makes this report highly technical. Electricity, unlike most other goods, would not have a viable market were the government not to intervene.⁵⁵ There usually is no such thing as a free market for electricity producers and it is for this reason that this report is struggling to determine what the relevant market should be. A great deal of effort was spent in comparing the government’s remuneration to what the market otherwise would have offered.⁵⁶ Given the great complexity of the market determination for electricity, one may argue that the WTO’s benefit determination test may not be the most appropriate. The panel itself even noted that certain other techniques have previously been used in jurisprudence for benefit determination and that an interpretation based on article 14(d) only is *one* way in which this assessment may be carried out.⁵⁷ Would an alternative benefit determination therefore be possible?

⁵⁴ Simon Lester, “The AB’s ‘Benefit’ Reasoning in the Renewable Energy/Feed-in Tariff Case”, (2013) online: International Economic Law and Policy Blog <<http://worldtradelaw.typepad.com>>.

⁵⁵ *Canada – Renewable Energy (Panel)*, *supra* at note 11 at para 7.282-7.283: “this theoretical market ideal has not yet been achieved in many electricity systems, including in Ontario. [...] governments and regulators have sought to control [...] price volatility by intervening in the market because of the value of stable electricity prices to their economies, with the consequence that many countries have experienced insufficient investment in generation because the price achieved on their “organized” wholesale market is not allowed to rise to a level that, in the long-run, fully compensates generators for the all-in cost of their investments”.

⁵⁶ *Ibid.* About 30 pages cover this issue in each decision. An impressive amount of evidence has been supplied on this matter, including an extensive expert report. The parties have suggested a series of different relevant markets, each of them with great detail. See sections on “The economics of electricity markets” and the “missing money problem”, “Ontario’s 2002 wholesale electricity market experience”, “The IESO-administered wholesale electricity market”, “Wholesale electricity markets outside of Ontario” at 116-129 and “Electricity in Ontario” at 35-50.

⁵⁷ The Panel (*Canada – Renewable Energy (Panel)* *supra* note 11) in a foot note in para 7.271, states that: “to date, the “marketplace” has not been explicitly used as a benchmark to determine whether financial contributions taking the form of the measures described in article 1.1(a)(ii) of the SCM Agreement (i.e. where “government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)”) confer a benefit. Panel Reports, US – FSC, para. 7.103; and US – FSC (article 21.5 – EC), paras. 8.44-8.48; and Appellate Body Reports, US – FSC, para. 140; and US – FSC (article 21.5 – EC), para. 198” at p 114.

It does not seem so. One should note that the cornerstone of the AB's reasoning⁵⁸ is article 14(d) of the *SCM Agreement*. While article 1 of the *SCM Agreement* seems to suggest that a simpler interpretation would suffice, article 14(d) explicitly calls for this method, even for the determination of the *existence* of a benefit:

Article 14

Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient

For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method 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)

“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” is crucial here. On the one hand, this argument is surprising, as this provision was drafted “for the purpose of Part V”, which covers countervailing measures and should therefore have nothing to do with the definition of a subsidy.⁵⁹ On the other hand, the provision's language does seem clear; the use of the exact same word, “benefit”, as in article 1 demonstrates that the drafters intended to refer to the same concept. It therefore seems that the drafters did express the will that benefit determinations always be carried out this way, even if this may sometimes turn out to be complicated. And, finally, it seems that the exception in case law to article 14's market-oriented benefit determination technique earlier pointed out by the panel⁶⁰ is more the result of judicial economy than of opposition to this technique.⁶¹

⁵⁸ Both in *Canada – Renewable Energy (AB) supra* note 6 and in *Canada – Aircraft, (Complaint by Brazil)* (1999) WTO Doc WT/DS70/R [*Canada – Aircraft*], which is the decision from which the AB in *Canada – Renewable Energy* based itself for this determination.

⁵⁹ Moreover, this provision aims at quantifying the amount of the benefit (and therefore of the countervailing measure), which also is different from verifying the existence of a benefit.

⁶⁰ See commentary at note 57.

⁶¹ This exception to the rule took place in *United States – Tax Treatment for “Foreign Sales Corporations” (Complaint by European Communities)* (1999), WTO Doc WT/DS108/R (Panel Report) [*US – FSC*], where the alleged subsidy was a form of tax credit. It seems that the panel, in

B. A Plea for a Simplified Benefit Determination

As stated earlier, the origin of this rule is stated in paragraph 149 of *Canada – Aircraft*, where the AB stated that:

“[...] the ordinary meaning of “benefit” clearly encompasses some form of advantage. ... In order to determine whether a financial contribution (in the sense of article 1.1(a)(i)) confers a “benefit”, *i.e.*, an advantage, it is necessary to determine whether the financial contribution places the *recipient in a more advantageous position than would have been the case but for the financial contribution.*”

In our view, the only logical basis for determining the position the recipient would have been in absent the financial contribution is the market [...]”⁶² (emphasis added)

While the first section of the paragraph perfectly encompasses the idea of a simplified benefit determination technique, the second section of the paragraph contradicts this idea by systematically imposing a comparison to the market. It will be argued that the first section of this paragraph alone would have been a more appropriate basis to benefit determinations.

The real nuisance caused by subsidies is not the fact that the help is distinctly more favourable than the market; it is the mere fact that this help is not granted even-handedly. In this sense, anything that helps, if distributed arbitrarily, will have trade-distorting effects. The question at the benefit determination stage should not be “just how much is the government's help worth?”, and should rather be “was this governmental intervention helpful or not?” This latter question should be simpler to answer. Now comparing the government's help with the market, as is done in case law, is a good standpoint to establish the existence of this help. It should however be emphasized that this market-oriented technique should only be applied when convenient,⁶³ and should otherwise not be mandatory.

para. 7.103, deemed it so obvious that tax exemptions indeed confer a benefit that it did not even bother going further into the details:

“7.103 Having found that the various tax exemptions under the FSC scheme give rise to a financial contribution, our next task is to consider whether a benefit is thereby conferred. In our view, the financial contribution clearly confers a benefit, in as much as both FSCs and their parents need not pay certain taxes that would otherwise be due. Further, that benefit can be quite substantial: according to the US Department of Commerce, “the tax exemption can be as great as 15 to 30 per cent on gross income from exporting”. We note that the United States has raised no contrary argument with respect to the issue of benefit”.

Had the panel used article 14's technique, it would most likely have determined that there is a benefit by comparing the situation at hand, where certain taxes are credited, to that of the “market”, where taxes are paid. This exception in the case law may therefore not be interpreted as a precedent of opposition to article 14's market-oriented benefit determination technique.

⁶² *Canada – Aircraft*, *supra* note 58.

⁶³ This market-oriented technique will be convenient in contexts where the state of the market is easy to determine, such as the granting of a loan with 5% interest when the market would normally impose 7% interest. On the contrary, the market-oriented technique will not be convenient in contexts where the market is distorted by the government's intervention.

Simpler techniques could be used when the market-oriented one proves to be too intricate. Rarely will an economic development-g geared measure be of absolutely no help. Hence, the “simplified technique” could presume the existence of a benefit if (a) the measure was meant to foster economic development; or (b) if competitors would have preferred this measure to apply to them as well. This presumption should only be rebuked if it is evidenced that the measure in fact was detrimental. In this sense, it seems that the attribution of FIT contracts should have fulfilled the “simplified benefit determination test”. The attribution of supply contracts, even on terms approximating the market, for periods as long as 20 to 40 years would certainly be something any competitor would prefer benefiting from as well.⁶⁴

Others are also of the view that that the AB's benefit determination technique should be simplified. The dissenting opinion of one of the panelists in *Canada – Feed-in Tariff* is a good example. After having failed to determine whether the challenged measure provides for “more than adequate remuneration”, the panelist found that a benefit nonetheless existed, as the mere presence of these renewable energy suppliers on the market was the result of the government’s help.⁶⁵ In other words, after having found the market-oriented technique to be fruitless, the panelist opted for a simpler, more straightforward approach. Professor Rubini also emphasises the need for a simpler method. He contends the subsidy analysis, at such an early stage (determination of its existence, as opposed to its legality), should “emerge from what is merely a preliminary and limited [...] counterfactual analysis that operates by reference to a positive alteration of the *status quo*”.⁶⁶ Moreover, Professor Sykes “questions the adequacy of market benchmarks when determining whether a benefit is conferred because they ignore the numerous effects that governmental measures have on the competitive position of firms in an industry”.⁶⁷

Finally, the need for flexibility during benefit determinations in the *SCM Agreement* has already been expressed by the AB on several occasions. In *Canada – Dairy* (article 21(5) I),⁶⁸ the AB opted for an alternative benchmark (the cost of production) in the context of the Canadian milk market, which is characterized by

⁶⁴ The consequence of adopting this “simplified benefit determination” technique is that entire government-created markets, such as electricity, would most likely be deemed as subsidies. The only rampart to their illegality would then be their non-specificity. This last rampart, in and of itself, does seem sufficient. It is indeed sensible to require that contracts in government-created markets be distributed even-handedly. The disadvantage to this “simplified benefit determination” will be that competitors may feel more prone to bring illegal subsidy disputes to the WTO in the context of government-created markets. The subsidy qualification already being straightforward, any acts on the government's part that could resemble arbitrariness would easily be the object of a dispute. All in all, the AB did not have to go through all these technical details to preserve the legality of FITs.

⁶⁵ *Canada – Renewable Energy (panel)*, *supra* at note 11 at para 9.23.

⁶⁶ Luca Rubini, “Ain’t Wastin’ Time No More: Subsidies for Renewable Energy, The *SCM Agreement*, Policy Space, and Law Reform” (2012) 15:2 *J Int’l Econ L* 525 at 546 [Rubini].

⁶⁷ Quote from Whitsitt, *supra* note 7 at 94, discussing Alan O Sykes, “The Questionable Case for Subsidies Regulation: A Comparative Perspective” (2010) 2:2 *J Legal Anlys* 473.

⁶⁸ *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to article 21.5 of the DSU by New Zealand and the United States* (2001), WTO doc WT/DS103/AB/RW, WT/DS113/AB/RW (Appellate Body Report) [*Canada – Dairy*].

heavy governmental regulation. *US – Softwood Lumber IV*⁶⁹ is another example. Here, the AB recognized that prices of similar goods sold by private suppliers in the country of provision cannot be the exclusive benchmark *if certain conditions make them unreliable*. The AB concluded that these prices should be considered as a starting point and could then include “proxies that take into account prices for similar goods quoted on world markets” or “proxies constructed on the basis of production costs”.⁷⁰ These numerous benefit determination technique variations are emblematic of the AB's struggle to efficiently comply with the injunctions of article 14 of the *SCM Agreement*.

It seems that article 14 of the *SCM Agreement* was drafted to add more precision and predictability to subsidy determinations by requiring a comparison with “prevailing market conditions”. However, it also seems that the drafters did not foresee that this additional level of precision would be problematic in the context of government-regulated markets. In any case, the inadequate state of the law with respect to government-regulated markets probably is one of the motives that lead the AB to come up with such a complex and arguably creative reasoning.

C. Potential Defects of the Current Technique

As evidenced in *Canada – Feed-in Tariff* (and in other similar reports⁷¹), the market-benchmark-oriented technique seems to bear certain shortcomings when it comes to markets regulated by governments. Indeed, this technique seems to be the very reason for which the AB was unable to complete its benefit analysis.⁷² The most obvious shortcoming is the simple fact that the market benchmarks will themselves be distorted by the government's regulation of the market, hence creating the need to refer to external, unpredictable and potentially arbitrary benchmarks.⁷³ Importantly, as will be discussed in this sub-section, the current state of the law risks allowing the creation of a series of loopholes.

Any form of benefit that cannot be deemed as “more than adequate remuneration” cannot amount to a subsidy. A government could therefore theoretically grant benefits that would roughly amount to an “adequate remuneration”

⁶⁹ *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* (2004), WTO doc WT/DS257/AB/R (Appellate Body Report) [*US – Softwood Lumber*].

⁷⁰ *Ibid* at para 106.

⁷¹ *Canada – Feed-in Tariff* *supra* note 6; *Canada – Dairy*, *supra* note 68; *US – Softwood Lumber*, *supra* note 69.

⁷² The situation was so complex that the test it came up with required information it did not have. One could think the AB would have preferred coming up with a test that would have enabled it to complete its analysis but was unable to do so because of the poor match between the market benchmark test and government-regulated markets.

⁷³ As was experienced by the AB in *Canada – Renewable Energy (AB)* *supra* note 6, *Canada – Dairy*, *supra* note 68; *US – Softwood Lumber*, *supra* note 69.

on an arbitrary basis.⁷⁴ An example of this loophole could be the granting of energy supply contracts for a remuneration close to the market benchmarks, for a period of 30 years, and only to certain enterprises. Here, the 30 year-long supply contract clearly is beneficial to the enterprise while being overlooked by the *SCM Agreement*. Moreover, the AB's requiring in *Canada – Feed-in Tariff* of a similarly distorted market as a basis for comparison creates a very simple problem: what if there are no similar markets elsewhere? Again, a government could theoretically “shield” its illegal subsidy from the *SCM Agreement* by creating a supply-mix so marginal that it cannot be compared to any other.

The AB overtly stated that its benefit determination was engineered so as to avoid transforming government-created markets that would otherwise not exist into *de facto* subsidies.⁷⁵ It however omitted to mention what criteria should be considered in determining whether a new, government-created market should be encompassed by this reasoning. Does this new market have to be justified by socially-beneficial outcomes, such as the protection of the environment? Just how does one identify a new market? In any case, this reasoning may allow the subsidization of uncompetitive production technologies in already existing markets. For instance, could Canada subsidize domestic greenhouse pineapple growers in order to develop a nascent, uncompetitive⁷⁶ market for Canada-grown pineapples?⁷⁷

D. In the End, was the AB not Trying to Carve Out an Exception for Socially Beneficial Subsidies?

WTO law formerly used to consider certain socially-beneficial subsidies as “non-actionable”. “One of the fundamental concerns raised by international economic law scholars on the WTO’s system of subsidy regulation [has been] its failure to differentiate between socially constructive subsidies versus protectionist subsidies”⁷⁸; how such differentiation should be achieved is subject to much academic debate.⁷⁹ In addition to being overly complicated and poorly adapted to government-regulated markets, the *SCM Agreement* leaves no room for social considerations. Of the few

⁷⁴ This would be the case for a subsidy, which would normally be “specific” under article 2 of the *SCM Agreement*, but which cannot be found to be a subsidy in the first place because of its absence of “benefit”.

⁷⁵ See: *Canada – Renewable Energy supra* note 6 at para 5.188: “[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”.

⁷⁶ Assuming domestic production in greenhouses would be more costly than importing pineapples from tropical countries.

⁷⁷ Pal, *supra* note 49 at 135.

⁷⁸ Whitsitt, *supra* note 7 at 93.

⁷⁹ *Ibid.*

authors commenting the report, almost all expressed that they could feel the AB was somehow trying to carve out an exception to the benefit determination for FITs because of their socially desirable outcome.⁸⁰ This impression probably comes from the fact that the AB repeatedly stated the importance of green-energy production and emphasized that government-created markets did not, in and of themselves, constitute a subsidy.⁸¹

In any case, and regardless of the fact that this was not explicitly stated, it seems that the AB's motive to arrive at this conclusion (tolerating government-created markets) in fact was to protect green-energy production. As previously stated, green-energy technology is not yet advanced enough to compete with other traditional forms of energy production technologies. It is therefore desirable that a government intervene in the green energy sector in order to reduce reliance on fossil energy sources. It is as if the AB more or less subconsciously intended to carve out this exception for a cause it deemed so urgently important. In this sense, one could think the government-created market tolerance logic is more likely to apply in cases where the measure is meant to respond to a socially urgent need. One could therefore argue that the AB also felt like the current state of the law was too rigid and that certain exceptions should apply. It is in this sense that it could be argued that this report is being “imaginative” in a context of “legislative drought”.⁸² The AB's reasoning does seem to be a victory for the renewable energy industry.

V. Would *GATT* Article XX'S General Exceptions Apply?

GATT article XX(b) reads as follows:

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:

(...)

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

⁸⁰ “The Appellate Body and Panel decisions were functionally similar in that both recognized the need to shelter the FIT programme from the finding that it constituted ‘a benefit’ due to the special characteristics of the market” Giorgio Sacerdoti et al, “WTO Case Law in 2013” (2014) online: Social Science Research Network <<http://ssrn.com>> at 8 [Sacerdoti]; “As evidenced by the Ontario government’s implementation of its FIT program, government intervention in the economy usually goes hand in hand with public policy objectives. From a legal perspective, one issue to consider is whether such objectives should be taken into account at the stage of determining the applicability of the *SCM Agreement* (i.e. whether there is a subsidy that confers a benefit)” Whitsitt, *supra* note 7 at 96; “In fact, the Appellate Body’s reasoning strains to reach what appears to be a preordained result motivated by a desire to exempt government support for renewable electricity from the disciplines of the *SCM Agreement*; Pal, *supra* note 49 at 126.

⁸¹ See: *Canada – Renewable Energy (AB)*, *supra* note 6 at 5.185 to 5.188.

⁸² Pelec *supra* note 8.

In other words, this provision allows for exceptions to *GATT* violations “necessary to protect human, animal or plant life or health”. This article’s application to the present dispute would then open the door to what the AB arguably has struggled to create: an exception to the *SCM Agreement* for environmentally urgent measures. However, two significant hurdles make this provision’s application unlikely: (1) the incertitude regarding *GATT* article XX applicability to the *SCM Agreement*; (2) *GATT* article XX’s intrinsically high evidentiary standard. This section will address these two issues.

A. **Incertitude Regarding *GATT* Article XX’s Applicability to the *SCM Agreement***

The applicability of *GATT* article XX to the *SCM Agreement* still is the object of much debate on the academic scene;⁸³ so far, there is no clear answer.⁸⁴ The majority⁸⁵ of academics discussing the question are of the opinion that such a link cannot be made. This opinion is anchored in convincing treaty interpretation arguments. Allowing for the article XX exceptions to apply to other WTO Agreements would have tremendous legal and financial ramifications. Had the drafters intended this to be a possibility, they would have explicitly stated it; nothing in either agreements points in this direction. Quite on the contrary, article XX’s *chapeau* states that, “nothing in this Agreement shall be construed to prevent the adoption or enforcement (...) of (the following) measures” (emphasis added). This indicates that the article XX exceptions are limited to the constraints set forth by the *GATT Agreement*. Had members wanted a justification to be available in the *SCM Agreement*, they would have done like in other agreements, such as the *WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)*, which expressly mentions the applicability of such exceptions.⁸⁶ Moreover, the AB, in *China – Various Raw Materials* found that Paragraph 11.3 of China’s *Accession Protocol* did “not contain any reference to other provisions of the *GATT* 1994, including article XX”.⁸⁷ The Panel emphasized that, “it is reasonable under these circumstances to assume that, were *GATT* article XX intended to apply to Paragraph 11.3 of China’s *Accession Protocol*, language would have been inserted to suggest this relationship”.⁸⁸ All in all, applying article XX to out-of-*GATT*

⁸³ For arguments in favor of its application, see Joost Pauwelyn, Testimony before the US Subcommittee on Trade of the House Committee on Ways and Means at 9 (2009), online: Ways and Means <<http://waysandmeans.house.gov>>; *SCM Agreement supra* note 10; Rubini, *supra* note 66 at 558; see: *ibid* 561-565 for a summary of arguments on both sides.

⁸⁴ Whitsitt, *supra* note 7 at 93; Rubini, *supra* note 66 at 561.

⁸⁵ Rubini, *supra* note 66 at 561.

⁸⁶ Another example is the *TRIMs Agreement*. The AB ruled that justifications of *TRIMs Agreement* violations through article XX *GATT* are possible, as article 3 of the *TRIMs Agreement* states that “[a]ll exceptions under *GATT* 1994 shall apply, as appropriate, to the provisions of this Agreement”. *China – Measures Related to the Exportation of Various Raw Materials* (2012) WTO doc WT/DS398/AB/R at para 303 (Appellate Body) [*China – Raw Material (AB)*].

⁸⁷ *Ibid*.

⁸⁸ *China – Measures Related to the Exportation of Various Raw Materials* (2011) WTO doc WT/DS398/R at para 7.154 (Panel).

Agreements would undermine the inner balance of rights and obligations negotiated by the parties.

On the other hand, there also exists a group of (although less numerous) academics arguing in favor of the applicability of article XX *GATT* to out-of-*GATT Agreements*. The legal anchoring of this reasoning is that WTO law is a single undertaking developed in various intertwined and integrated agreements.⁸⁹ This comes out of the General Interpretative Note to Annex 1A of the *WTO Agreement*.⁹⁰ In this respect, it is clear that the *SCM Agreement* develops on the *GATT* with respect to subsidies.⁹¹ In *US—AD/CVD*, the AB noted that “the WTO is one single legal system and that the covered agreements cannot be read in clinical isolation”.⁹² The footnote to article 32.1 of the *SCM Agreement* specifies that, “this paragraph is not intended to preclude *action under other relevant provisions of GATT 1994*, where appropriate” [emphasis added]. This seems to indicate that other provisions of the *GATT*, such as article XX, do apply to the *SCM Agreement*. Moreover, article XX’s *chapeau*, including the reference to “this agreement” (allegedly limiting the provision’s application to the *GATT*), was merely copy-pasted from its earlier counterpart in the *GATT 1947*.⁹³ There only existed one single agreement at the time the *chapeau* was drafted – it was therefore not intended to limit article XX’s scope.⁹⁴

⁸⁹ Robert Howse, *Climate Change Mitigation Subsidies and the WTO Legal Framework: A Policy Analysis* (Winnipeg, Manitoba: International Institute for Sustainable Development, 2010) at 6; Christopher Tran “Using GATT, article XX to Justify Climate Change Measures in Claims Under the *WTO Agreements*” (2010) 27 *Envtl & Plng LJ* at 355; Amicus Curiae Submission by IISD, CELA Ecojustice Canada – *Certain Measures Affecting the Renewable Energy Generation Sector* (2012) WTO Doc WT/DS412 at 6-19 online: IISD <www.iisd.org> [*Canada—Renewable Energy (Amicus Curiae brief)*].

⁹⁰ ANNEX 1A: Multilateral Agreements on Trade in Goods
General Agreement on Tariffs and Trade 1994
Agreement on Agriculture
Agreement on the Application of Sanitary and Phytosanitary Measures
Agreement on Textiles and Clothing
Agreement on Technical Barriers to Trade
Agreement on Trade-Related Investment Measures
Agreement on Implementation of article VI of the General Agreement on Tariffs and Trade 1994
Agreement on Implementation of article VII of the General Agreement on Tariffs and Trade 1994
Agreement on Preshipment Inspection
Agreement on Rules of Origin
Agreement on Import Licensing Procedures
Agreement on Subsidies and Countervailing Measures
Agreement on Safeguard

⁹¹ Article 32.1 of the *SCM Agreement supra* note 10 emphasizes that “no specific action against a subsidy of another Member can be taken except in accordance with the provisions of the *GATT 1994*, as interpreted by this Agreement” (emphasis added). The *SCM Agreement* therefore interprets or develops on the provisions of the *GATT 1994*.

⁹² See: *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (2011), WTO Doc WT/DS379/AB/R at 136 (Appellate Body Report) [*US—AD/CVD*].

⁹³ Simon Lester, Bryan Mercurio & Arwel Davies, *World Trade Law: Text, Materials and Commentary*, 2 edition ed (Oxford, United Kingdom: Hart Publishing, 2012) at 455.

⁹⁴ *China – Periodicals supra* note 37, the AB did not interpret the reference to “this Agreement” as limiting the application of article XX to the *GATT 1994*. In the earlier *Brazil – Measures Affecting Desiccated Coconut* (1997), WTO Doc WT/DS22/AB/R at 17 (Appellate Body Report), the Appellate Body found that the meaning of “this Agreement” in article 32.3 of the *SCM Agreement* refers to the

Furthermore, several examples exist in the case law where article XX was applied to out-of-GATT legislation.⁹⁵ In *China – Periodicals*, the AB found a “clearly discernible, objective link” between China’s Accession Protocol and the regulation of trade in goods.⁹⁶ The links between the *SCM Agreement* and the *GATT* arguably are even stronger than in this latter case. According to this reasoning, article XX should apply to the *SCM Agreement*. A fully-fledged assessment of article XX’s application to the *SCM Agreement* falls outside the scope of this paper. This issue certainly is rich enough to be the object of much research in and of itself. The point here only is that successfully invoking article XX (b), as a defence to the eventual violation of the *SCM Agreement*, seems possible, although unlikely.

B. *GATT* Article XX’s Intrinsicly High Evidentiary Standard

In the unlikely event that article XX could be applicable to the *SCM Agreement*, the AB would firstly assess whether the measure is “necessary to protect human, animal or plant life or health”⁹⁷. It would then move to the *chapeau* assessment, which requires measures to not be “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”. All in all, the article XX test has high evidentiary standards and is difficult to pass.⁹⁸

Clearly, the FIT measure relates to article XX(b) (the protection of human, animal or plant life or health), as its object was to replace Ontario’s coal-based energy production with greener production methods.⁹⁹ Whether the measure is *necessary* for the achievement of this objective is another question. In *US – Section 337*, the Appellate Body affirmed that a measure is not “necessary” if there is a *reasonably available* alternative measure that leads to a lesser degree of inconsistency with *GATT* rules¹⁰⁰. In *US – Gasoline*, the DSB affirmed an alternative clearly is “reasonably available” if it merely entails administrative difficulties¹⁰¹. Finally, in *Korea – Beef*, the Appellate Body specified that,

SCM Agreement and article VI of the *GATT* 1994; *Canada – Renewable Energy (Amicus Curiae brief)* *supra* note 89.

⁹⁵ This is the case for *China – Periodicals* *supra* note 37, where the AB concluded article XX applied to China’s *Accession Protocol*.

⁹⁶ *China – Periodicals* *supra* note 37 at para 233.

⁹⁷ Whitsitt *supra* note 7 at 97.

⁹⁸ Whitsitt *supra* note 7 at 98; Jan-Christoph Kuntze & Tom Moerenhout, “Are Feed-In Tariff Schemes with Local Content Requirements Consistent with WTO Law?” (2013) online: Social Science Research Network <<http://ssrn.com>> at 15 [Kuntze & Moerenhout “Feed-In”].

⁹⁹ “one of the fundamental objectives of the FIT Programme is to secure investment in new generation facilities for the purposes of diversifying Ontario’s supply-mix and helping to fill the supply gap that is expected from the closure of Ontario’s coal-fired facilities by 2014”, *Canada – Renewable Energy (AB)*, *supra* note 6 at 2.173.

¹⁰⁰ *United States – Section 337 of the Tariff Act of 1930 and Amendments thereto (Complaint by the European Communities)* (2000) WT/DS186 (Request for Consultation) [US – Section 337].

¹⁰¹ *United-States – Standards for Reformulated and Conventional Gasoline (Complaint by Venezuela, Bolivarian Republic of)* (1996) WTO Doc WT/DS2/R at para 6.25-6.28 (Panel Report) [US – Gasoline].

in sum, determination of [whether a measure may] be “necessary”, involves a process of weighing and balancing a series of factors which prominently include (1) the contribution made by the compliance measure to the enforcement of the law at issue; (2) the importance of the common interests or values protected by that law or regulation; and (3) the accompanying impact of the law on imports or exports.

FITs with LCRs would not pass the “necessary to protect human, animal or plant life or health” test, as LCRs do interfere with trade and are not necessary to replace its coal-based energy production with greener production methods.¹⁰² However, it is possible that FITs without LCR would pass this test, as they (1) contribute directly to the creation of new and greener energy production methods; (2) respond to the urgent need to protect the ozone layer by eliminating coal-based energy production; (3) have a minor impact on trade. Whether FITs without LCR would pass the *chapeau* test is impossible to answer, as this all depends on the manner in which Ontario would apply them. The legality of FITs without LCRs is hypothetical here because Ontario's measure comprised LCRs.¹⁰³ In any case, FITs without LCR could possibly be justified if implemented and applied in an even-handed manner.

In addition to being a technically demanding read, this report is somewhat disappointing in that it arguably avoids answering the two thorny questions that were submitted. Indeed, the AB has (probably in the name of judicial economy¹⁰⁴) fallen short of completing its legal analysis both regarding the article III:8(a) test and article 1 of *SCM Agreement's* benefit determination for technical reasons. These two questions are far from being minor details and it seems that judicial clarity should have outweighed judicial economy. The result now is that the state of the law regarding these two issues remains almost as uncertain as it was in the first place.¹⁰⁵

When reflecting on the overall effect of this report, one realizes that it prohibits FITs with LCRs and, in principle, allows FITs without LCR. In order to determine whether this outcome is desirable or not, one must be familiar with the

¹⁰² One could argue that LCRs add a “local job creation” aspect to the opting for green energy, which makes it an easier political decision to make. It is however very unlikely that this “local job creation” component be necessary for this project to take place.

¹⁰³ Consequently, Ontario has no experience of implementing FITs without LCR.

¹⁰⁴ Jurisprudence affirms that nothing in the DSU requires panels to consider every issue (*EC – Canada-Autos*) *Canada – Certain Measures Affecting the Automotive Industry (Complaint by Japan)* (2000), WTO Doc WT/DS139/R.

¹⁰⁵ “This dispute's unclear outcome will further discourage LCRs by creating an atmosphere of legal uncertainty for investors. The general applicability of the Appellate Body's reasoning here is uncertain, as it dismissed article III:(8)a on a somewhat technical basis that the product being procured by the government (electricity) was not ‘like’ the imported product in dispute (electricity-generating equipment). Sacerdoti *supra* note 80 at 8.

debate regarding LCRs. In a context of economic austerity,¹⁰⁶ LCRs make decisions regarding the financing of green energy much more politically desirable; they add a much-needed “job creation” aspect to the political decision, thus making it much more acceptable to the public than investing large sums in technology produced abroad.¹⁰⁷ Moreover, in a context where only a few companies dominate the market, LCRs have the potential to foster competition, as they allow “late comers”, such as Canada, to enter the market.¹⁰⁸ Furthermore, LCRs generate tax revenues to governments. LCR advocates are therefore likely to claim that this report portrays how WTO law can have the ridiculous effect of prioritizing free-trade over urgent¹⁰⁹ environmental issues. On the other hand, economists will claim that LCRs are in opposition to the concept of comparative advantage and therefore result in an important waste of funds that could have been injected into renewable energy.¹¹⁰ More importantly, an extensive research analyzing FIT programs containing an LCR in 13 countries on all continents concludes that the vast majority of these programs fail to foster competition in renewable energy production.¹¹¹ It is said that, “most countries using them base their policy choices on political motivations, rather than on economic and empirical analyses, which remain largely absent in the case of LCR”.¹¹² Some argue that such policies are likely to focus more on job creation and tax revenues than research and development in the renewable energy sector.¹¹³ The risk is that subsidies are “difficult to withdraw once interests become cemented in politics and policies”.¹¹⁴ Finally, given that FITs with LCRs have not yet proven to be beneficial in the development of renewable energy production, the AB's report to forbid them seems unlikely to have a negative effect.

¹⁰⁶ Since 2009, the world has seen an increase of 27 million unemployed, to a total of 200 million. Peat *supra* 1 note 1.

¹⁰⁷ Kuntze & Moerenhout “Feed-In” *supra* note 98.

¹⁰⁸ Nilmini Silva-Send, “Climate Change Disputes at the World Trade Organization: National Energy Policies and International Trade Liability” (2012) San Diego J Climate & Energy L 195.

¹⁰⁹ Power generation is the most important contributor to GHG emissions, with close to 25% of the current total emissions. REN21 *supra* note 2.

¹¹⁰ Amar Breckenridge, “A Review of the Economics of a WTO Panel Ruling on Feed-in Tariffs and Local Content Requirements” (2013) online: Frontier Economics Australia <<http://www.frontier-economics.com>>.

¹¹¹ Jan-Christoph Kuntze and Tom Moerenhout, “Local Content Requirements and the Renewable Energy Industry- a Good Match?” (2012) online: International Center for Trade and Sustainable Development <<http://ictsd.org>> [Kuntze & Moerenhout “Local Content”].

¹¹² *Ibid* at p 1.

¹¹³ *SCM Agreement supra* note 10; Rubini *supra* note 66.

¹¹⁴ Kuntze & Moerenhout “Local Content” *supra* note 111 at 7.