BEFORE THE

WORLD TRADE ORGANIZATION
DISPUTE SETTLEMENT BODY

- APPELLATE BODY -

Canada – Certain Measures Affecting the Renewable Energy Generation Sector
Canada – Measures Relating to the Feed-In Tariff Program
(WT/DS412, WT/DS426)

Written Submission of Non-Party Amicus Curiae

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Canada – Renewable Energy/FIT	Panel Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector, Canada – Measures Relating to the Feed-In Tariff Program*, WT/DS412/R, WT/DS426/R), circulated 19 December 2012
Canada - Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999
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Summary

- The *Canada – Renewable Energy/FIT* appeals provide the Appellate Body with the opportunity to clarify key concepts of the definition of subsidy under Article 1 of the SCM Agreement and develop its jurisprudence. The significance of these appeals goes beyond the green economy sector and affects the proper understanding and operation the WTO system of subsidy control in itself. What can emerge from these disputes is a well-balanced notion of subsidy, eventually clarified in all its constituent elements.
- The definition of subsidy is a treshold issue. It is simply the main gateway to subsidy disciplines. Through an assessment which is inherently preliminary, often imprecise and pragmatic, its goal is to select some measures of public support and subject them to the relevant disciplines.
- In approaching the interpretation of the definition of subsidy it is important to recall that:
    - language, requirements and tests of the definition should be interpreted having in mind the purpose of the definition and the objective of the relevant disciplines;
    - the definition requires an analysis that is only preliminary, and as such should not exhaust the assessment of the measure;
    - since potentially several measures may produce effects similar to subsidies, for practical and other reasons, the meaning and scope given to the legal notion of subsidy should not be excessive.
- The Appellate Body is called to interpret the phrase 'income or price support' for the first time. This requirement broadens the scope of the definition beyond the 'financial contribution' element to which is alternative. Despite a relatively unqualified language, it should not be interpreted in an open ended fashion but in harmony with the rest of the definition, and in particular the companion element of the financial contribution. In particular, the focus of the interpretation should firmly be the form or type of action rather than its effects. 'Price support' can accordingly refer only to those schemes where the government directly sets and maintains a given price, rather than to those cases where changes in price are merely a side-effect of any form of government measures.
- 'Price support' is the best characterization of Ontario's FIT Programme.
- The objective of the benefit analysis, which is broadly the same of the definition of subsidy, is fairly simple. It is there to capture those measures that have the potential to distort trade. No more, no less. No comprehensive analysis to conclusively determine whether this

potential has translated into actual harm is necessary, no consideration of the redeeming, even if legitimate, objectives of the measures is permitted.

- The Panel majority's analysis of the benefit is fundamentally wrong since it confuses and conflates the question of the economic and policy justification of the subsidy the the different and separate question of its existence.
- The FIT measures at issue represent, in their stated goal and resulting effect, a deviation from what the electricity market, left to its own forces, would normally provide, and this deviation is advantageous for the eligible wind and solar renewable energy generators.
- The fact that the market is even fundamentally, distorted, to the extent that the public hand creates it, does not represent an obstable to – but rather evidence for – the determination of the existence of a benefit.
- It is therefore indisputable, almost self-evident, that Ontario's FIT Programme confers a benefit.

I. Introduction

1. The Appellate Body can, at its discretion, accept and consider unsolicited *amicus curiae* briefs from non-governmental persons. There is no particular procedure for submitting *amicus curiae* submissions. This brief has been submitted electronically, via an email sent to Dr Werner Zdouc, the Director of the Appellate Body Secretariat of the World Trade Organization ('WTO').

2. The author is a full-time academic with a long-standing interest in the study of the law and policy of public subsidies. This brief does therefore focus on the legal interpretation of the subsidy claims raised in the appeals. Although equally important, the appeals on the national treatment obligation are not addressed.

3. What has motivated the decision to submit this brief is the importance of these disputes for the clarification of concepts that are central to the regulation of public support to the green economy. In fact their significance goes beyond this sector and affects the proper understanding and operation the WTO system of subsidy control in itself.

4. The Appellate Body is called to interpret key definitional concepts, in some cases for the first time, and thus develop the existing jurisprudence. What can emerge from this dispute is a well-balanced notion of subsidy, eventually clarified in all its constituent elements. If the interpretations are consistent with the goals of the Agreement on Subsidies and Countervailing Measures ('SCM Agreement'), and, within it, with the goal of the definition of subsidy under Article 1, the outcome cannot but be proper and, importantly, cannot but be perceived as such.

5. This brief offers a proposal of interpretation. Some arguments will result obvious but, considering the serious perplexities raised by some findings of the Panel, and its reticence in other respects, they may be worth repeating.

II. The author

6. Luca Rubini is Reader (Associate Professor) in International Economic Law and Deputy-Director of the Institute of European Law at the University of Birmingham Law School in the United Kingdom. He is currently Robert Schuman Senior Research Fellow at the Robert Schuman Centre for Advanced Studies of the European University Institute in Florence. He

has a long-standing interest in the regulation of subsidies in the WTO and in the EU. In this respect, he has published *The Definition of Subsidy and State Aid: WTO Law and EC Law in Comparative Perspective* (Oxford University Press: 2009) which is, to the best of the author's knowledge, the first work that attempts to offer a conceptual framework to understand the difficult issue of the notion of subsidy in the WTO and EU legal systems. Luca Rubini is of Italian nationality.

7. The author does not have any material or personal interest in the disputes. He has advised on a pro bono basis one Non-Governmental Organization, the International Institute for Sustainable Development ('IISD'), in relation to the amicus curiae brief filed by the IISD together with Canadian Environmental Law Association ('CELA') and Ecojustice Canada before the Panel in the present disputes. He has not received any financial or other compensation from the IISD or any of the said organizations. The views expressed in this brief are solely those of its author and should not be attributed to any of those organizations.

III. Brief summary of the Panel stage

8. The disputes focus on the WTO-consistency of the 'Minimum Required Domestic Content Level' prescribed under the Feed-In Tariff ('FIT') Programme adopted by the Government of the Province of Ontario, Canada, in 2009, as well as all individual contracts implementing this requirement. Japan and the EU claim that this local-content obligation that is through these acts imposed on electricity generators using solar PV or windpower technology is incompatible with:

    i. the obligation of national treatment of Article III:4 the General Agreement on Tariffs and Trade ('GATT') and Article 2.1 of the Agreement on Trade-Related Investment Measures ('TRIMs'), and

    ii. the prohibition of local-content subsidies under Article 3 of SCM Agreement.

9. In its reports circulated on 19 December 2012, the Panel did find a breach of the obligation of national treatment of GATT Article III:4 and TRIMs Article 2.1. In so doing, it crucially rejected Canada's defence that the obligation of national treatment did not apply because of the 'government procurement' exemption of GATT Article III:8(a).[1].

[1] Article III:8(a) of the GATT reads: "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."

10. While finding the 'Minimum Required Domestic Content Level' of Ontario's FIT Programme incompatible with national treatment obligations, the Panel did not agree with Japan and the EU with respect to the subsidy claims. In particular, while concluding that the FIT programme did amount to a financial contribution, it could not find that these measures conferred a benefit to the eligible renewable energy generators. One member of the Panel disagreed with the majority and issued a dissenting opinion on the benefit analysis.

11. It is crucial to highlight that, throughout the proceedings, the complainants repeatedly stressed that they did not question the FIT in itself and the legitimacy of the objectives pursued by the Government of Ontario through the FIT Programme of reducing carbon emissions and promoting the generation of electricity from renewable energy sources. What troubled them was the 'Minimum Required Domestic Content Level'. According to the complainants, 'this aspect of the challenged measures affords a form of WTO-inconsistent protection to producers of certain types of equipment used to generate electricity from solar and wind energy ("renewable energy generation equipment") that are based in Ontario to the detriment of competing industries in other WTO Members, and should therefore be eliminated.'[2]

12. The stance of the complainants on what type of governmental support is, and what is not, legitimate does constitute an important element in the litigation which, it is argued, produced an undue impact on the legal reasoning of the Panel.

IV. A methodological note: how to approach the interpretation of the definition of subsidy

13. The definition of subsidy is a treshold issue. It is simply the main gateway to subsidy disciplines. Through an assessment which is inherently preliminary, often imprecise and pragmatic, its goal is to select some measures of public support and subject them to the relevant disciplines.

14. Whether a certain measure is included or excluded essentially depends on two factors, both broadly referring to the goals of subsidy control, and linked to each other. On the one hand, the selection decision relies on the existence – or otherwise - of concerns from the perspective of the objectives of subsidy rules. In this respect, it is known that subsidies may distort international trade by impairing market access and distorting competition. On the other hand, there is an inevitable need to draw boundaries, since many measures may

[2] See Panel Report, *Canada – Renewable Energy/FIT*, paragraph 7.7. See also Japan's Integrated Executive Summary, paragraph 3; EU's Integrated Executive Summary, paragraph 2.

produce certain similar effects but cannot, and should not, for this reason alone be caught by the same disciplines. Various reasons, some of eminent practical order, militate against this outcome.

15. The fact that the analysis carried out at the level of the definition is by nature preliminary and cannot exhaust the assessment of the measure finds confirmation in the consideration that legal analysis is often a *process* or *procedure*. It is a series of steps taken in order to achieve a determination. Each step has its own function and purpose – in light of the goals pursued by the disciplines and their design.

16. Within a process, questions that are different are frequently analyzed independently, issues that can be distinguished are kept separate - all to the benefit of clarity and transparency. This method enables to distinguish what is more relevant from what is less relevant (always from the perspective of the objectives of the disciplines), and accordingly attach different legal consequences. Distinguishing issues means that there may be implications from the perspective of the rules of evidence and burden of proof. There may also be significant institutional ramifications, since different organs or institutions may be called on to act at different stages.

17. In conclusion, the main guidelines for interpretation of the definition of subsidy are as follows.

18. First, language, requirements and tests of the definition have to be interpreted having in mind the purpose of the definition and the objective of the relevant disciplines. Secondly, the definition requires an analysis that is only preliminary, and as such should not exhaust the assessment of the measure. Thirdly, since potentially several measures may produce effects similar to subsidies, for practical and other reasons, the meaning and scope given to the legal notion of subsidy should not be excessive.

V. The 'financial contribution' and the 'income or price support'

19. Several findings and interpretations of law of the Panel on the subsidy claims, including the characterization of Ontario's FIT Programme under one (or more) of the forms of financial contribution under Article 1.1(a)(1) of the SCM Agreement and/or under 'any form of income or price support' under Article 1.1(a)(2), have been appealed.

20. The Panel concluded that the better characterization of Ontario's FIT Programme was that of a 'purchase of goods' and that this classification excluded the possibility that the same

measure could also amount to any other of the forms of financial contribution under Article 1.1(a)(1) of the SCM Agreement. The Panel did exercise judicial economy on the issue of whether the measures at issue could qualify as a form of 'income or price support'.

21. In its appeal,[3] Japan argues that the best characterization of the measure would be 'direct transfer of funds' or 'potential direct transfers of funds', or 'any form of income or price support' under Article 1.1(a)(2), or, alternatively, that the measures at issue could *also* - i.e. in addition of being 'governmental purchases of goods' - be characterized as such. Japan also appeals the Panel's finding that the the forms of financial contribution listed under Article 1.1(a)(1) of the SCM Agreement are mutually exclusive. Finally, it criticizes the Panel's decision to exercise judicial economy on the claim that the FIT Programme does amount to a form of 'income or price support', and invites the Appellate Body to make a finding on this.

22. The Panel concluded that the FIT measures at issue in the disputes[4] do involve a government purchasing goods.

23. It cannot be easily disputed that in the scheme at issue Ontario's 'government' (more specifically the Ontario Power Authority, 'OPA', and other key 'public bodies'[5] operating in the energy sector) undertakes to pay a certain price (which includes the FIT) as consideration for the delivery of electricity into its transmission network which it owns and controls (and the execution of few other, ancillary obligations including the construction of a qualifying renewable energy electricity generation facility). If, as all parties seem to agree, and the Panel seem concur with them,[6] electricity is a good (and it would be desirable that the Appellate Body expressly confirm this), the essence of the bilateral contractual transaction at issue is evidently a purchase of goods, or in any event, in the context of the forms of financial contribution of Article 1.1(a)(1) of the SCM Agreement, it can be *more properly characterized* as a 'purchase of goods' rather than being considered a simple and unqualified 'transfer of funds'.

24. That said, the best characterization of Ontario's FIT Programme is not that of a financial contribution but that of 'income or price support', and, more specifically, a *price support*.

25. Article 1.1(a)(2) of the SCM Agreement provides that a subsidy shall be deemed to exist if

[3] See Japan's Notification of appeal, paragraph 1.
[4] It goes without saying that the conclusion may be different if other schemes with different design and features were considered.
[5] The 'public body' classification under Article 1.1(a)(1) of the SCM Agreement follows the interpretation of the Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paragraph 290.
[6] Panel Report, *Canada – Renewable Energy/FIT*, paragraph 7.11.

there is any form of income or price support in the sense of Article XVI of GATT 1994

26. The requirement of 'any form of income or price support' is alternative to the financial contribution under Article 1.1(a)(1). It is thus one of the two gateways for public action into the WTO subsidy definition.[7] The income and price support does play a very important role in the definition, particularly if interpreted in a not too open-ended but balanced way. It is surprising that there is virtually no interpretation of this concept since the beginning of the GATT era.

27. The Panel did exercise judicial economy on the claim that the FIT Programme did amount to a form of income or price support under Article 1.1(a)(2) of the SCM Agreement.[8] While this might be understood from the narrow perspective of settling the case at hand, it is a missed opportunity from the broader, and equally important, perspective of law development, which is a central contribution of dispute settlement. This is even more upsetting since, as shown below, the recent jurisprudence had already prepared the path to a balanced finding.

28. The language of 'any form of income and price support' is broad and relatively unqualified. The reference to the GATT ('in the sense of Article XVI of GATT 1994') does not give much direction. The first paragraph of Article XVI of the GATT refers to

> any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory.

It is clear that international subsidy disciplines are aimed at regulating subsidies (not only in the form of income or price support) that eventually increase exports or decrease imports. This is, however, legally inexpressive if put within the context of the SCM Agreement, and in particular at the level of the definition of Article 1. In other words, if the impact on imports or exports is something that needs to be established, this happens only after a subsidy has been found to exist, under the substantive disciplines for prohibited, actionable or countervailable subsidies under Parts II, III or V of the SCM Agreement.

[7] As noted below, my reading of the 'income or price' and the 'financial contribution' is that the two are mutually exclusive.
[8] Panel Report, *Canada – Renewable Energy/FIT*, paragraph 7.249.

29. It may well be that expression 'income or price support' was originally introduced in that provision with support to agriculture in mind where these schemes are common.[9] It could also crucially be that, as the incipit 'any form of' of GATT Article XVI seems to hint at, the GATT negotiators had somewhat in mind a broad concept. This breadth would obviously be confirmed if focus were placed on the ultimate effect of various policy measures in supporting income or price.

30. Although the negotiating history of the SCM Agreement does not shed much light on the meaning of the insertion of this second category of public action in the definition of subsidy, it looks clear that the *positioning in the SCM Agreement* of an expression previously present only in the GATT does significantly inform its meaning. In particular, since the expression 'income and price support' is now part of a general definition of subsidies, it cannot be meaningful in the context of farm support only. Most importantly, however, it has to be construed in harmony with the rest of the definition, and in particular the companion element of the financial contribution.[10]

31. Furthermore, while a relatively broad definition of subsidy could well be accepted in the context of GATT XVI, since that provision did not essentially impose more than the obligation to notify subsidy to the Contracting Parties and the modest requirement to discuss with the parties affected by the subsidy (or with the Contracting Parties) the possibility to limit the subsidization, a too much broad interpretation would be difficult under the SCM which provides for much more substantive and invasive obligations. If a broad interpretation is adopted, many – perhaps too many - forms of public action could be caught. This result may not be desirable, especially in the context of a definition which is a continuous and painstaking effort to carefully identify what should be regulated and what should be unbound.

32. So: what is the meaning of 'any form of income and price support' *now*, in the context of the SCM Agreement?

33. After outlining the various forms of financial contribution under Article 1.1(a)(1) of the SCM Agreement, the Appellate Body in *US – Softwood Lumber IV* noted:

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[9] Cf, eg, Petros C. Mavroidis, Patrick A. Messerlin and Jasper M. Wauters, *The Law and Economics of Contingent Protection in the WTO* (Cheltenham-Northampton: Elgar, 2008) page 323.

[10] For the transformation of a GATT remedy of non-violation nullification and impairment following its insertion in the SCM Agreement as one of the forms of adverse effects, see Robert Howse, 'Do the World Organization Disciplines on Domestic Subsidies Make Sense? The Case for Legalizing Some Subsidies', in Kyle W. Bagwell, George A. Bermann and Petros C. Mavroidis (eds), Law and Economics of Contingent Protection in International Trade (Cambridge: Cambridge University Press, 2009) page 85, at page 91.

> [t]his range of government measures capable of providing subsidies is *broadened still further* by the concept of "income or price support" in paragraph (2) of Article 1.1(a).[11] In particular:

34. Indeed, a natural reading of Article 1 of the SCM Agreement seems to indicate that the expression 'income or price support' is there to broaden the scope of the definition. As a matter of fact,

> to do justice to its separate mention in the definition and hence to its utility, this provision should naturally regulate measures *different* from those considered as 'financial contribution' under Article 1.1(a)(1).[12]

35. A *corollary* of this statement – and an issue that the Appellate Body is called to decide on - is that the 'financial contribution' and the 'income and price support' elements are *mutually exclusive*.

36. One has always to look at the typical attributes of the transaction at issue and use them to come out with the best possible legal characterization. To reach a different conclusion, and allow the same transaction to be covered by multiple alternatives, would mean that the interpreter has focused on features of the transaction which are less typical of it and, as such, are also common to other transactions. From another standpoint, it would be inefficient and without any clear purpose to have the same measure covered by more than one alternative of the financial contribution requirement.[13] To put it another way, if it is commonly repeated that interpretations should not be adopted that render a certain provision inutile.[14] It looks equally true that interpretations should not be adopted that make the process of interpretation itself redundant.[15]

37. Now, if the 'income and price support' element operates an expansion of the definition of subsidy, the key questions focus on the limits of this expansion. What type of measures are covered? What are their characteristics? How should they differ from those that may be

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[11] Appellate Body Report, *US – Softwood Lumber IV*, paragraph 52 (emphasis added).
[12] Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (Oxford: Oxford University Press, 2009), page 123 (emphasis in the original).
[13] Of course, the scenario is different when *different* aspects of the measure may lead to identify different transactions.
[14] Appellate Body, *US – Gasoline*, page 23.
[15] The same argument can be applied with respect to the 'financial contribution' and the relationship between its various forms. In our view, these are mutually exclusive. These categories are sufficiently precise and highlight the main characteristics of the principal types of governmental economic ((i) and (iii)) and non-economic ((ii)) activities.

considered already financial contribution? What measures, and why, are, by contrast, left out?

38. These questions, which have a crucial importance for the understanding of the definition of subsidy, have virtually never been asked in the WTO. The Appellate Body can now seize the opportunity and provide much needed clarification.

39. The recent Panel in *China – GOES*, which was called to determine whether a voluntary restraint agreements ('VRAs') could amount to 'price support', provides very good guidance. It is worth summarizing its findings in some detail.

40. The Panel began with remarks similar to those just outlined, noting that, in *US – Softwood Lumber IV*, the

> Appellate Body has commented that the concept of "income or price support" under Article 1.1(a)(2) broadens the range of measures capable of providing subsidies beyond those that constitute financial contributions, it has not otherwise been required to consider the meaning of Article 1.1(a)(2), and nor has any WTO dispute settlement Panel.[16]

41. It then observed how there can be two different ways to approach the language of 'price support'.

42. On the one hand, the phrase 'any price support' could be read 'to include any government measure that has the effect of raising prices within a market'. After referring to few entries in the most popular dictionaries of economics, it also highlighted that, despite its potential breadth, the concept of price support 'does seem to suggest that the government sets or targets a given price, and consequently does not to capture every government measure that has an incidental and random effect on price' but seems to suggest.[17]

43. On the other hand, the Panel noted that the context of Article 1.1(a) of the SCM Agreement does suggest a 'more narrow interpretation' as appropriate. In particular,

> [u]nder Article 1.1(a)(1)(i)-(iv), the existence of each of the four types of financial contribution is determined by reference to the action of the government concerned, rather than by reference to the effects of the measure on a market. This is consistent with the panel's interpretation of 'financial contribution' in *US – Export Restraints*,

[16] Panel Report, *China – GOES*, para. 7.83.
[17] Panel Report, *China – GOES*, para. 7.84.

which the Appellate Body concurred with in *US – Countervailing Duty Investigation on DRAMS*. According to the Panel:

> [B]y introducing the notion of financial contribution, the drafters foreclosed the possibility of the treatment of *any* government action that resulted in a benefit as a subsidy. Indeed, this is arguably the principal significance of the concept of financial contribution, which can be characterised as one of the 'gateways' to the SCM Agreement, along with the concepts of benefit and specificity. To hold that the concept of financial contribution is about the effects, rather than the nature, of a government action would be effectively to write it out of the Agreement, leaving the concepts of benefit and specificity as the sole determinants of the scope of the Agreement.

Reading the term "price support" in this context, it is our view that it does not include all government intervention that may have an effect on prices, such as tariffs and quantitative restrictions. In particular, it is not clear that Article 1.1(a)(2) was intended to capture all manner of government measures that do not otherwise constitute a financial contribution, but may have an indirect effect on a market, including on prices. The concept of "price support" also acts as a gateway to the SCM Agreement, and it is our view that its focus is on the nature of government action, rather than upon the effects of such action. Consequently, the concept of "price support" has a more narrow meaning than suggested by the applicants, and includes direct government intervention in the market with the design to fix the price of a good at a particular level, for example, through purchase of surplus production when price is set above equilibrium.[18]

44. The Panel did find support to its reasoning in an old GATT Panel which focused on price-support schemes and 'discussed the circumstances under which a system which fixes domestic prices to producers at above the world price level might be considered a subsidy in the meaning of Article XVI.[19] Although the GATT Panel did eventually consider dispositive whether the measure involves a 'loss to the government' or not (which, as the *China – GOES* Panel notes, does not seem relevant in the WTO anymore), it crucially implied that the concept of 'price support' necessarily refers to a scheme where the government sets and

[18] Panel Report, *China – GOES*, para. 7.85.
[19] Panel Report, *China – GOES*, para. 7.86. The GATT Panel is Panel Report 'Review pursuant to Article XVI:5', BISD 9th Supp (1961), 188.

maintains a fixed price, rather than to a random change in price merely being a side-effect of any form of government measure.[20]

45. The concept of price support as interpreted through these findings does provide a very useful path to follow.

46. What we find particularly convincing is the anchorage of the *China – GOES* Panel to the findings of the *US – Export Restraints* Panel and in particular to the finding that the focus of the interpretation of the definition of subsidy should be firmly the form or type of action rather than its effects. The impact of the measure is clearly important (since it is eventually what may cause the distortion of trade), but exclusive reliance on the similar effects of the conduct may open up the definition of subsidy too much.

47. By endorsing this approach, the action covered by the 'price support' (but similar considerations could apply to the 'income support') is immediately comparable to the directedness of the forms of financial assistance covered under financial contribution. However, far from being intended as an additional concept to make up for the formal strictures of the financial contribution,[21] the price support becomes more fundamentally aimed at addressing different types of governmental conduct of support which directly focus on the setting and maintaining of prices and income.[22]

48. If the above reading is correct, one can easily conclude that a FIT programme such as the one at issue in the disputes does amount to a form of 'price support' under Article 1.1(a)(2) of the SCM Agreement. The 'price' at issue is established by the OPA (a 'public body' according to the definition of the SCM Agreement) through the FIT Contract Price.[23] Although in practice the actual payments are made by a combination of the various agents, the ultimate contractual liability for them lies with the OPA itself.[24]

49. Interpreted in this way, the 'income or price support' may cover some measures which could be loosely called as *regulation* because of the role the normative element plays in them. These measures are particularly common especially in sectors that, like energy, have been

[20] The Panel found further support in the concept of 'market price support' under Annex 3 of the Agreement on Agriculture, and the reference therein to the notion of 'applied administered price'. See Panel report, *China – GOES*, paragraph 7.87.
[21] Suffice to mention the legal intricacies of mandated action under the fourth letter of Article 1.1(a)(1)) which, for example, requires to define when governmental action is 'normal'. See Luca Rubini, '*Ain't Wasting Time No More*: Subsidies for Renewable Energy, the SCM Agreement, Policy Space, and Law Reform', 15(2), (2012) Journal of International Economic Law, page 525, at page 543.
[22] The end result of this interpretation is a well-balanced definition of subsidy which may cover *equally direct and immediate* forms of support. See Luca Rubini, '*Ain't Wasting Time No More*', at pages 542-543.
[23] Panel Report, *Canada – Renewable Energy/FIT*, paragraphs 7.68 and 7.202.
[24] Panel Report, *Canada – Renewable Energy/FIT*, paragraphs 7.68.

subject to liberalization. Since they can be at least as distortive as traditional forms of financial assistance covered by the financial contribution, it looks appropriate that a the present-day notion of subsidy should cover *some* of these measures too, alongside with the more traditional forms of financial contribution.

50. Since the world of regulation is broad, and encompass a large variety of settings – with a complex interplay of agents, transactions and regulatory frameworks - it is necessary to draw a clear line. The Appellate Body can now contribute to clarifying this line. The outcome must be practicable and well-balanced. As repeatedly noted, the reading suggested by the Panel in *China – GOES* is worth following.

VI. The 'benefit'

51. The Panel majority interpreted the concept of benefit under Article 1.1(b) of the SCM Agreement wrongly. This wrong interpretation may have significant, and undesirable, consequences for subsidy control in the WTO.

52. It may be worth recalling that Japan and the EU essentially put forward two benefit arguments.[25] They first noted that the FIT price exceeds various wholesale electricity market price benchmarks (inside and outside Ontario). Secondly, they argued that the very nature and objectives of the FIT Programme, which is intended to facilitate private investment in renewable electricity generation which the market would not otherwise provide, demonstrates the existence of a benefit.

53. Canada rejected these arguments substantially highlighting the 'fundamental condition' that the electricity purchased under the FIT programme is generated from renewable sources of energy.[26] This means that 'a range of factors' should be taken into account in the light of the objective 'to secure a reliable and clean supply of electricity in Ontario'. Accordingly, the benefit analysis should be made with reference to to the 'market' for electricity produced from wind and solar PV technologies, and not to benchmarks - such as those suggested by Japan and the EU - which reflect a single price for electricity, irrespective of its origin.

54. The Panel majority rejected these arguments, noting:

[25] Panel Report, *Canada – Renewable Energy/FIT*, paragraphs 7.250-7.258. See also Japan's Integrated Executive Summary, paragraphs 65 and 68; EU's Integrated Executive Summary, paragraphs 52 and 53.
[26] Panel Report, *Canada – Renewable Energy/FIT*, paragraphs 7.259-7.263. See also, e.g., Canada's Integrated Executive Summary, paragraph 39.

> the complainants have not convinced us of the premise underlying their two main lines of benefit arguments, namely, that in the absence of the FIT Programme, the FIT generators would be faced with having to operate in a competitive wholesale electricity market. The evidence before us indicates that competitive wholesale electricity markets, although a theoretical possibility, will only rarely operate in a way that remunerates the mix of generators needed to secure a *reliable* electricity system with enough revenue to cover their all-in costs, let alone a system that pursues *human health and environmental* objectives through the inclusion of facilities using solar PV and wind technologies into the supply-mix.[27]

55. In essence, what the Panel majority did is to conclude that there is no benefit, and hence no subsidy, because there would not have been any similar investment in the market, that is an investment delivering the same goods as desired by Ontario (what the Panel describes as the 'missing money problem').[28]

56. As the dissenting opinion aptly noted,[29] it is textbook knowledge that it is exactly when the market fails that government intervention, also in the form of subsidies, may be warranted.

57. To put it in another way, it is not correct to conclude that there is no benefit and no subsidy on the basis of economic and policy considerations that may justify the introduction of the incentive measure. One thing is to find that there are sound economic and policy reasons for the government to step in and direct the economy, surely quite another to suggest that we should not call an out-of-the-market incentive as such, only because it is a good one.

58. The issue is not semantic. As I noted elsewhere, '[o]ne of the crucial questions of interpretation of the definition of subsidy … is the recurring risk of conflation of justification considerations into scope analysis.' [30] Although recurring, this temptation should be resisted. There are indeed various conceptual and practical reasons which indicate that the justification of a subsidy be kept separate from its definition.

59. Before outlining some of these reasons, it is worth recalling the premise of this *amicus* brief, which centres around the importance of the goal of the subsidy definition within the context of subsidy rules. To paraphrase, the benefit test, which is a crucial gateway of the definition, can be correctly interpreted only if its role within the context of the definition of subsidy -

[27] Panel Report, *Canada – Renewable Energy/FIT*, paragraph 7.309 (emphasis in the original).
[28] Panel Report, *Canada – Renewable Energy/FIT*, paragraph. 7.279 et seq. See also
[29] Panel Report, *Canada – Renewable Energy/FIT*, paragraph 9.5.
[30] Luca Rubini, *The Definition of Subsidy*, op. cit., page 20.

and the role of the definition of subsidy within the system of subsidy control - are properly understood.

60. The objective of the benefit analysis, which is broadly the same of the definition of subsidy, is fairly *simple*. It is there to capture those measures that have the *potential* to distort trade. No more, no less. No comprehensive analysis to conclusively determine whether this potential has translated into actual harm is necessary, no consideration of the redeeming, even if legitimate, objectives of the measure is permitted.

61. From another perspective, the legal notions of benefit and subsidy under Article 1 of the SCM Agreement do not correspond to an economic notion, whether this refers to the 'second best' theory, to the idea of 'social cost', or, more simply, to that of a 'net benefit' or 'net subsidy'.[31] All these approaches share the common characteristic of requiring a comprehensive assessment of the net impact of the measure, and of all negative and positive externalities involved, before concluding that there is a benefit or a subsidy. The economic lens is deployed to determine whether the measure does really distort or rather simply corrects an already existing imperfection.

62. This analysis is sound in principle. It is, however, very difficult to carry out, almost to an impracticable degree.[32] Most crucially for our analysis, it does not correspond to the objectives of the benefit and subsidy test. Borrowing from a clear expression of Professor Alan Sykes, of New York University, the legal subsidy test cannot but be 'myopic' in this respect.[33] Some of these considerations, on the context and objectives of the measure, may be taken into account subsequently etc.

63. The simple goal of the benefit test – to detect the potential to distort trade – explains the credit that the *marketplace* has consistently gained as appropriate basis for comparison or benchmark. As the Appellate Body noted in *Canada – Aircraft*:

> The marketplace provides an appropriate basis for comparison in determining whether a 'benefit' has been 'conferred', because the *trade-distorting potential* of a

[31] See, e.g., Alan O. Sykes, 'The Questionable Case for Subsidies Regulation: A Comparative Perspective', 2(2), (2010) Journal of Legal Analysis, page 473, at pages 501-502; id., 'The Economics of WTO Rules on Subsidies and Countervailing Measures', Chicago John M. Olin Law and Economics Working Paper No. 186 (2nd Series) May 2003, pages 3-5.

[32] It is almost impossible to capture all economic effects. In the context of the benefit test, this analysis would be very costly and may lead to an endless stream of negative determinations. The price for practicability would be to select some considerations and take only them into account. How the discretion inherent in this analysis could be exercised and squared with the WTO dispute settlement organs' responsibility to apply the rules that are given to them is hard to understand.

[33] Sykes, 'The Questionable Case', op. cit., page 502.

'financial contribution' can be identified by determining whether the recepient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market.[34]

64. This statement makes eminent sense. The benefit analysis is just part of the *preliminary* assessment carried out within the frame of the definition (recall the observations on the process or procedural nature of the legal approach, paras 15-16 above). Through this, the SCM Agreement operates the first broad selection, shortlisting only those measures that may raise concerns. This anxiety – the potential to distort trade – is naturally sparked off by the execution of a transaction that puts the recipient is more favourable position than the one that would have resulted from the normal functioning of the market, the place where enterprises compete with each other.

65. The preliminary, 'simple' nature of the benefit test can be further understood from another angle.

66. The determination of the *existence* of a benefit, under Article 1 of the SCM Agreement, is different from its *calculation*.[35] Although, in practice, in most of the cases, the two determinations merge one another, and may involve a difficult search for the reference market benchmarks, their focus and objective are and remain different.[36] And this difference may have a significant practical impact.

67. Logically, the calculation of the benefit already presupposes that a benefit – and hence a subsidy – has been found to exist in the context of Article 1 of the SCM Agreement. More fundamentally, however, it is the goal of the assessment that is different. In both cases a benchmark must be found in order to make a comparison with the measure at issue but the precision and the intensity of the comparison are different. One thing is to have enough evidence to be satisfied that a benefit has been conferred, quite another is to have to precisely determine the magnitude of that benefit because this may be an important consideration in the determination of adverse effects, or in the assessment of the subsidy

[34] Appellate Body Report, *Canada – Aircraft*, paragraph 157 (emphasis added). See also Appellate Body Report, *Japan DRAMs (Korea)*, paragraph 172.
[35] See Panel, *EC – Countermeasures on DRAMs,* paragraphs 7.178-7.180.
[36] It is with this caveat in mind that the broad guidelines for calculating the amount of subsidy under Article 14 of the SCM Agreement may provide useful context for the analysis of the existence of the benefit under Article 1. The Panel seems to be somewhat aware of the relative utility of the guidelines of Article 14 in the case at hand, at least at the beginning of its reasoning, when it notes that 'in the context of the present disputes, Article 14(d) suggests that *one* way to demonstrate that the challenged measures confer a benefit' is by resorting to the guidelines therein (Panel Report, *Canada – Renewable Energy/FIT*, paragraph 7.274, emphasis in the original).

margin for the imposition of countervailing duties, or even in the context of the determination of the level of countermeasures.[37]

68. In other words, the process to determine whether a benefit does exist as a consequence of the action of the government may be more straightforward – or, put it another way, less demanding – than its calculation.

69. For example, when it has been established that there is a financial contribution under Article 1.1(a)(ii) of the SCM Agreement because the government has foregone or not collected government revenue which was otherwise due, the subsequent determination of whether this omission is beneficial is pretty much straightforward.[38]

70. Arguably, the simplicity of the benefit test here derives from the fact that the main bulk of the analysis – the determination that a deviation from the applicable normal tax rule has taken place - has already been carried out in the context on the 'otherwise due' conterfactual test of the financial contribution.[39]

71. If this is correct, it proves a more general, even intuitive, point. In those cases where it is *clear* that the measure diverge from normal behaviour – be it non-economic (like in the case of taxation) or economic (for commercial activities like lending and equity investment, purchases or sales) - and this divergence goes to the advantage of the recipient, there is by necessity an economic benefit or advantage.[40]

72. The case of Ontario's FIT Programme is a textbook example in this respect.

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[37] Especially, the 'appropriate countermeasures' of Article 4.10 of the SCM Agreement. See, eg, Report of the Arbitrators, *Brazil – Aircraft Article 22.6 – Brazil)*; Report of the Arbitrators, *US – FSC (Article 22.6 – US)*; Report of the Arbitrators*, Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*.

[38] See, e.g., Panel Report, *US – FSC*, paragraph 7.103; Panel Report, *US – FSC (Article 21.5)*, paragraph 8.46. See also Panel Report, *US – Large Civil Aircraft*, paragraphs 7.170-7.171.

[39] Rubini, *The Definition of Subsidy*, op.cit., page 263. In such cases, even at the level of the financial contribution assessment, the positive determination that there has been a foregoing of government revenue does not itself seem to necessarily depend on the identification of a precise benchmark. The Appellate Body has alternatively made use of a 'but for' test (with the qualification that mechanical applications be avoided; Appellate Body, *US – FSC*, paragraphs 90-91) or of a vague 'comparison' of the tax treatment of 'comparable tax incomes' (Appellate Body, *US – FSC (Article 21.5 – EC)*, paragraph 91). More importantly for the purpose of our analysis, while endorsing these tests, the Appellate Body expressly kept away from the more demanding and exercise of precisely finding the relevant general tax rule and establish whether the measure at issue does depart from it constituting an exception to it (Appellate Body, *US – FSC (Article 21.5 – EC)*, paragraph 91). Whether – and to what extent – it is really possible to dispense from the search for general rules and exemptions is debatable. See Rubini, *The Definition of Subsidy*, op.cit., pages 262-264.

[40] This 'economic' benefit is not necessarily the same of a 'competitive' benefit. The existence of the latter is assessed conclusively afterwards, especially when the determination of whether the subsidy is prohibited, actionable or countervailable is made.

73. It is indisputable that the FIT measures are there to *facilitate* the deployment of certain renewable energy technologies in the Province of Ontario. Canada itself accepts this. The dissenting member of the Panel draws the attention to one statement in one of Canada's written submission:

> Like FIT Programs in other parts of the world, the Ontario FIT Program was created to induce new renewable generation. As recognized by Japan, the Ontario FIT Program … became necessary to *encourage the entry into the market of renewable energy generators, most of which would not have entered the market in the absence of the FIT Program*.[41]

74. Quite similarly, the Panel majority highlighted:

> Canada accepts that "most" of the contested FIT generators would be unable to conduct viable operations in a competitive wholesale market for electricity in Ontario. Indeed, Canada points out that one of the objectives of the FIT Programme was to *encourage the construction of new renewable energy generation facilities that would not have otherwise existed*.[42]

75. All parties seem to agree that, at least for now, without government intervention (ie the FIT) market forces in Ontario (and perhaps also in several other parts of the world) would not lead to the reliable supply of renewable energy electricity which is desired for environmental and energy goals.[43]

76. If all this is clear and undisputed, there is really no need, from the perspective of satisfying the benefit standard under Article 1.1(b) of the SCM Agreement, to further enquire and identify precise market or competitive benchmarks – at least at the level of the determination of the benefit existence.[44] It is clear, almost self-evident, that Ontario's FIT Programme confers a benefit. The FIT measures at issue represent, in their stated goal and resulting effect, a deviation from what the electricity market, left to its own forces, would

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[41] Panel Report, *Canada – Renewable Energy/FIT*, paragraph 9.18 (emphasis added). See, eg, Canada's Integrated Executive Summary, paragraphs 10 and 41.
[42] Panel Report, *Canada – Renewable Energy/FIT*, paragraph 7.277 (emphasis added).
[43] Panel Report, *Canada – Renewable Energy/FIT*, paragraph 7.311. See, e.g., Japan's Integrated Executive Summary, paragraph 30; EU'S Integrated Executive Summary, paragraph 52; Canda's Integrated Executive Summary, paragraph 41.
[44] Therefore, in the light of the circumstances of the case, there is really no need, in our view, to identify a benchmark alternative to those proposed by the parties as the Panel majority has dutifully done (see paragraph 7.322-7.323). We cannot, however, avoid noting how the 'simple' standard put forward by the Panel majority (Panel Report, *Canada – Renewable Energy/FIT*, paragraph 7.323) does not look right. In particular, the 'risk' profile of a comparable investment cannot be pertinent, when risk is not an issue in a measure, such as the FIT, which involves long-term (20 or 40 years) contract.

normally provide, and this deviation is advantageous for the eligible wind and solar renewable energy generators.

77. This is the spirit of second legal standard proposed by Japan and the EU, and essentially embraced by the dissenting panelist:

> … I am of the view that *facilitating* the entry of certain technologies into the market that does exist – such as it is – by way of a financial contribution can itself be considered to confer a benefit.[45]

78. The alternative (which is in fact the first) line of benefit argument put forward by Japan and the EU is that the FIT price would exceed Ontario's wholesale electricity market price (and also other similar out-of-Province prices).

79. Suffice here to be brief, since the following remarks are closely intertwined with the previous analysis.

80. The Panel majority agreed with Canada, to the effect Ontario's wholesale electricity market cannot offer any reliable benchmark because it is fundamentally distorted by the government.[46] The out-of-Province prices would similarly not be appropriate.[47] The Panel majority went as far as finding that even a competitive wholesale electricity market that could in theory exist could not be used as a basis for the benefit analysis because it would fail to attract the degree of investment in generating capacity needed to secure a reliable supply of electricity.[48] According to Canada, the only appropriate benchmark could be found in the 'market' for electricity produced from wind and solar PV technologies.[49]

81. To be sure, the electricity market in Ontario is not only distorted by government regulation but it is, more radically, artificially created by it.

82. The inherent and significant distortions in the working of supply and demand do not, however, impinge the benefit analysis, quite the contrary. In other words, the fact itself that the market is, even fundamentally, distorted to the extent that the public hand creates it, does not represent an obstacle to – but rather evidence for – the determination of the existence of a benefit. It is still the market standard that is at work, albeit in an extreme setting.[50]

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[45] Panel Report, *Canada – Renewable Energy/FIT*, paragraph 9.3 (emphasis added).
[46] Panel Report, *Canada – Renewable Energy/FIT*, paragraph 7.308.
[47] Ibid.
[48] Panel Report, *Canada – Renewable Energy/FIT*, paragraph 7.312.
[49] Panel Report, *Canada – Renewable Energy/FIT*, paragraphs 7.259-7.260. See, e.g., Canada's Integrated Executive Summary, paragraph 72.
[50] Cf Appellate Body Report, *Japan – DRAMs (Korea)*, paragraph 172.

83. From another perspective, the fact that a 'competitive market' producing the desired outcome does not exist (or even that it could not possibly exist), and that it is only because of government intervention that the desired 'public goods' are supplied, is in itself evidence of a subsidy scenario. Things may clearly be more difficult were it necessary to precisely calculate the relevant benchmark but this is beyond the goal of Article 1 analysis.[51]

84. These brief remarks reflect the first legal standard proposed by the dissenting member of the Panel:

> The competitive wholesale market for electricity that *could* exist in Ontario is the appropriate focus of the benefit analysis.[52]

85. Two further observations can be made in respect of the market and the industry at issue.

86. First, the special characteristics (such as the costs of production) of the renewable energy industry cannot be sufficient to single out a separate market for renewable energy. The relevant product market is that of electricity – irrespective of its source. When electricity is fed into the transmissions and distribution lines, its origin cannot be detected. The electricity market is the market where various (conventional and renewable) energy producers compete. It is in this market that the potential to distort trade and competitive relationships may materialize.[53]

87. Second, in the context of a benefit analysis that has the simple objective to determine whether the measure has the potential to distort trade, the public policy objectives pursued (irrespective of whether they are legitimate and broadly shared), and more generally the context in which the measure operates, are not normally relevant. The main conceptual fault of Canada's, and, more worringly, the Panel majority's argumentation, is the continuous negation of the marketplace as benchmark on the basis of the inability of the market to ensure a supply of electricity that meets the objectives sought by the government of

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[51] This is why the Panel majority correctly noted that 'where a government's involvement as a provide of a particular good in a given market is such that "there is no way of telling whether the recipient is 'better' off absent the financial contribution", the market that is the object of the government intervention cannot serve as an appropriate benchmark for the purpose of Article 14(d)' (Panel Report, *Canada – Renewable Energy/FIT*, paragraph 7.274). This is certainly true in the context of Article 14(d) since, in that case, you need a precise benchmark to precisely determine the subsidy element. It is not true – as the Panel majority unfortunately opined by requesting the existence of a "market where there is effective competition" as a prerequisite of the benefit analysis (Panel Report, *Canada – Renewable Energy/FIT*, paragraph 7.275) - in the context of Article 1.

[52] Panel Report, *Canada – Renewable Energy/FIT*, paragraph 9.3.

[53] These comments, which focus on the definition of the relevant product market, are valid irrespective of any factual consideration with respect to the modesty of cross-border trade in electricity, which may be an issue under WTO subsidy laws for the separate question of whether the subsidy is actionable (which is not at issue in the present disputes).

Ontario.[54] As noted above (see paragraphs 56-58), the SCM Agreement does not permit to confuse and conflate the question of the economic and policy justification of the subsidy with the question of its existence.

88. Crucially, this does not mean that these public policy considerations are, or should be, irrelevant for subsidy disciplines. Equally, it does not imply that subsidy laws are necessarily inimical to the success of green energy or to the fight against climate change etc. It simply means that these considerations are not relevant at the level of the definition.

89. To some limited extent the context of the subsidy and the policy objectives pursued by the subsidy may become relevant under the legal requirements of specificity, adverse effects, and the prohibitions of certain types of subsidies. Significantly, the limited pursuit of some policy objectives was expressly captured in the original version of the SCM Agreement by the now lapsed category of non-actionable subsidies (see Articles 8 and 9).

90. Whether this regulatory framework appropriately takes into account the interests and objectives subsidies involve, is a different question. And it is ultimately a question that Members and their negotiators (that are fully accountable to their constituents and citizens) – and not dispute settlement - have to answer.

91. Finally, the proper definition of subsidy is pivotal to safeguard the *transparency* of the system and hence the integrity of subsidy control at large.

92. The notification obligation is geared to ensure that Members are transparent with respect to a subset of subsidies that may, even potentially, have a detrimental effect on trade. If consistently and even-handedly implemented, transparency creates a very effective system of control and can hence constitute, in itself, one way to discipline unwarranted subsidization.

93. To this end, the first substantive obligation introduced by the GATT in 1947 was one of notification (see Article XVI). With the advent of the SCM Agreement, the type of subsidies that are subject to notification has been defined, and in a wise way. Only subsidies that are specific should be notified. For practical reasons, disciplines could not ask to notify all subsidies *even if not specific* – since this would have implicated far too many measures. For equally obvious reasons, it would have been troublesome if it there had been a requirement for notification (or cross- notification) to establish that subsidies are, legally speaking, prohibited or actionable. The evident connotation of self-incrimination (or accusation) in

[54] See Panel Report, *Canada – Renewable Energy/FIT*, paragraph 7.260; and paragraphs 7.309-7.312.

this requirement wisely suggested not to adopt it. It would have made compliance with the obligation more difficult by rendering it too much legalistic and juridified. The disciplines just limit themselves – and this is still a controversial requirement - to require to notify any 'statistical data permitting an assessment of the trade effects' of the measure.[55]

94. Transparency is key to subsidy control. Unfortunately, for various reasons, the incentives to be transparent on subsidies are already not very strong.[56] One of the key conditions of the proper working of transparency is the clarity of the definition of what has to be notified. To introduce a comprehensive, complex, and potentially murky, one-step assessment of the existence of the benefit and to substantially delegate it to Members does not seem the best way to serve the needs of openness and clarity of the subsidy control.

VII. Conclusions

95. The analysis of the Panel report is extremely unsatisfactory. On the one hand, the Panel majority's analysis of the benefit test is seriously flawed since, by unduly confusing the determination of the existence of the benefit and the subsidy with the latter's reasons and objectives, it completely overlooks the simple goal of the benefit test and the subsidy definition as well as the broader structure of subsidy disciplines. On the other hand, the Panel's decision to exercise judicial economy on the possible categorization of the measures at issue as a form of 'income or price support' is a missed opportunity.

96. The 'original sin' of the Panel's analysis lies in its approach, which ultimately confuses and merges legal and policy analysis. The *Canada – Renewable Energy/FIT* litigation (and many of the cases currently pending before the WTO dispute settlement) should certainly be inserted intro the broad policy debate about 'good' and 'bad' government intervention in support of the green economy. Protectionist tendencies should be kept at bay. At the same time, important policy objectives, such as those underpinning a FIT scheme, should not be discouraged, particularly if these are widely supported by WTO Membership.

97. Legal analysis should, however, proceed independently. WTO subsidy rules do not object subsidies as such.

98. As the *amicus* bried suggests, the Ontario's FIT Programme, and the relevant measures, do amount to a form of 'price support' which confers a benefit. The measures at issue do

[55] Article 25.3 of the SCM Agreement.
[56] Terry Collins-Williams and Robert Wolfe, 'Transparency as a Trade Policy Tool: the WTO's Cloudy Windows', 9(4), (2010) World Trade Review (2010) page 551.

therefore constitute a subsidy under Article 1 of the SCM Agreement. In other words, the mere finding that the Ontario's FIT Programme does constitute a subsidy does not mean that the FIT scheme is *per se* inconsistent with WTO subsidy law. There is no mark of legal disapproval attached to this classification. What makes it eventually illegal under Article 3.1(b) of the SCM Agreement is the clear local content conditionality of the "Minimum Required Domestic Content Level".

99. That said, it may well be that the determination that a measure does amount to a subsidy, and is hence subject to the application of subsidy disciplines, may already be perceived by some as a constraint. This - we suggest – may explain both the conflation and the reticence in the Panel's analysis. We do not comment here on the more general point of whether WTO subsidy rules are appropriate and duly take into due account the interests and objectives subsidies involve. This is a policy question which Members – and not dispute settlement - can only answer. What dispute settlement organs have to do is to interpret and apply the rules as they are - to clarify the law as it is. What they cannot do is to stretch the law to accomodate real or perceived weaknesses in the law. They are courts of law, not equity. The harm done to the integrity of the law, and to dispute settlement at large, may be bigger than the benefit of a perceived just solution to the case at issue.