Université de Montréal

Support for Renewable Energy and WTO Law

The actionability of Ontario and Québec renewable energy support mechanisms

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Résumé

Le Traité de Marrakech stipule que le commerce et le développement économique devraient être orientés de manière à permettre l'utilisation optimale des ressources mondiales, conformément à l'objectif de développement durable. Combiné aux dispositions du Protocole de Kyoto et du Traité de Copenhague, les gouvernements poursuivent de politiques nationales favorisant les producteurs nationaux au détriment des étrangers. Cette mémoire propose une analyse des règles de l'OMC, dans le but de déterminer les mesures disciplinaires possibles contre le Canada à l'égard de ses mécanismes de support de l'énergie renouvelable. Une analyse des règles énoncées dans le GATT, l'*Accord sur les subventions et les mesures compensatoires* et divers accords multilatéraux conclus dans le cadre de l'OMC permet de déterminer si elles pourraient s'appliquer aux mécanismes de support de l'énergie renouvelable. Une analyse des programmes du Québec et de l'Ontario permet une prise de position quant à leur conformité aux règles commerciales de l'OMC.

Mots-clés : OMC, GATT, commerce international, droit international, droit de l'environnement, nation la plus favorisée, traitement national, TRIMs, obstacles techniques au commerce, garanties, subventions, subventions à l'exportation, subventions domestiques, droits compensateurs, contenu national, contenu local, énergie , énergies renouvelables, énergie verte, énergie éolienne, énergie solaire, développement durable, électricité, développent durable, mécanismes de soutien à l'énergie renouvelable, Programme TRG Ontario, tarifs de rachat garantis, appel d'offres énergie éolienne Québec.

Abstract

The Marrakesh Agreement's preamble states that trade and economic development should be conducted to allow for the optimal use of the world's resources in accordance with the objective of sustainable development. This, combined with the provisions of the Kyoto Protocol and Copenhagen Accord, allows governments to pursue their domestic policies in such a way as to unfairly favor domestic producers over foreign ones. This thesis provides a review of WTO law to assess the potential for disciplinary measures against Canada with regard to renewable energy support mechanisms. An analysis of the rules outlined in the GATT, the *Agreement on Subsidies and Countervailing Measures* and various other WTO multilateral agreements allows us to determine whether such rules can apply to renewable energy support mechanisms. Furthermore, an analysis of the programs in support of renewable energy production available in Québec and Ontario sheds light on such mechanisms' compliance with WTO trade rules.

Keywords : WTO, GATT, International Trade, International Law, Environmental Law, Most-Favored Nation, National Treatment, TRIMs, Technical Barriers to Trade, Safeguards, Subsidies, Export Subsidies, Domestic Subsidies, Countervailing Duties, Domestic Content, Local Content, Energy, Renewable Energy, Green Energy, Wind power, Solar power, Sustainable Development, Electricity, Renewable Energy Support Mechanisms, Ontario FIT Program, Feed-in Tariff, Québec Wind Tenders.

Table of Contents

INTRODUCTION – THE WTO, SUBSIDIES AND RENEWABLE ENERGY 1

PART I – ONTARIO AND QUÉBEC'S RENEWABLE ENERGY SUPPORT MECHANISMS 11

SECTION 1 – ONTARIO 15

1.1 The OPA and Ontario's Electricity Market 15

1.2 The FIT Program 17

1.2.1 Financial Assistance 18

1.2.2 Local Content Requirements 19

SECTION 2 – QUÉBEC 20

2.1 Hydro-Québec and Québec's Electricity Market 20

2.1 Community CFT 22

2.2.1 Financial Assistance 22

2.2.2 Local Content Requirements 23

SECTION 3 – APPLICABILITY OF WTO LAW 24

PART II – SUBSIDIES REGULATION AND RENEWABLE ENERGY 27

SECTION 1 – THE LIFE OF A SUBSIDY BEFORE THE GATT 28

SECTION 2 – GATT 1947 AND THE DEBUT OF INTERNATIONAL SUBSIDIES REGULATION 29

2.1 Countervailing Duties 30

2.2 Subsidies 31

2.2.1 Notification and Consultation 31

2.2.2 Export Subsidies 33

SECTION 3 – THE TOKYO ROUND SUBSIDIES CODE 35

3.1 Export Subsidies 36

3.2 Domestic Subsidies 37

3.3 Countervailing Duties *38*

3.4 Dispute Settlement *39*

SECTION 4 – THE SCM AGREEMENT AND RENEWABLE ENERGY 40

4.1 Background *41*

4.2 Structure *43*

4.3 Definition of Subsidy *44*

4.3.1 A Financial Contribution 45

Meaning of Financial Contribution 46

Direct or Indirect Financial Contributions 47

4.3.2 Conferring a Benefit 51

4.3.3 Which is Specific 54

4.3.4 Renewable Energy Support Mechanisms as Subsidies 56

4.4 Prohibited Subsidies *56*

4.4.1 Export Subsidies 57

4.4.2 Local Content Subsidies 58

4.5 Actionable Subsidies *63*

4.5.1 Injury to domestic industry 66

4.5.2 Nullification or impairment of benefits 68

4.5.3 Serious prejudice 69

4.5.4 Renewable Energy Support Mechanisms as Actionable Subsidies 69

4.6 Notification and Consultation *70*

4.7 Remedies *72*

4.7.1 Dispute Mechanism 73

4.7.2 Countervailing Measures 75

Initiation and Subsequent Investigation 77

Evidence 78

Consultation 78

Calculation of the Amount of a Subsidy 79

Determination of Injury 79

Provisional Measures 80

Undertakings 80

Imposition and Collection 81

Duration and Review 82

PART III – THE WTO, THE SCM AGREEMENT AND RENEWABLE ENERGY 83

SECTION 1 – WTO TREATY INTERPRETATION 85

SECTION 2 – THE WTO'S FOUNDING PRINCIPLES 88

2.1 Most-Favored Nation 89

2.2 National Treatment 95

2.3 The "Chapeau" of GATT Article XX 101

SECTION 3 – GATS 105

SECTION 4 – THE WTO'S MULTILATERAL AGREEMENTS 106

4.1 TRIMs 107

4.2 Technical Barriers to Trade 110

CONCLUSION – THE MORALS OF SUPPORT MECHANISMS 113

BIBLIOGRAPHY 120

List of Tables and Annexes

TABLE 1 - ONTARIO FIT PRICES

TABLE 2 - ONTARIO CONSUMER ELECTRICITY PRICES

TABLE 3 - ONTARIO MONTHLY AVERAGE ELECTRICITY PRICES

ANNEX 1 - SELECTED DEFINITIONS OF TRADE POLICY TERMS

ANNEX 2 - JAPAN QUESTIONS TO CANADA ON FIT PROGRAM

ANNEX 3 - SCM AGREEMENT

For my family, without whom

nothing is possible.

For Ophélie, with whom

everything is possible.

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Finally, I thank my dear wife, my family and my friends: for putting up with me.

Abbreviations

Community CFT	HQ's 500 MW Call for Tenders A/O 2009-02
Community CFT PPA	The standard PPA provided as an annex to the Community PPA
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
Electricity Act	*Electricity Act, 1998 (Ontario)*, S.O. 1998, c. 15
FIT	Feed-in Tariff
FIT Contract	FIT Program standard PPA
FIT Directive	The September 24, 2009 FIT directive issued by the MEI
FIT Program	OPA FIT program
FIT Rules	FIT Program rules
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GATT 1947	Original GATT 1947 text, including amendments prior to GATT 1994
GATT 1994	GATT 1947, as amended by the WTO Agreement
GEA	*Green Energy Act, 2009 (Ontario)*, S.O. 2009, c. 12
HQ	Hydro-Québec
HQD	Hydro-Québec Distribution
Hydro-Québec Act	*Hydro-Québec Act (Québec)*, R.S.Q. c. H-5
kW	Kilowatt
kWH	Kilowatt-Hour
MEI	Ontario's Ministry of Energy and Infrastructure
MFN	Most-Favored Nation
MW	Megawatt
MWh	Megawatt-Hour
NT	National Treatment
OPA	Ontario Power Authority
PPA	Power Purchase Agreement
SCM Agreement	Agreement on Subsidies and Countervailing Measures
Subsidies Code	Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade
TBT	Agreement on Technical Barriers to Trade
TRIMs	Trade Related Aspects of Investment Measures
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

To truly transform our economy, protect our security, and save our planet from the ravages of climate change, we need to ultimately make clean, renewable energy the profitable kind of energy.

Barack Obama, *Address to the Joint Session of Congress*, 2009

Introduction – The WTO, Subsidies and Renewable Energy

Most stories involving contemporary trade issues begin in a Havana conference room in 1947 with the signing of the *General Agreement on Tariffs and Trade* ("**GATT 1947**")[1]. Still reeling from the aftershocks of the Second World War, the international community believed that peace would be guaranteed through the establishment of global institutions. The United Nations, the International Monetary Fund and the World Bank had already been pen-stroked into existence. With international security, finance and development seemingly covered, the nations of the world turned their collective eye towards tackling issues surrounding trade.

And so it was that in Havana twenty-three countries, including Canada, began

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[1] We refer to GATT 1947 as that version of the *General Agreement on Tariffs and Trade*, 55 U.N.T.S. 194 (30 Oct. 1947) (the "**GATT**") adopted in 1947, as amended from time to time, up until the signing of the WTO Agreement. *Supra*, note 3.

the effort of regulating trade on a global level. This resulted in the signing of the GATT, which initially promised the establishment of a permanent body, the International Trade Organization, to oversee the treaty's application. That organization never came to fruition, partly due to objections within the United States Congress. Instead, member states oversaw the GATT and applied its rules without the stability of a governing institution. Successive rounds of negotiations between GATT members (Dillon, Kennedy, Tokyo) yielded additional rules on international trade, generally striving toward lower tariffs. As tariffs were gradually eliminated, nations increasingly focused their attention on non-tariff barriers to trade. Governmental subsidy programs embody one of the best known and most frequently used non-tariff barrier, and in a world of low tariffs even a small subsidy can affect production levels of another country.[2]

Developments in subsidy regulation abound, particularly since the signing of the Marrakesh Agreement in 1994 at the culmination of the Uruguay Round and

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[2] Terence P. STEWART (ed), *The GATT Uruguay Round: A Negotiating History (1986-1992)*, vol. 1: commentary, Deventer, Kluwer Law and Taxation Publishers, 1993, p. 812.

the creation of the *World Trade Organization* ("**WTO**").[3] The WTO's permanent nature, along with its dispute resolution mechanism, ensured an even larger membership amongst trading nations and an ever-increasing number of subsidies-related clashes, since clear recourses and sanctions were now available to trading states seeking to discipline other members' programs.[4]

The use and misuse of subsidies has therefore remained an important part of international trade relations, and the apparent stalemate in the current Doha round of WTO multilateral trade negotiations means that the existing framework will continue to apply for the foreseeable future. By one estimate, global subsidies may amount to more than a trillion dollars per year or 4 percent

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[3] *Marrakesh Agreement Establishing the World Trade Organization*, 1867 U.N.T.S. 154 (15 April 1994) (hereinafter referred to as the "**WTO Agreement**"). The Uruguay Round would result in the signing of the WTO Agreement. The WTO Agreement includes an amended version of the GATT 1947 (the "**GATT 1994**"), along with numerous annexes. Much of the WTO's substantive law is not contained within the WTO Agreement. Annex 1A of the WTO Agreement contains the WTO's multilateral agreements, such as the GATT 1994 and the *Agreement on Subsidies and Countervailing Measures*, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 14 (15 April 1994) ("**SCM Agreement**"). Annex 1B includes the *General Agreement on Trade in Services*, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 (15 April 1994) ("**GATS**"). Annex 2 contains the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 (15 April 1994) ("**DSU**"). Annex 3 includes the trade policy review mechanism. Finally, Annex 4 contains various plurilateral trade agreements, such as the Agreement on Government Procurement. All of these agreements are appended to the WTO Agreement and form part of a single undertaking.

[4] Since 1995, 83 cases (out of a total of 411 cases so far) have been adjudicated at the WTO with respect to the SCM Agreement, subsidies and countervailing measures. See http://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A20#selected_agreement, compared to a total of approximately 100 cases during the entire GATT 1947 period with respect to all matters. See http://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm.

of world GDP.[5] Subsidies are not necessarily undesirable however, and governments have always had incentives to implement them to solve economic, social, and political problems. As GATT Director-General Oliver Long so eloquently stated three decades ago:

> A principle difficulty is to draw a distinction between subsidies granted by governments in pursuit of valid economic and social policy and those which, directly or indirectly, intentionally or unintentionally, have the effect of distorting world trade and depriving other countries of legitimate trade opportunities.[6]

The distinction between "legal" and "illegal" subsidies, "actionable" and "non-actionable", "permitted" and "prohibited", "green light" and "red light" – "good" or "bad" – is particularly relevant in an era of increased environmental sensitivity. This sensitivity to humanity's effect on our planet, and particularly its climate, has begun to have marked effects on all manners of economic policy, international trade being no exception.

The seriousness with which the international community considers the potential

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[5] Gross Domestic Product. See WTO SECRETARIAT, *World Trade Report 2006: Exploring the Links Between Subsidies, Trade and the WTO*, Geneva, World Trade Organization, 2006, p. 45.

[6] GENERAL AGREEMENT ON TARIFFS AND TRADE (ORGANIZATION), *The Tokyo Round of Multilateral Trade Negotiations: Report by the Director-General of GATT*, 1979, p. 53.

effects of climate change is evidenced by the contents of the *Kyoto Protocol*[7] and recent *Copenhagen Accord*[8]. These agreements also serve as a perfect example of the disconnect Director-General Long touched upon:

> The tension between the two regimes could be described as resting on two assumptions: international trade increases domestic welfare through the quantifiable benefits it delivers to consumers, while environmental regulation increases domestic (and global) welfare by protecting the environment against harm and furthering the preferences of citizens of the regulating country.[9]

Article 2 of the Kyoto Protocol and Article 4 of the Copenhagen Accord allow Annex 1 countries such as Canada a significant amount of flexibility with respect to domestic policies in order to meet emissions targets, while Article 3.5 of the accords' governing document, the *United Nations Framework Convention on Climate Change*[10], states that "measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade." Furthermore, the WTO Agreement's preamble provides that trade and economic development should be conducted so as to allow for the optimal use

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[7] *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, UN Doc FCCC/CP/1997/7/Add.1, 37 ILM 22 (11 December 1997) (the "**Kyoto Protocol**").
[8] *Copenhagen Accord to the United Nations Framework Convention on Climate Change*, Copenhagen (18 December 2009) (the "**Copenhagen Accord**").
[9] Marie-Ève RANCOURT, "Promoting Sustainable Biofuels Under the WTO Legal Regime", (2009) 5 *McGill J.S.D.L.P.* 73, at para. 28.
[10] *United Nations Framework Convention on Climate Change*, 1771 U.N.T.S. 107 (21 March 1994).

of the world's resources in accordance with the objective of sustainable development. All of these various factors combine to allow governments to "pursue their domestic policies in such a way as to unfairly favor domestic producers over foreign ones."[11]

In sum, contrasting the need for control of governmental subsidies, as required by the WTO system, are national efforts to support local renewable energy production in order to meet fossil fuel and carbon output reduction strategies required by Kyoto and Copenhagen. Governments have implemented various support measures to buttress renewable energy production which over the past decade have been primary drivers behind increased adoption of renewable energy in the electricity distribution networks of developed countries.[12]

The four most common methods by which governments can directly or indirectly support renewable energy[13] production in their jurisdictions and communities are:

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[11] ZhongXiang ZHANG and Lucas ASSUNÇÂO, *Domestic climate policies and the WTO*, FEEM Working Paper No. 91, December 2001, p. 2.

[12] See data concerning increased renewable energy production throughout INTERNATIONAL ENERGY AGENCY, *Renewables Information 2010*, OECD/IEA, 2010 and INTERNATIONAL ENERGY AGENCY, *World Energy Outlook 2009*, OECD/IEA, 2009.

[13] Renewable energy is generally defined as energy obtained from natural and persistent flows of energy occurring in the immediate environment, and is contrasted by non-renewable energy which is obtained from static sources that remain underground unless released by human interaction. See John TWIDELL and Tony WEIR, *Renewable Energy Resources*, 2nd ed., Taylor & Francis, 2006, p. 7.

(i) financial support schemes that reduce the commercial uncertainty related to the production and sale of renewable energy (uncertainty which may be due to the existence of an electricity market with variable and unpredictable short to long-term electricity prices) in the form of a feed-in tariff ("**FIT**"), guaranteed purchase price per megawatt hour ("**MWh**") of electricity sold or requirements for electricity distributors to purchase a minimum portfolio of energy sourced from renewables;

(ii) local content rules in renewable energy tenders or renewable energy sourcing legislation requiring renewable energy facility developers to employ locals and purchase locally-manufactured goods for the development, construction and operation of their facility as a pre-condition to entering into a power purchase agreement and/or receiving the relevant financial support;

(iii) encouragement of community participation in the development of renewable energy facilities, through the requirement for minimum local participation (i.e. of the municipality or residents of same) in the economic benefits associated with the facility or through the flow-through of tax revenues associated with the relevant facility directly to the local community;

(iv) direct government, or government supported, investment in

> electricity infrastructure, such as renewable energy compliant electricity transmission infrastructure (smart grids).[14]

Where these support mechanisms have an effect on international trade, they may be challengeable under WTO law. For instance, the existence of a government sponsored financial incentive within a specific domestic industry can be actionable under WTO subsidies regulations, while domestic content rules could be considered trade related investment measures or as having trade diverting effects contrary to the WTO's founding principles.

A review of WTO law so as to determine the acceptability of renewable energy support mechanisms is paramount in order to assess the potential for disciplinary measures. Since WTO law contains no provisions specifically applicable to electricity,[15] an analysis of the rules outlined in the GATT 1994, the SCM Agreement and the various other WTO multilateral agreements will allow us to determine whether such rules may potentially apply to renewable energy support mechanisms. Furthermore, a review of the programs in support

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[14] Michael J. TREBILCOCK and James S.F. WILSON, *The Perils of Picking Technological Winners in Renewable Energy Policy: An Energy Probe Study*, Energy Probe, 5 March 2010, p. 8. See also Pierre-Olivier PINEAU, "Electricity Subsidies in Low-Cost Jurisdictions: The Case of British Columbia", (2008) 4(3) *Canadian Public Policy* 379, at p. 381; See also Jonathan PERSHING and Jim MACKENZIE, *Removing Subsidies: Leveling the Playing Field for Renewable Energy Technologies*, Thematic Background Paper, International Conference for Renewable Energies, Secretariat of the International Conference for Renewable Energies, March 2004, p. 15.

[15] Indeed, it is unclear under WTO law whether electricity should be treated as a good or a service. *Supra* Part III, Section 3 regarding GATS.

of renewable energy production in place in Québec and Ontario will focus our analysis and illustrate the potential for compliance with WTO trade rules.[16]

We must highlight the fact that renewable energy subsidy programs, including local content requirements therein, have not yet been the subject of an international trade dispute.[17] Nevertheless, as one author notes, renewable energy subsidies "are likely to result in trade disputes of different kinds".[18] These programs are clearly not immune to WTO sanctions. In fact, it is possible that a challenge to such mechanisms will be brought soon, as evidenced the comments made by Japan in May of 2010 with respect to Ontario's FIT program:

> Japan, at the meeting of the Council for Trade in Goods on 21 May 2010, expressed concern over what it said were local-content requirements in a renewable-energy programme in Canada's province of Ontario. It asked Canada to explain the consistency of the requirements with various WTO agreements, including the GATT 1994 provision on equal treatment for imports, and the Agreement on Trade-Related

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[16] China's renewable energy supports mechanisms' closely resemble those used in Quebec and Ontario, particularly with respect to local content requirements. See a review of China's programs' compliance with WTO law in Joanna I. LEWIS, *A review of the Potential International Trade Implications of Key Wind Power Industry Policies in China*, Report for the Energy Foundation's China Sustainable Energy Program, Center for Resource Solutions, 1 November 2007.

[17] "Because most governments provide such […] assistance, and do not wish to set a precedent that would call into question their own expenditure, there has so far been little interest shown by governments in challenging public support for demonstration projects." in James CUST and Karsten NEUHOFF, *The Economics, Politics and Future of Energy Subsidies*, Report from Climate Policy Initiative Workshop, DIW Berlin, 21 March 2010, p. 6.

[18] Thomas COTTIER et al, *Energy in WTO law and policy*, NCCR Trade Regulation, Working Paper No 2009/25, May 2009, p.12.

> Investment Measures.
>
> The European Union and the United States expressed interest on this matter.[19]

Part I of our study analyses Ontario and Québec's renewable energy production programs in order to highlight the characteristics of such programs that may be actionable under WTO law. Both offer a form of financial assistance to new renewable energy facilities and impose local content restrictions. Part II provides an overview and analysis of the development and current extent of subsidies regulation under international trade law, focusing primarily on the SCM Agreement. In Part III, we examine the more fundamental principles of WTO law, namely the national treatment and most-favored nation rules, as well as three other relevant WTO multilateral agreements. Throughout Parts II and III, we discuss how the various rules studied relate to subsidies discipline and apply them to renewable energy support mechanisms, while theorizing on the applicability of WTO law to Québec and Ontario's programs.

An apparent dichotomy exists between the recent push toward increasing overall renewable energy production and continued efforts to limit trade distorting subsidies. Our study allows us to provide insight into one effect of this disconnect: the actionability of renewable energy support mechanisms.

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[19] WTO COUNCIL FOR TRADE IN GOODS, *Japan questions local-content requirements in Canadian province's energy programme*, News Release, 21 May 2010.

If the government spends money in the regions of the UK it is called subsidy. But if it pours it down the gullet of the cities and counties in south-east England it is called essential support of the infrastructure.

John Forsyth

Part I – Ontario and Québec's Renewable Energy Support Mechanisms

The last decade has seen both Québec and Ontario source electricity through successive renewable energy production programs, more recently with the development in Ontario of a permanent renewables FIT program and in Québec of a 500 MW community focused wind tender.

In Québec, *Hydro-Québec Distribution* ("**HQD**") obtained its first non-hydroelectric renewable energy in 2003 when it issued a 1,000 MW wind tender.[20] From 2005 to 2008, a second wind tender was in effect, this time for

[20] *Regulation respecting wind energy and biomass energy*, 2003 G.O. II, 1278; *Décret concernant les préoccupations économiques, sociales et environnementales indiquées à la Régie de l'énergie à l'égard de l'énergie éolienne et l'énergie produite avec de la biomasse*, (2003) 135 G.O. II, 1778.

2,000 MW of electricity sourced from wind energy.[21] In July 2010, HQD closed its third renewables tender, seeking 500 MW of wind energy from projects developed in conjunction with the province's communities and First Nations (the "**Community CFT**").[22] Throughout this period, other tenders have sourced renewable energy from small-hydro (i.e. less than 50 MW – Hydro-Québec Production maintains its monopoly for developing hydroelectric production

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[21] *Regulation respecting the second block of wind energy*, (2005) G.O. II, 1278; *Regulation amending the Regulation respecting the second block of wind energy*, (2007) 139 G.O. II, 2755; *Décret 926-2005 Concernant les préoccupations économiques, sociales et environnementales indiquées à la Régie de l'énergie à l'égard du second bloc d'énergie éolienne*, (2005) 137 G.O. II, 5867B; *Décret 1016-2005 concernant une modification aux préoccupations économiques, sociales et environnementales indiquées à la Régie de l'énergie à l'égard du second bloc d'énergie éolienne*, (2005) 137 G.O. II, 6426; *Décret 96-2007 concernant une modification aux préoccupations économiques, sociales et environnementales indiquées à la Régie de l'énergie à l'égard du second bloc d'énergie éolienne*, (2007) 139 G.O. II, 1373.

[22] Call for Tenders A/O 2009-02, issued April 30, 2009 pursuant to Orders-in-council ("**O.C.**") No. 1043-2008 and 1045-2008 respectively enacting the *Regulation respecting a 250 MW block of wind energy from Aboriginal projects* and the *Regulation respecting a 250 MW block of wind energy from community projects*, the O.C. No. 179-2009 and 180-2009 adopted March 4, 2009 respectively enacting the *Regulation to amend the Regulation respecting a 250 MW block of wind energy from community projects and the Regulation to amend the Regulation respecting a 250 MW block of wind energy from Aboriginal projects,* the O.C. No. 520-2009 and 521-2009 adopted April 29, 2009 respectively enacting the *Regulation to amend the Regulation respecting a 250 MW block of wind energy from Aboriginal projects and the Regulation to amend the Regulation respecting a 250 MW block of wind energy from community projects,* the O.C. No. 468-2010 and 469-2010 adopted June 2nd, 2010 respectively enacting the *Regulation to amend the Regulation respecting a 250 MW block of wind energy from Aboriginal projects and the Regulation to amend the Regulation respecting a 250 MW block of wind energy from community projects,* and the O.C. No. 1044-2008 and 1046-2008 *Concernant les préoccupations économiques, sociales et environnementales indiquées à la Régie de l'énergie à l'égard d'un bloc de 250 MW d'énergie éolienne issu de projets autochtones and Régie de l'énergie à l'égard d'un block de 250 MW d'énergie éolienne issue de projets communautaires* adopted October 29, 2008 (the "**1044-2008 and 1046-2008 Decrees**") and the O.C. No. 67-2010 and 68-2010 adopted January 26, 2010 *Concernant une modification aux préoccupations économiques, sociales et environnementales indiquées à la Régie de l'énergie à l'égard d'un bloc de 250 MW d'énergie éolienne issu de projets autochtones* et *Concernant une modification aux préoccupations économiques, sociales et environnementales indiquées à la Régie de l'énergie à l'égard d'un bloc de 250 MW d'énergie éolienne issu de projets communautaires.* The Community CFT also had appended to it a standard form of PPA, the "**Community CFT PPA**".

sites of more than 50 MW) and biomass, however the wind tenders are by far the most significant. [23]

Québec wind tenders are structured so as to provide winning projects with a guaranteed purchase price of electricity throughout the twenty year term of the *power purchase agreement* ("**PPA**") signed with HQD. The tenders have consistently incorporated high local content requirements.

In Ontario, developments in renewables generation have been no less significant. Three renewable energy supply tenders have been issued by Ontario's *Ministry of Energy and Infrastructure* ("**MEI**") leading to approximately 1,500 MW of electricity sourced from renewables since 2004.[24] The province of Ontario has been particularly aggressive in its industry support initiatives over the past year. The *Green Energy Act, 2009*[25] (the "**GEA**") was adopted with the goal of "fostering the growth of renewable energy projects, which use cleaner sources of energy, [of] removing barriers to and promoting opportunities for renewable energy projects and [of] promoting a green economy."

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[23] Consult a complete list of signed contracts pursuant to such tenders at http://www.hydroquebec.com/distribution/en/marchequebecois/contrats.html.
[24] Tender documentation and model renewable energy supply contracts (PPAs) available at OPA Generation Procurement website: https://testopa1.powerauthority.on.ca/GP/Page.asp?PageID=749&SiteNodeID=149.
[25] S.O. 2009, c. 12.

Pursuant to the GEA, Ontario initiated in September of 2009 a FIT program mandating that producers of renewable energy which meet the program's eligibility conditions receive a guaranteed above-market price per kilowatt-hour ("**kWH**") of electricity sold (the "**FIT Program**"). Since Ontario has an electricity market, enabling a market-driven and fluctuating price of electricity, the FIT allows renewable energy developers a level of certainty with respect to price inputs, enabling them to compete with coal and natural gas facilities by offsetting the comparatively high price per MW of renewables production versus conventional generation sources.

The FIT Program's local content rules are also particularly restrictive, but are justified by the MEI as a way of increasing the development of local manufacturing capacity and renewable energy expertise in the province. The success of the FIT Program so far in attracting renewable energy development in Ontario has been remarkable: following the program's launch in December 2010, 184 projects were submitted in the program's first four months to the *Ontario Power Authority* ("**OPA**"), totaling a potential of approximately 2,500 MW of new renewable energy.[26]

In the following sections, we examine the characteristics of the Community

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[26] ONTARIO POWER AUTHORITY, *Ontario Announces 184 Large-Scale Renewable Energy Projects*, News Release, 8 April 2010.

CFT and FIT Program, with a particular focus on the financial incentives offered by such programs as well as their local content requirements. In addition, we review the relationship between HQD, the OPA and their respective province's electricity sectors. Finally, we examine the applicability of WTO law to provincial industry support measures.

Section 1 – Ontario

1.1 The OPA and Ontario's Electricity Market

Ontario's electricity market is largely governed by the *Electricity Act, 1998*[27], which liberalized the sector by breaking up the province's electricity monopoly, Ontario Hydro, into five independent entities: (i) Hydro One Inc. (which owns and operates electricity generation and transmission facilities), (ii) Ontario Power Generation Inc. (which owns and operates electricity generation facilities), (iii) the Independent Electricity System Operator (which regulates the province's electricity transmission and distribution network), (iv) the Electrical Safety Authority and (v) the Ontario Electricity Financial Corporation.

In addition, the Electricity Act established the OPA as a statutory corporation without share capital. The objects of the OPA include: (i) forecasting electricity

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[27] S.O. 1998, c. 15 (hereinafter "**Electricity Act**").

demand and the adequacy and reliability of electricity resources for Ontario for the medium and long term, (ii) supporting the goal of ensuring adequate, reliable and secure electricity supply and resources in Ontario, and (iii) facilitating the diversification of sources of electricity supply by promoting the use of cleaner energy sources and technologies, including alternative energy sources and renewable energy sources.[28]

In order to pursue these objectives, the OPA enters into contracts for the procurement of electricity supply using alternative or renewable energy sources to assist the Government of Ontario in achieving goals in the development and use of alternative or renewable energy technology and resources, either pursuant to a direction of the MEI or pursuant to a procurement process.[29] In 2009, the Electricity Act was amended to allow the MEI to direct the OPA to develop a FIT program.[30] On September 24, 2009, the MEI issued such a directive (the "**FIT Directive**"):

> I direct you to develop a feed-in tariff program that is designed to procure energy from a wide range of renewable energy sources. The development of this program is a key element of meeting the objectives of the Green Energy and Green Economy Act, 2009 and is critical to Ontario's success

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[28] Electricity Act, s. 25.2(1).
[29] Electricity Act, s. 25.2(5) and 25.32(1) and (4.1). A list of all directives issued to OPA are available here: http://www.powerauthority.on.ca/Page.asp?PageID=122&ContentID=6268.
[30] Electricity Act, s. 25.35.

in becoming a leading renewable energy jurisdiction.[31]

The FIT Program launched the same day, as Canada's first renewable energy FIT.[32]

1.2 The FIT Program

Contemporaneously with the FIT Directive, the OPA issued final FIT Program standard rules (the "**FIT Rules**") and PPA (the "**FIT Contract**").[33] Developers are allowed to submit an application to the OPA at anytime.[34] If the application meets the requirements outlined in the FIT Rules, the OPA may award the developer a FIT Contract which will be signed by the OPA. There are several general requirements which must be met by a proposed generating facility under the FIT rules. The facility must be located in Ontario and have a contract capacity which does not exceed the limits set out in the FIT Rules. Obviously, the facility must also generate electricity exclusively from a renewable source (meaning wind, solar (PV), renewable biomass, landfill gas or waterpower) and connect to an electricity distribution network and transmission system.

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[31]Consult the FIT Directive here:http://www.powerauthority.on.ca/Storage/106/15420_FIT_Directive_Sept_24_09.pdf.

[32] A similar program may soon be deployed in British Columbia. On June 3, 2010, the *Clean Energy Act*, S.B.C. 2010, c. 22 received royal assent, containing similar provisions as the GEA and allowing the government to direct the British Columbia Hydro and Power Authority to establish a FIT program. See Section 16 of the act.

[33] The FIT Rules and FIT Contract are continuously updated and our review is based on Version 1.3.1 of the FIT Rules and FIT Contract, issued July 2, 2010. They can be downloaded on the FIT Program Website: http://fit.powerauthority.on.ca/

[34] Hence, contrary to a tender, there is no closing date for submission of proposals. The FIT is ongoing and there is no planned date for its closure.

1.2.1 Financial Assistance

Once awarded a FIT Contract, the facility will benefit from a FIT. For wind powered on-shore facilities, a FIT of 13.5 ¢/kWh (or $135/MWh) over the 20 year term of the PPA is provided (indexed to take inflation into account). Since Ontario has an open electricity market, these rates are paid out by the province's main distributor of electricity, Hydro-One Inc., or by any of the nearly 100 local distribution companies with electricity distribution networks located throughout the province. The increased cost of purchasing electricity from FIT facilities is ultimately passed on by distributors to end-user consumers. Facilities can also sell their power directly into Ontario's open electricity market, in which case the OPA will cover the difference between the actual price obtained on the open market per kWH and the relevant FIT price, paying such amount directly to the generator.[35]

Annexed hereto, Table 1 provides a complete list of the FIT prices granted to the various renewable energy facility types. The prices may not seem significant, however they must be compared to the prices actually paid by retail customers (regulated prices, see Table 2) and on the open electricity market (see Table 3). The margin available to renewable energy suppliers is

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[35] Conversely, if the FIT facility receives on the open market a price per kWH that is higher than that which it is afforded under the FIT pricing, it will reimburse the difference to the OPA. See FIT Contract Section 3.1 and Exhibit B.

considerable. For instance, in May of 2010 a supplier could obtain 4.04 ¢/kWh on the open market for electricity. Were it to be a photovoltaic[36] energy facility benefiting from a FIT, it would notwithstanding the market price receive, depending on the facility's size, anywhere between 44.3¢ and 58.8¢ for each kWh sold.

1.2.2 Local Content Requirements

The FIT Rules and FIT Contract mandate that a minimum of Ontario-sourced expertise and equipment be used in the development and construction of a renewable energy facility sourcing power from wind turbines or solar photovoltaic Panels.[37] Although demonstrating local content is not an eligibility requirement for the purposes of a FIT Program application, the FIT Contract awarded requires that facilities obtain the minimum required local content levels as a condition precedent to receipt of the FIT. Furthermore, failure to achieve the levels can lead to the OPA terminating the FIT contract.[38] The local content levels for on-shore wind power projects with a generating capacity greater than 10 kW is 25% for facilities with a milestone date for commercial

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[36] Whereas most electricity generation techniques involves the movement of a magnetic field and a conductor, meaning an engine or turbine – powered by the burning of a fossil fuel, the movement of the wind or water – photovoltaic generation uses solar cells, which produce electricity directly from sunlight. See John TWIDELL, note 13 above, p. 182.

[37] FIT Contract, Section 2.2(f). Currently, no local content rules apply to facilities sourcing power from other renewable sources. As such, the analysis contained in this thesis dealing with local content provisions would not apply to those facilities.

[38] FIT Contract, Sections 2.4(b)(iii), 2.6 and 9.1(b).

operation[39] prior to January 1, 2012 and 50% thereafter. For solar (PV) projects with a generating capacity greater than 10 kW, the levels are 50% for facilities with a milestone date for commercial operation prior to January 1, 2011 and 60% thereafter.[40]

In order to assist developers in determining whether they achieve the minimum local content levels, the OPA has provided a table outlining a number of designated activities that qualify as local content under the FIT Contract.[41] Where a designated activity has been performed in relation to the facility, the facility is allocated the corresponding qualifying percentage. For example, having wiring and electrical hardware sourced from an Ontario supplier will provide 9% toward meeting the 25% requirement. Wind turbine blades cast in a mould in Ontario and instrumentation within such blades assembled in Ontario provide 16%.

Section 2 – Québec

2.1 Hydro-Québec and Québec's Electricity Market

The *Hydro-Québec Act*[42] established Hydro-Québec ("**HQ**") in 1964 to "supply

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[39] Meaning the date the facility achieves substantial completion with a demonstrated ability to continuously generate electricity and the OPA's various conditions-precedent to commercial operation are met. See FIT Contract, Section 2.6(a).
[40] FIT Contract, s. 2.2(f).
[41] FIT Contract, Exhibit "D".
[42] R.S.Q. c. H-5 (the "**Hydro-Québec Act**").

power and to pursue endeavors in energy-related research and promotion, energy conversion and conservation, and any field connected with or related to power or energy". It may generate, acquire, sell, transmit and distribute electricity. HQ's electricity distribution division, HQD, is tasked with procuring and selling electricity to industrial, commercial and residential consumers. It must provide a minimum of 165 terawatt-hours of electricity to Québec consumers. Electricity is principally sourced from HQ's electricity production division, *Hydro-Québec Production*, which owns and operates all of the province's hydro-electric facilities with a generation capacity greater than 50 MW. [43]

Although HQ enjoyed a complete monopoly over Québec's electricity supply for decades, changes were brought about as a result of efforts to liberalize the North-American electricity market. Since HQ wished to supply foreign markets with electricity, it needed to allow companies access to its market. Furthermore, the total annual demand for electricity in Québec exceeded the capacity of Hydro-Québec Production's existing generation facilities beginning in the late-90s. As such, HQD began to source electricity from private developers through tender processes for the purchase of electricity, recently focusing its efforts on

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[43] Hydro-Québec Act, s. 22 and 29; *An Act respecting the Régie de l'énergie*, R.S.Q. c. R-6.01 (the "**Régie de l'énergie Act**"), s. 52.2(1).

sourcing additional capacity from wind energy facilities.[44]

2.1 Community CFT

Following the success of its previous wind tenders, HQD issued the Community CFT on April 30, 2009.[45] The tender called for a 250 MW block of wind energy sourced from facilities developed, owned and operated in partnership with local communities and/or municipalities and a 250 MW block from facilities partnered with First Nations. The facilities could be located anywhere in the province, so long as they provided local communities and First Nations groups with designated ownership and control levels over the project. The Community CFT was therefore seen as a community empowering tender. When the Community CFT closed on July 6, 2010, HQD had received more than double the tender's request: 31 bids totaling 732 MW for the community block, and 13 bids totaling 319 MW for the First Nations bloc.[46]

2.2.1 Financial Assistance

Bidders determine the price offered to HQD for electricity sourced from the

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[44] Claude GARCIA, *How would the privatization of Hydro-Québec make Québecers richer?*, Montreal Economic Institute Research Papers, February 2009, p. 19. The tender processes are administered by HQ, but overseen by the Province's energy board, the *Régie de l'énergie*, see s. 74.1 the Régie de l'énergie Act.

[45] See Community CFT Website here: http://www.hydroquebec.com/distribution/en/marchequebecois/ao-200902/index.html

[46] HYDRO-QUÉBEC DISTRIBUTION, *Appel d'offres de 500 MW d'énergie éolienne : Hydro-Québec Distribution reçoit 44 soumissions totalisant 1 051 MW*, News Release, 7 July 2010.

eventual facility. The Community CFT provided that bidders could offer a maximum price of $125/MWh in 2009 dollars for electricity generated at their facility. Evidently, bidders who offered a lower price were ranked higher and therefore increase the likelihood of being offered a PPA.[47] Unlike in Ontario, all electricity rates paid by retail and industrial customers are established by an independent energy board, the *Régie de l'énergie*[48] and paid directly to HQD.

2.2.2 Local Content Requirements

Sixty percent of costs relating to the bidder's wind farm project must be incurred in Québec, including thirty percent in the province's Gaspésie-Îles-de-la-Madelaine administrative region (regional county municipality of Matane).[49] The bidder must guarantee that it will meet these requirements.[50]

In addition, bidders can only source the wind turbines used in their facility from so-called "designated manufacturers": HQD approved turbine manufacturers who have invested in Québec through the establishment of manufacturing facilities for turbines in the Gaspésie-Îles-de-la-Madelaine administrative region. These requirements have resulted in numerous companies establishing a

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[47] Community CFT, s. 1.7.
[48] See Régie de l'énergie Act, s. 1, 31(1), 32(1) and 48.
[49] See 1044-2008 and 1046-2008 Decrees, note 22 above, para. 6-7.
[50] Community CFT, s. 1.5.

manufacturing and supply-chain presence in Québec.[51]

Where a bidder awarded a PPA with HQD fails to achieve the local content requirements, penalties are imposed that effectively remove much of the financial benefits associated with the generation facility.[52] Furthermore, the bidder must warrant that its wind turbines will be sourced from Gaspésie, failing which HQD may terminate the PPA.[53]

Section 3 – Applicability of WTO law

Considering the central focus of this study is an analysis of two provincial renewable energy support mechanisms, it is relevant to determine whether WTO law applies to such provincial programs. The issue stems from the structure of the Canadian Constitution which, at Articles 91 and 92 of the *Constitution Act, 1867*[54], distinguishes between those areas of legislation that fall upon the federal Parliament (Article 91) and the provincial legislatures (Article 92). Treaties however are not specifically addressed by these articles. As such, even where the power to ratify treaties vests exclusively with the

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[51] Community CFT, s. 1.5.3. See also Joanna I. LEWIS and Ryan H. WISER, *Supporting Localization of Wind Technology through Large Utility Tenders in Québec: Lessons for China*, Center for Resource Solutions for the Energy Foundation's China Sustainable Energy Program, 8 June 2006, p. 5 and 6.
[52] A shortfall points system is provided, with penalties ranging from $4,000 to $12,000 per point, per megawatt of contract capacity. See Community CFT PPA, s. 29.2.
[53] Community CFT PPA, s. 35.1(j).
[54] *The Constitution Act, 1867 (U.K.)*, 30 & 31 Victoria, c. 3.

federal executive, the power to implement them is divided between federal and provincial governments. As such, the matter dealt with in a treaty falls within provincial jurisdiction under Article 92, the decision of whether to pass implementing legislation in performance of the treaty obligation is provincial.[55]

A comprehensive trade agreement however, such as the WTO Agreement[56], addresses not only direct barriers to trade such as tariffs (or custom's duties), which fall under federal authority, but also provincial practices that discriminate against goods of another country and that constitute indirect or non-tariff barriers to trade between agreeing countries.[57] Québec has specifically implemented the WTO Agreement, through the *Act respecting the implementation of international trade agreements*[58]. Ontario has not passed similar legislation. Absent this form of implementing legislation, it may be possible for Ontario to contest the applicability of the WTO Agreement to the FIT Program were Canada to decide to force Ontario to abide by the WTO Agreement or any WTO ruling pursuant thereto.

Notwithstanding this, Canada cannot set-up its domestic constitutional

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[55] R.E. R SULLIVAN, "Jurisdiction to Negotiate and Implement Free Trade Agreements in Canada: Calling the Provincial Bluff", (1987) 24 *U. W. Ontario L. Rev.* 63, p. 68.
[56] Implemented in Canada through the *World Trade Organization Agreement Implementation Act*, S.C. 1994, c. 47.
[57] Peter W. HOGG, *Constitutional Law of Canada*, vol. 1, Carswell, 5th ed. supp., 2010, p 11-18.
[58] R.S.Q. c. M-35.2, s. 2 (adopted in 1996).

arrangements to excuse non-conformity with WTO obligations before a WTO adjudicating body.[59] The WTO Agreement provides at Article II(2) that the various WTO agreements and texts are "binding on all Members". More specifically, every member country is required to "ensure the conformity of its laws, regulations and administrative procedures with its obligations" under WTO law. Canadian provincial measures have indeed already successfully been contested before the WTO's *Dispute Settlement Body* ("**DSB**"), as evidenced by the recent softwood lumber disputes between Canada and the United States, which specifically dealt with provincial subsidization schemes.[60]

Having reviewed the structure of Ontario and Québec's electricity market and the requirements of the FIT Program and Community CFT, we now turn in Parts II and III to an examination of WTO law in order to determine whether such programs are actionable under said law.

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[59] *Vienna Convention on the Law of Treaties*, 1155 UNTS 331 (23 May 1969), Article 27: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

[60] See *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/RW (1 September 2006). Note that this case concerned measures taken by British Columbia which, like Ontario, has not adopted WTO implementing legislation.

Manufacturing and commercial monopolies owe their origin not to a tendency imminent in a capitalist economy but to governmental interventionist policy directed against free trade and laissez faire.

Ludwig Mises, *Socialism*, 1951

[…] la vraie politique d'un pays doit tendre à affranchir tout tribut envers l'étranger, mais dans le secours honteux des douanes et des prohibitions. L'industrie ne peut être sauvée que par elle-même, la concurrence est sa vie. Protégée, elle s'endort; elle meurt par le monopole comme sous le tarif.

Honoré de Balzac, *Le médecin de campagne*, 1833

Part II – Subsidies Regulation and Renewable Energy

Balzac and Mises's words indicate they recognized the importance of free trade, the negative effects of subsidization and a belief that subsidies protected against competition and inevitably led to non-competitive, inefficient, bloated and wasteful domestic industries. An analogous belief existed amongst trading nations' governments of the negative effects of subsidies. They understood that unbridled and competing national subsidies undermined global prosperity.

The international community has been fashioning guidelines that distinguish between acceptable and unacceptable national subsidy measures for nearly a century. In Sections 1 to 3 below, we outline the history of international subsidies regulation, to allow for a fuller understanding of subsidies regulation developments that eventually led to the discipline's broad applicability to international trade and domestic policy.

In Section 4, we cover in greater detail the SCM Agreement and analyze its potential applicability to Ontario and Québec's renewable energy support mechanisms.

Section 1 – The Life of a Subsidy Before the GATT

Prior to the advent of global rules applicable to subsidies, national countervailing duty[61] laws were the only effective means by which countries could neutralize the adverse effects of subsidies. The laws were designed to offset subsidies by increasing the tariffs placed over the applicable imported good equal to the delta between the subsidized good and the theoretical unsubsidized version of it.[62]

In the United States for instance, a countervailing duty law was first enacted in

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[61] Countervailing Duty is a "Duty" imposed as a "Countermeasure" against another country's imports: see Annex 1 hereto.
[62] Terence P. STEWART, note 2 above, p. 812.

1890 to deal with export subsidies (i.e. subsidies afforded to local industry that lower the cost – thereby increasing the amount – of exports) on sugar.[63] In 1897, the U.S. enacted a general countervailing duty law which "required that a countervailing duty equal to the net amount of the subsidy ("bounty or grant") bestowed be imposed on dutiable merchandise which had received, directly or indirectly, a bounty or grant on exportation."[64] Similar laws have since been enacted in Canada[65], Australia, the European Community, Chile and Japan.[66]

Section 2 – GATT 1947 and the Debut of International Subsidies Regulation

During negotiations surrounding the GATT 1947, members decided to include rules dealing with subsidies. The provisions incorporated into the final document represented a balancing act between sound economic doctrine and an understanding of what was possible with subsidies regulation at the time. [67] On the one hand, negotiators were persuaded that any subsidy would interfere with the optimum allocation of resources on a global and national level. [68] On the other hand, "drafters understood that most countries maintained various

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[63] *Tariff Act of 1890*, ch. 1244, 26 Stat. 584 (1890).
[64] *Tariff Act of 1897*, 30 Cong.Rec. 1634 (1897).
[65] *Special Import Measures Act*, R.S.C. 1985, c. S-15 (hereinafter the "**Special Import Measures Act**"), s. 6.
[66] Terence P. STEWART, note 2 above, p. 813.
[67] John W. EVANS "Subsidies and Countervailing Duties in the GATT: Present Law and Future Prospects", (1977-1978) 3 *Int'l Trade L. J.* 211, p. 213.
[68] *Id.*

domestic subsidies, often with desirable social purposes, the international effects of which were negligible or virtually impossible to measure."[69] The result was a GATT that contained some guidance on the issue of subsidies, but little substance.

2.1 Countervailing Duties

National laws generally follow a procedure by which countervailing duties are imposed following a governmental investigation into another trading country's use of subsidies.[70] Investigations were – and still are – sparked by requests made by local industry who feel their products are disadvantaged by a foreign government's subsidy practices.[71]

The GATT 1947's Article VI imposed restrictions on countries seeking to apply domestic countervailing measures. First, it defines countervailing duty as "a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, either directly or indirectly, upon the manufacture, production or export of any merchandise". Second, the amount of any countervailing duty imposed by a GATT signatory is limited to "an amount equal to the estimated

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[69] *Id.*
[70] Edmond MCGOVERN, *International trade regulation: GATT, the United States, and the European Community*, Exeter, Globefield Press, 1986, p. 331.
[71] In Canada, see Special Import Measures Act, s. 31.

bounty or subsidy determined to have been granted."[72] A country's ability to levy a duty is restricted to those cases where the party seeking to impose a duty can demonstrate that subsidization was "such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry."[73] Other than these restrictions, the original GATT 1947 afforded members discretion in the design and functioning of their countervailing regime.

2.2 Subsidies

The most important restrictions on the use of subsidies are located in Article XVI of GATT 1947. The article is divided in two: section A deals with notification and consultation procedures, while section B tackles export subsidies.

2.2.1 Notification and Consultation

GATT 1947 Article XVI, Section A provides that GATT members (or "contracting parties") are bound to notify other members when they consider that the latter's acts constitute subsidies and that discussions on the possibility of "limiting" the subsidy must be entered into between the relevant contracting parties. Not surprisingly, many signatories took the position that merely

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[72] GATT 1947, Article VI(3).
[73] GATT 1947, Article VI(6)(a).

entering into discussions discharged them of their obligations under Article XVI.[74] A working party on EC refunds on exports of sugar observed however, that the committee preparing the GATT 1947 subsidies provisions believed the intention was to oblige subsidizing members to participate in discussions concerning the subsidy at an international level and to provide for "limiting" subsidization so that its prejudicial effects might be reduced.[75] The word "limiting" was therefore used to reinforce members' obligation to maintain subsidization at as low a level as possible and remind them that the gradual reduction of subsidy payments over time was sought-after.[76] Nevertheless, these notification and consultation requirements were often ignored:

> The role of Article XVI in providing the CONTRACTING PARTIES with accurate information about the nature and extent of subsidies in individual countries has been partly frustrated by the failure of some contracting parties to notify the subsidies they maintain. […] a contracting party can be required to consult concerning a subsidy, whether or not it has been notified. There seems, therefore, [to be] no advantage to a contracting party in refraining from notifying subsidies; on the contrary, notifications may dispel undue suspicions concerning those subsidies not previously notified.[77]

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[74] Edmond MCGOVERN, note 70 above, p. 331.
[75] EUROPEAN COMMUNITIES, *Report of the working party on EC refunds on exports of sugar*, BISD 28S/80, 1982; Edmond MCGOVERN, note 70 above, p. 331.
[76] *Id.*
[77] WORLD TRADE ORGANIZATION, *Guide to GATT Law and Practice*, vol. 1: Articles I-XXI, Geneva, World Trade Organization, 1995, p. 449.

2.2.2 Export Subsidies

Although a 1955 review session had initially sought to develop more meaningful restrictions on the use of subsidies, that attempt largely failed.[78] The result was a GATT 1947 that only regulated the use of export subsidies (subsidies that operate directly or indirectly to increase exports), completely ignoring the effects subsidizing domestic industries could have on global trade.

Section B of Article XVI was introduced with the hope of limiting the growing use of export subsidies and countering their distorting effects on world trade. Unfortunately, no direct prohibition of export subsidies was included.[79] The export subsidy provisions were further diluted by the inclusion of a distinction between primary and non-primary products. This distinction would be continued under the WTO regime with subsidies disciplined differently depending on whether they are applied to agricultural or non-agricultural products.[80]

Article XVI, paragraph 4 governed non-primary products, but only with respect to those countries that had accepted the *Declaration Giving Effect to the*

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[78] John H. JACKSON and William J. DAVEY, *Legal Problems of International Economic Relations: Cases, Materials and Text on the National and International Regulations of Transnational Economic Relations*, 2nd ed., St. Paul, West Publishing Co., 1986, p. 727.
[79] Edmond MCGOVERN, note 70 above, p. 320-321.
[80] See Part II, Section 4 hereto.

Provisions of Article XVI:4[81] (the "**Subsidies Declaration**"). The Subsidies Declaration provided that accepting parties refrain from direct subsidization that resulted in the sale of a product for export at a price lower than the comparable price charged for a similar product to buyers in the domestic market.

Surprisingly, the GATT 1947 did not provide a definition of "subsidy". In fact, a 1961 Panel report concluded that an agreed interpretation was neither necessary nor feasible considering that it would be impossible to arrive at a definition which would at the same time include all measures that fall within the intended meaning of Article XVI and exclude others not so intended.[82]

In sum, the rules applicable to subsidies remained limited and confused throughout this initial era of international subsidies regulation. As we have seen, not only were they drafted in such a way as to make compliance relatively voluntary (consider the notification procedures), but they used unclear language open to broad interpretation. The GATT 1947 therefore did not provide adequate regulation of subsidy policies and did not prevent the continued expansion of those policies. The initial shortcomings of the subsidy rules forced

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[81] Only 17 countries ever adopted the Subsidies Declaration, see Guiguo WANG, *The Law of the WTO: China and the Future of Free Trade*, Hong Kong, Sweet & Maxwell Asia, 2005, p. 647.

[82] GATT CONTRACTING PARTIES, *Report of the Panel on subsidies*, BISD 10S/201, 1962, p. 208; Edmond MCGOVERN, note 70 above, p. 319.

signatories to eventually decide to go back to the drawing board.

Section 3 – The Tokyo Round Subsidies Code

The period following adoption of the GATT and the beginning of the Tokyo Round negotiations in 1974 witnessed an unprecedented increase in the use of subsidies by governments, as their economies struggled to adapt to the post-reconstruction economic reality. Then Director-General Oliver Long summarized the backdrop to the Tokyo Round subsidies negotiations as follows:

> Under the influence of political and social necessity, governments have embarked on massive financial commitments in order, among other things, to prop up ailing industries, to support depressed areas, to stimulate consumer demand or to promote exports. Subsidies have become an important instrument of protection.[83]

Trading nations recognized the danger increased subsidization posed to market access and trade, but were divergent in their views on how to deal with the issue. Although some, like the United States, were particularly interested in strengthening the rules governing subsidies, most countries believed that stringent international regulation of domestic subsidies would amount to

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[83] GENERAL AGREEMENT ON TARIFFS AND TRADE (ORGANIZATION), note 6 above, p. 53.

intolerable interference in domestic policy. [84]

Nevertheless, with the Tokyo Round about to begin, negotiators optimistically declared their intention to reduce or eliminate non-tariff barriers to trade. Domestic subsidies, separate from subsidies used to buttress a country's export industry, were therefore finally on the agenda.[85]

The *Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade* (the "**Subsidies Code**") was the result of the Tokyo Round negotiations on subsidization.[86] Instead of amending the multilateral text, drafters opted to create a separate agreement that interpreted the GATT 1947 subsidy provisions. The Subsidies Code had as its main purpose to counter the effects of subsidies and ensure that subsidization did not adversely affect the interests of other signatories to the Subsidies Code.[87] It included four parts dealing with export subsidies, domestic subsides, countervailing duties and dispute settlement procedures.

3.1 Export Subsidies

Contrary to the situation under the Subsidies Declaration, where disciplining

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[84] Terence P. STEWART, note 2 above, p. 816.
[85] *Id.*
[86] *Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade*, reprinted in GATT, Basic Instruments and Selected Documents (BISD) 26th Supp. at 56 (1980).
[87] Subsidies Code, at Preamble.

export subsidies required a pricing determination, the Subsidies Code's provisions on export subsidies included an illustrative list of deemed prohibited subsidies which were actionable regardless of their effect on other contracting parties' domestic industry.[88] Examples included governments directing subsidies to firms contingent upon export performance and the full or partial exemption of direct taxes related to exports. As in the GATT 1947 text, export subsidies on primary products were not generally prohibited.[89]

Signatories of the Subsidies Code could however contest other contracting parties' export subsidies in two ways by demonstrating: (i) that a subsidy was specifically prohibited pursuant to the Illustrative List; or (ii) in all other circumstances, that the subsidy caused injury to its domestic industry, nullification or impairment of benefits under the GATT 1947 or serious prejudice. This latter effect-based trigger to actionability would be further refined, as we shall see, under the SCM Agreement's provisions governing actionable subsidies.[90]

3.2 Domestic Subsidies

Concerning domestic subsidies, the Subsidies Code recognized their important

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[88] Subsidies Code, Article 9(2). The Illustrative List of Export Subsidies was annexed to the Subsidies Code.
[89] Subsidies Code, Illustrative List of Export Subsidies.
[90] Subsidies Code, Article 13(4).

role in the development of national economies: they would therefore not be completely banned. Instead, the Subsidies Code reminded countries that domestic subsidies might have an unfavorable impact on the trade levels of other countries and that such affected countries had the right to take measures to offset that impact.[91]

Hence, where the export of subsidized products led to injury to the industry of the importing country, the importing country was entitled to levy countervailing duties on imported products.[92] In cases where the situation was particularly serious, the importing country was permitted to prohibit the import of certain products in order to maintain its competitive position. The exporting country subject to such measures was permitted to seek redress through consultation and dispute settlement mechanisms.[93]

3.3 Countervailing Duties

On the issue of countervailing duties, the Subsidies Code contained fairly specific provisions. It included rules on the means for determining the existence of subsidies, the examination of countervailing duty measures, as well as the circumstances under which interim protective measures could be taken. The Subsidies Code also contained rules on how to enact and enforce domestic

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[91] Subsidies Code, Article 11(1).
[92] See discussion of "injury" in Section 4.5.1 and Annex 1 hereto.
[93] WANG, note 81 above, p. 658; Subsidies Code, Article 11.

countervailing duty laws. This represented a significant step in that the Subsidies Code removed some of the discretion GATT signatories had in applying countervailing measures and offered guidance on the appropriate use of countervailing measures.[94]

3.4 Dispute Settlement

Concerning notification, consultation and dispute settlement, the Subsidies Code again represented a significant improvement over the original GATT 1947 text.[95] With respect to dispute settlement, it emphasized full utilization of the consultation process: any contracting party could request bilateral consultations with parties that had allegedly violated the Subsidies Code. Countries were then obliged to comply with the request in order to attempt a mutually satisfactory solution. If consultations failed, a signatory could refer the dispute to a committee composed of one representative from each of the contracting parties. That committee would examine the facts of the dispute and recommend solutions. Where the dispute remained unresolved, the parties could request that a Panel be appointed to examine the matter and suggest a solution.[96]

Notwithstanding the various improvements the Subsidies Code offered, it

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[94] WANG, note 81 above, p. 659; Subsidies Code, Articles 4 and 5.
[95] WANG, note 81 above, p. 660.
[96] See Subsidies Code, Articles 3, 7, 12, 13, 18.

nevertheless failed to resolve the problems associated with subsidies in international trade, namely their identification and the enforcement of rules meant to limit their use. As the Tokyo Round drew to a close, negotiators proclaimed its failure for not providing any substantive solutions to these basic issues.[97]

Section 4 – The SCM Agreement and Renewable Energy

As trading nations gathered for the Uruguay Round of multilateral trade negotiations around an ambitious agenda, they signified their intent to once again devote considerable time and effort on subsidies regulation. Negotiations would be based on a review of the Subsidies Code and of Articles VI and XVI of the GATT 1947 in order to improve regulation of subsidies and countervailing measures affecting international trade. A negotiating group was established to deal with these issues.[98]

The next section reviews the efforts undertaken during the Uruguay Round to improve international subsidies regulation. We then provide a detailed explanation of the result of those efforts: the SCM Agreement. Throughout, we

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[97] Terence P. STEWART, note 2 above, p. 821; Jeffrey S. THOMAS and Michael A. MEYER, *The New Rules of Global Trade: A Guide to the World Trade Organization*, Toronto, Carswell, 1997, p. 153.
[98] *Ministerial Declaration on the Uruguay Round* (Punta Del Este Declaration), GATT Doc. No. MIN. DEC. (Sept. 20, 2986), p. 7.

analyze the SCM Agreement's applicability to Ontario and Québec renewable energy support mechanisms.

4.1 Background

Following the adoption of the Subsidies Code, the effects of subsidization on international trade continued to be problematic:

> There has been a substantial increase in the use of subsidies in industry […] during the 1980s. Subsidies […] have become an important element in world trade to the extent that, in some sectors, financial ability to subsidise exports has overridden competitive reality.[99]

While international trade law attempted to regulate subsidies to facilitate market access, some countries began to use anti-subsidy and countervailing measures in order to increase barriers to markets. Furthermore, the form and content of national subsidization policies were modified in order to circumvent existing GATT subsidies rules.[100]

In 1985, less than six years after the conclusion of the Tokyo Round, a GATT report identified subsidies as being at "the root of the most serious and intractable trade disputes that have been brought before the GATT".[101] The

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[99] Terence P. STEWART, note 2 above, p. 809.
[100] Guiguo WANG, note 81 above, p. 644.
[101] GENERAL AGREEMENT ON TARIFFS AND TRADE (ORGANIZATION), *Trade Policies for a Better Future*, 1985, p. 39.

report provided detailed information on specific problems associated with subsidies regulation following the Tokyo Round. It served as a key discussion document that would frame negotiations surrounding subsidies regulation throughout the Uruguay Round. Selective findings include:

> Under the present rules, export subsidies on manufactured products are banned except for developing countries. […] Although domestic subsidies are permitted, they are subject to retaliation if they damage the trade interests of other countries.
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> […] In the case of domestic subsidies, their full effects often emerge only some time after they are granted. If these effects are limited to the country where the subsidy is given, they are solely the affair of its citizens, but if international trade is affected, other countries may be legitimately concerned. In either case, more open procedures for considering subsidies can only be helpful.
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> Actions against subsidies must also be brought within clear rules: some measures now being taken against subsidies […] are illegal and therefore unfair, as are domestic procedures which permit harassment or importers. The rules defining injury should be clarified, and the type of offsetting procedures and actions permissible more strictly defined. Every effort should be made to bring all GATT members within the scope of the improved subsidy rules.
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> […] Moreover, GATT should be the place where it can be determined what is acceptable under whatever rules are adopted. GATT's complaint procedures for subsidy cases should be broadened and strengthened. Only then will the

system be able to determine what is fair and what is not.[102]

Although many delegates of the Uruguay Round GATT Negotiating Group were reluctant to give up their freedom to subsidize, they were able to successfully include the SCM Agreement in the WTO Agreement. In doing so, they ensured that subsidies regulation would form part of the multilateral framework applicable to all WTO members and that domestic subsidies would finally be regulated.[103]

4.2 Structure

The SCM Agreement[104] includes thirty-two articles divided into eleven parts. Seven annexes are also attached. The most substantive features are located in Parts II through V, with Parts II, III and IV dealing with subsidies and Part V with countervailing duties. The agreement buttresses the subsidy and countervailing duty provisions contained within the GATT text and Subsidies Code, while at the same time dealing new substantive and procedural rules.

In addition to providing a definition of what constitutes a subsidy, the SCM Agreement continues the Subsidies Code's prohibition of subsidies contingent on (i) export performance or (ii) the use of domestic over imported goods.

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[102] *Id.*; Jeffrey S. THOMAS, note 97 above, p. 153-154.
[103] Terence P. STEWART, note 2 above, p. 812.
[104] See copy in Annex 3 hereto.

Other subsidies may still be actionable if they cause adverse effects to the interests of other WTO members, such as an injury to such member's domestic industry. This categorization of subsidies reflects the understanding the "certain subsidies are trade distorting *per se*, while others are either potentially trade distorting and still others are not trade distorting at all"[105]. Finally, the SCM Agreement offers detailed provisions governing remedies available to WTO members seeking to discipline a fellow members' subsidization measures.

4.3 Definition of Subsidy

One of the more interesting debates during the Uruguay Round centered on the fact that neither the GATT text, nor the Subsidies Code, offered a definition of subsidy. As discussed, this apparent failure reflected a belief within the trading community that any attempt to define the term "subsidy" would be either under-inclusive or over-inclusive.[106]

The SCM Agreement thankfully does provide at Article 1(1) a definition of the

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[105] Debra P. STEYER, "The Subsidies and Countervailing Measures Agreement: Ahead of its Time or Time for Reform?", (2010) 44(4) *Journal of World Trade* 779, p. 782.
[106] See Part II, Section 2.2.2 hereto

term "subsidy".[107] The definition elucidates a three-part test: only when each component of the test is met can one conclude the existence of a subsidy. As such, the definition acts as a gate which, once all of its elements are met, unlocks to enable the SCM Agreements various disciplinary provisions. The components of the test are as follows:

(i) The subsidy must constitute a financial contribution or some form of income support by a domestic government or a public body; which

(ii) confers a benefit to its recipient; and

(iii) which is granted to a specific recipient.[108]

4.3.1 A Financial Contribution

The SCM Agreement's Article 1.1(a)(1) provides examples of government financial contributions that would be considered to fall under the scope of the first part of the test:

(i) a direct transfer of funds or liabilities (e.g. grants, loans, equity

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[107] With respect to energy subsidies, the United Nations Environment Program offers a simple definition which nevertheless captures some of the intent of the SCM Agreement, and which allows us to focus in on the application of subsidies to renewable energy production: "An energy subsidy is any government action that lowers the cost of energy production, raises the price received by energy producers or lowers the price paid by energy consumers." in UNITED NATIONS ENVIRONMENT PROGRAM, *Reforming Energy Subsidies – An explanatory summary of the issues and challenges in removing or modifying subsidies on energy that undermine the pursuit of sustainable development*, United Nations Environment Program and the International Energy Agency, 2002.

[108] Petros C. MAVROIDIS, SHOENBAUM, Thomas J. and Mitsuo MATSUSHITA, *The World Trade Organization: Law, Practice, and Policy*, 2nd ed., Oxford, Oxford University Press, 2006, p. 336.

infusions and loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (e.g. tax credits);

(iii) the provision of goods or services other than general infrastructure; or

(iv) payments to a funding mechanism, either directly or indirectly though a private body, carrying out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government.[109]

As such, a financial contribution can therefore be made either by a government directly or indirectly through a private body under direct or indirect government control. Furthermore, a financial contribution can take many forms, including the supply of moneys or other goods.

Meaning of Financial Contribution

The Panel in *US – Softwood Lumber III*[110] analyzed the extent of the notion of financial contribution and determined that such a notion must be broadly interpreted. Under a Canadian government program, persons wanting to harvest timber on lands owned by the Canadian government were required to first enter into licensing agreements with the appropriate provincial government. The licensing agreements allowed the licensee to harvest timber on the relevant

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[109] SCM Agreement, Article 1.1(a)(1).
[110] *United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*, Report of the Panel, WT/DS236/R (27 September 2002).

land. As a condition-precedent to entering into such license agreements however, the licensees had to commit to various service and maintenance obligations, including road-building and fire prevention. The licensees were also technically required to pay a *stumpage fee* – a fee charged in order to maintain the right to harvest timber – however no price per unit of timber was levied by the federal government. The timber was therefore provided for harvest for free.

The issue arose as to whether this granting of timber would qualify as a financial contribution under the SCM Agreement's Article 1.1(a)(1)(iii) relating to goods and services other than general infrastructure. According to the Panel, it did:

> […] we find that through the Canadian provincial government stumpage programmes, Crown timber is being supplied to tenure holders. Standing timber is a valuable input for logs which may be processed by sawmills into softwood lumber […] there is no basis in the text of the SCM Agreement to limit the term "goods" to tradeable products with a potential or actual tariff line […] *we consider that standing timber, trees, are goods* in the sense of Article 1.1(a)(1)(iii) of the SCM Agreement. (emphasis added)[111]

Direct or Indirect Financial Contributions

With respect to indirect financial contributions – through a private body –

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[111] *Id.*, para. 7.29

Panels have determined that although an explicit government instruction given to an entity to provide a financial contribution would satisfy the requirements of Article 1.1(a)(1)(iv), such explicit instruction is not absolutely necessary. Circumstantial evidence may suffice and a case-by-case analysis called for.[112] Hence, in *US – Countervailing Duty Investigation on DRAMS*[113], the Appellate Body analyzed the extent of the meaning of Article 1.1(a)(1)(iv), providing that the concept included situations where government cedes responsibility to a private body or exercises governmental authority over a private body.[114]

With respect to direct financial contributions – through a public body – the Panel in *EC – Countervailing Measures on DRAMS Chips*[115] provided that where entities are state-owned, "all that is required [to satisfy the first part of the SCM Agreement's test with respect to the existence of a subsidy] is evidence that a financial contribution did occur".[116]

As seen, the FIT Program guarantees renewable energy facilities an above-market price for electricity. In Québec, guaranteed purchase prices are provided. As such, we can surmise that both programs provide developers with

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[112] Petros C. MAVROIDIS, note 108 above, p. 344.
[113] *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs)*, Report of the Appellate Body, WT/DS296/AB/R (27 June 2005).
[114] *Id.,* para. 116.
[115] *EC – Countervailing Measures on Dynamic Random Access Memory Chips from Korea, Report of the Panel*, WT/DS299/R (17 June 2005).
[116] Petros C. MAVROIDIS, note 108, p. 345

a financial contribution, particularly considering the broad interpretation of the concept illustrated in the *US – Softwood Lumber III* case.

With respect to electricity (as with all sources of energy, including oil and gas) subsidy funding can be "provided directly by energy users or through the general budget" of the relevant governmental entity.[117] The issue is therefore whether the FIT Program and Community CFT's financial contribution can be considering as stemming (indirectly or directly) from a governmental entity, thereby placing such financial contributions to facility developers under the SCM Agreement's lens. The European Court's *PreussenElektra* case analyzed whether minimum-price purchase requirements for electricity sourced from renewable energy contained in the German FIT program were considered "state aid".[118] The Court concluded that payments under such program could not constitute governmental aid, since they did not involve the direct or indirect transfer of government moneys. Rather, the Court noted that an obligation was being placed on third parties, such as electricity distributors, to pay the FIT to eligible facilities.[119]

This analysis would not necessarily be cogent under WTO law. Indeed, since

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[117] James CUST, note 17 above, p. 5.
[118] *PreussenElektra Aktiengesellschaft v. Schleswag Aktiengesellschaft*, European Court of Justice, 13 March 2001, Case C-379/98.
[119] *Id.*, para 66.

the SCM Agreement's Article 1.1(a)(1)(iii) specifically contemplates purchasing goods[120], "a situation where the government directs a private actor to purchase goods at a higher than market price [may be] included within the meaning of "financial contribution", even if the government does not incur any cost itself".[121]

The OPA is a government controlled public body. It receives mandatory directives from the MEI by virtue of the Electricity Act. The FIT Program was a result of such a directive, whereby the government instructed the OPA to create the FIT electricity price support mechanism. Although payments are not in all cases made directly by the OPA (since they are often paid by electricity distributors), the government of Ontario has mandated a mechanism whereby publicly held or controlled entities, namely the OPA, as well as private actors, such as Hydro-One Inc., the various local distribution companies and ultimately end-users of electricity, must make FIT payments to renewable energy facilities for the purchase of its electricity.[122]

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[120] Note that electricity is generally understood to be a "good" under international trade law. See discussion *supra* Part III, Section 3.
[121] Robert HOWSE and Antonia ELIASON, "Countervailing Duties and Subsidies for Climate Mitigation: What Is, and What Is Not, WTO-Compatible?" in Richard B. STEWARD et al (ed.), *Climate Finance, Regulatory and Funding Strategies for Climate Change and Global Development*, New York University Abu Dhabi Institute, New York University Press, 2009, p. 264. See also discussion with respect to cost to government not being a determining factor *supra* Part II, Section 4.3.2.
[122] See FIT Contract, Article 4 (*Statements and Payments*).

The situation for HQD is more straightforward, since the Hydro-Québec Act provides that HQD is a mandatary (or agent) of the province and that all of its property is the property of the province.[123] All payments under the relevant Community CFT PPA are made by HQD and the plain meaning of the Hydro-Québec Act is that such payments should be considered as sourced from the Québec government's treasury.[124]

As such, both Ontario and Québec renewable energy support mechanisms can be considered as providing a "financial contribution", satisfying the first part of the SCM Agreement's definition of subsidy.

4.3.2 Conferring a Benefit

Not all government actions conferring a financial contribution constitute subsidies under the SCM Agreement. The determination of a financial contribution calls for an analysis of the motivations and methods of the government – or government controlled – entity, as well as an examination of the recipient of such contribution.

In *United States – Measures Treating Export Restraints as Subsidies*, the Panel observed that a financial contribution only confers a benefit or advantage if it is

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[123] Hydro-Québec Act, s. 3.1.1 and 3.1.2
[124] Community CFT PPA, s. 15

provided on terms that are more advantageous than those available on the market.[125] As such, the Panel decided that a government making loans at market rates would not be conferring a benefit to recipients. The Appellate Body, in *US – Lead and Bismuth II* issued a broader test, less focused on the machinations of the market, determining simply that "there can be no "benefit" to the recipient unless the "financial contribution" makes the recipient "better off" than it would otherwise have been, absent such contribution."[126]

It is therefore possible to make a financial contribution without it constituting a benefit. Conversely, a government might provide a benefit but not a financial contribution. For example, it could restrain exports: benefiting users of the product by lowering its domestic value without the need for direct financial contributions.[127] Finally, the *Canada – Aircraft* case analyzed the extent of the meaning of "benefit" in detail, removing any correlation with actual government expenditures from the determination. It concluded that:

> Canada insists that the concept of "cost to government" is relevant in the interpretation of "benefit". […] These situations cannot be *excluded* from the definition of "benefit" in Article 1.1(b), given that they are specifically *included* in

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[125] *United States – Measures Treating Export Restraints as Subsidies*, Report of the Panel, WT/DS194/R (29 June 2001), para. 8.73-8.74.
[126] *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, Report of the Appellate Body, WT/DS138/AB/R (10 May 1993), para 67.
[127] BRONKERS, Marco C.E.J. and Gary N. HORLICK, *WTO Jurisprudence and Policy: Practitioners' Perspectives*, London, Cameron May, 2004, p. 322.

> the definition of "financial contribution" in Article 1.1(a)(1)(iv). We are, therefore, not persuaded by this argument of Canada.[128]

Beneficiaries of the FIT Program and Community CFT are provided a financial contribution that grants terms more advantageous than those that would have been available on the market. The situation in Ontario is clear, considering the price per kWH that would be available to renewable energy facilities but for the FIT Program's existence.[129] Furthermore, that the province of Ontario or the OPA do not always incur a direct cost should not affect this analysis considering the Appellate Body's analysis of the *Canada – Aircraft* case.

In Québec, it is not immediately clear whether the price for electricity generated from an equivalent renewable energy facility would be less if the Community CFT was not available. Nevertheless, an application of the *US – Lead and Bismuth II* test indicates that winning bidders are indeed "better off" than would otherwise have been, absent the existence of the Community CFT, since they obtain a guaranteed price for electricity during the twenty year term of the PPA, need not compete with HQD's comparatively lower cost of production hydro-electric facilities, and are not subject to market fluctuations. As seen, there is furthermore a direct cost to government associated with the benefic since all

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[128] *Canada – Measures Affecting the Export of Civilian Aircraft*, Report of the Appellate Body, WT/DS70/AB/R (2 August 1999) (hereinafter "**Canada – Aircraft**"), para. 160.
[129] Compare Tables 1, 2 and 3 annexed hereto.

amounts are paid to the facility developers directly by HQD, which is itself a government-owned entity.

Both the FIT Program and Community CFT therefore confer a "benefit" for the purposes of the second part of the SCM Agreement's definition of subsidy.

4.3.3 Which is Specific

The applicability of the SCM Agreement to governmental subsidization measures is further conditioned by the definition of subsidy's specificity requirement contained in Article 2. Subsidies must be "specific" to a particular enterprise or industry or group of enterprises and industries. By including this provision, negotiators highlighted their desire to ensure that only subsidy practices designed to help specific industrial sectors or enterprises are regulated and not generally available subsidies designed to achieve wider policy objectives.[130] Hence, Article 2.1(a) of the SCM Agreement states that specificity will be found in cases where "the granting authority, or the legislation pursuant to which the granting authority operates, […] explicitly limits access to a subsidy to certain enterprises […]."[131]

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[130] Petros C. MAVROIDIS, note 108 above, p. 353.

[131] For an example of a determination of specificity, see *Indonesia – Certain Measures Affecting the Automobile Industry*, Report of the Panel, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (2 July 1998) (hereinafter "**Indonesia – Autos**"), para. 14.155.

The SCM Agreement then provides at Articles 2.2 and 2.3 for three other situations where a subsidy will be presumed "specific": (i) export subsidies; (ii) local content subsidies; and (iii) subsidies to companies in a specific region.[132] These types of subsidies are commonly referred to as being *de jure* specific: they will automatically be subject to discipline under the SCM Agreement.[133]

Where none of the situations outlined above seem to apply – i.e. they are not granted to a specific enterprise and are not *de jure* specific – members are permitted to factually establish the existence of specificity. To do so, they may argue the actual use of a subsidy program by a limited number of enterprises, the granting of disproportionately large amounts of a broadly available subsidy to specific enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.[134] This determination will result in a subsidy being referred to as *de facto* specific.

There is unfortunately little WTO jurisprudence dealing with the issue of specificity.[135] However, both the FIT Program and Community CFT are by their very design and purpose limited to renewable energy developers and their

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[132] Petros C. MAVROIDIS, note 108 above, p. 354.
[133] Assuming, of course, that the first two parts of the definition of subsidy are met.
[134] SCM Agreement, Article 2.1 (c).
[135] LODEFALK, Magnus and Mark STOREY, "Climate Measures and WTO Rules on Subsidies", (2005) 39(1) *Journal of World Trade* 23, p. 43.

corresponding facilities. Indeed, the Panel in *US – Softwood Lumber IV*[136] clarified that a finding of specificity should be arrived at even where a financial contribution conferred a benefit over an entire industry. This, combined with their respective local content requirements, would in our opinion lead to the programs likely being considered "specific" under the SCM Agreement.

4.3.4 Renewable Energy Support Mechanisms as Subsidies

As we have outlined above, both the FIT Program and Community CFT likely meet the three-tiered definition of subsidy contained in the SCM Agreement. Simply because a subsidy exists however, does not mean that it is actionable under international trade law. As such, with the general definition of subsidy out of the way, the SCM Agreement then divides subsidies into two distinct categories: prohibited (red light) and actionable (yellow light).[137] Only those subsidies that fall under these two categories will be subject to countermeasures under the SCM Agreement.

4.4 Prohibited Subsidies

Part II of the SCM Agreement addresses so-called "red light" subsidies: export subsidies and local content subsidies. These subsidies are completely prohibited

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[136] *United States – Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada*, Report of the Panel, WT/DS257/R (29 August 2003), para. 143.
[137] Jeffrey S. THOMAS, note 97 above, p. 157.

by the SCM Agreement and as such their disciplining does not depend on their ultimate effect on fellow WTO members such as whether they cause injury to foreign industries.[138]

4.4.1 Export Subsidies

Export subsidies are those contingent, in law or in fact, on export performance. Annex I of the SCM Agreement, similarly to the Subsidies Code, provides an Illustrative List of subsidies that are deemed prohibited export subsidies:

> A measure that falls within the scope of the Illustrative List is *deemed* to be prohibited export subsidy. In other words, a Member may establish that a measure is a prohibited export subsidy by going directly to the Illustrated List, without first demonstrating that a measure falls within the scope of Article 3.1(a). […] measures in the Annex are *ipso facto* 'subsidies contingent upon export performance'.[139]

A subsidy falling under the auspices of the Illustrative List therefore renders an immediate determination of the existence of a prohibited – and therefore actionable – export subsidy. This is contrasted against a *de jure* or *de facto* export subsidy determination, which depends on an analysis of the legal requirements or factual circumstances surrounding the subsidy, the whole as provided by the Appellate Body in *Canada - Aircraft*, whereby the Appellate

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[138] ZHANG, note 11 above, p.5.
[139] *Brazil – Export Financing Programme for Aircraft*, Recourse to Arbitration by Canada under Article 21.5 of the DSU, Decision of the Panel, WT/DS46/RW (9 May 2000), para. 6.31.

Body attempted to clarify the exact method by which a subsidy will be deemed contingent on export performance. It stated:

> *De jure* export contingency is demonstrated on the basis of the words of the relevant legislation, regulation or legal document. Proving *de facto* export contingency is a much more difficult task. There is no single legal document that will demonstrate, on its face, that a subsidy is 'contingent […] in fact […] upon export performance'. Instead, the existence of this relationship of contingency, between the subsidy and export performance, must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy […].[140]

With respect to the FIT Program and Community CFT, the subsidies afforded under the renewable energy support mechanisms are in no way contingent on export performance and as such would not be considered a prohibited subsidy under the export subsidy provisions of Part II of the SCM Agreement.

4.4.2 Local Content Subsidies

The second category of prohibited subsidy is local content subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods. Unlike Article 3.1(a) of the SCM Agreement, which refers to subsidies contingent "in law or in fact" on export performance, Article 3.1(b) contains no such qualifier. Notwithstanding, the Appellate Body in

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[140] Canada – Aircraft, paragraphs 166-167.

Canada – Autos[141] provided that a legal *or* factual analysis could be undertaken in order to determine whether subsidies were contingent on the use of domestic goods.

The case considered a complaint by the European Communities and Japan on a Canadian measure that offered a duty exemption for the importation of certain motor vehicles if the importer had produced similar vehicles in Canada during a reference period. The complainants argued, among other elements, a violation of Article 3.1(b) of the SCM Agreement. Canada countered, and the Panel agreed, that the measure was not in violation of Article 3.1(b) since it was not, in law, contingent on the use of domestic over imported goods, considering the use of domestic goods was one of several alternative conditions provided in the relevant regulations for receiving the subsidy. On appeal, the complainants argued that a determination of whether a subsidy is contingent "in fact" upon the use of domestic over imported goods should also have been made, since the configuration of facts surrounding the granting of the subsidy was such that the subsidy was granted only if the recipient used domestic over imported goods. The Appellate Body agreed and stated the following:

> Finally, we believe that a finding that Article 3.1(b) extends only to contingency "in law" upon the use of domestic over

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[141] *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, (19 June 2000) (hereinafter "**Canada – Autos**").

> imported goods would be contrary to the object and purpose of the *SCM Agreement* because it would make circumvention of obligations by Members too easy.[142]

The task of the DSB is therefore to analyze all legal and factual circumstances surrounding the subsidy in order to determine whether it is possible for the subsidized party to purchase imports instead of domestic goods and still receive the relevant subsidy.[143]

The granting of a PPA under both Ontario and Québec programs is not immediately contingent on meeting the relevant local content requirements. Both programs allow developers to sign a PPA – and therefore potentially access the subsidy – without meeting local content requirements. Furthermore, both programs impose a percentage requirement of local content, such that they do not provide an absolute requirement that all inputs to the development and construction of the renewable energy facility be locally sourced.

Nevertheless, the receipt of payments under both PPAs is contingent on meeting local content requirements when applying the configuration of facts analysis elaborated by the Appellate Body in the *Canada – Autos* case. Under the FIT Contract, not achieving the required levels leads to a termination

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[142] *Id.*, para 142.
[143] Andrew GREEN, "Trade Rules and Climate Change Subsidies", (2006) 5:3 *World Trade Review* 377, p. 397.

event.[144] The Community CFT does not mandate termination of the relevant PPA in all cases: it imposes stiff penalties that remove much of the economic benefit associated with the renewable energy facility where the relevant Québec content is not achieved and the PPA's termination in cases where the wind turbines are not sourced in Québec.[145]

However, since WTO subsidies regulations oversee governmental policy[146] the question of whether the FIT and Community CFT programs' requirements are contractual – and not imposed by the relevant legislation – can justifiably be raised. We believe both Ontario and Québec renewable energy support mechanisms fail under a *de jure* and *de facto* analysis of whether receipt of the subsidy is contingent on the use of domestic goods.

First, the FIT Directive clearly indicates that the OPA was required by the MEI to condition payment on local content requirements. It states:

> It is also important that the feed-in tariff program provide opportunity for Ontario manufacturers to participate in the economic benefits that will flow from the program. Therefore, I direct the OPA to require that each wind power and solar PV project […] contain a defined percentage of domestic content. […] Domestic content provisions will be enforced through the FIT Contract. *Developers who do not achieve the domestic content requirements should be subject to significant*

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[144] FIT Contract, Article 9.1(a).
[145] Community CFT PPA, Article 29.2 and 32.
[146] See discussion on applicability of WTO rules to the programs in Part I, Section 3.

> *commercial consequences under the FIT Contract*. (emphasis added)[147]

In Québec, the regulations enacting the Community CFT specifically call for the sourcing of locally manufactured goods in the construction of the wind farm. They provide:

> La maximisation des retombées économiques au Québec en matière d'emplois et d'investissements *doit se traduire*, pour chaque projet, par la réalisation de dépenses au Québec correspondant à un minimum de dépenses au Québec correspondant à un minimum de 60 % des coûts globaux, incluant l'installation des éoliennes, étant entendu que les dépenses réalisées localement devront bénéficier d'un traitement préférentiel.
>
> La maximisation des retombées économiques en matière d'emplois ou d'investissements manufacturiers dans la municipalité régionale de comté (MRC) de Matane et dans la région administrative de la Gaspésie-Îles-de-la-Madeleine *doit se traduire* par la réalisation de dépenses, excluant l'installation des éoliennes, ou d'investissements manufacturiers correspondant à un minimum de 30 % des coûts globaux, excluant l'installation des éoliennes, d'une production d'énergie éolienne équivalente à 250 MW. (emphasis added)[148]

As such, applying a *de jure* analysis leads to a conclusion that the law mandates the use of local content in order to access the subsidy.

One may however argue that receipt of the relevant benefits under the FIT

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[147] FIT Directive, page 2.
[148] 1044-2008 and 1046-2008 Decrees, note 22 above, para. 6 and 7.

Program and Community CFT subsidy are conditional not only on domestic content, but also on the host of other factors contained within the relevant program rules and PPA. We believe this argument would not be tenable under WTO law when applying the Appellate Body's reasoning in *Canada – Autos* with respect to *de facto* contingency.[149] If we take wind energy projects as an example we note that under the FIT Program, the minimum required domestic content level is 25% for facilities entering into service prior to January 1, 2012 and 50% for those entering into service thereafter. Regardless, the levels imposed render it impossible to construct an operational wind farm without meeting the required levels.[150] Under the Community CFT, the situation is even clearer. The wind turbines used for the generation of electricity *must* be sourced from manufacturing centers based in the Gaspé region of Québec. Without wind turbines, there can be no wind energy facility.[151]

Both programs therefore make receipt of the subsidy contingent, in law and/or in fact, upon meeting local content requirements and are likely to be considered prohibited under the SCM Agreement's Article 3.

4.5 Actionable Subsidies

In order to provide a complete analysis of the actionability of Québec and

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[149] See discussion of case in Part I, Section 4.4.1.
[150] See Part I, Section 1.2.2 with respect to FIT Program.
[151] See Part I, Section 2.2.2 with respect to Community CFT.

Ontario renewable energy support mechanisms – since as seen it is altogether possible that they will not be considered prohibited outright under WTO law – we must also examine Part III of the SCM Agreement, which deals with so-called "yellow light" subsidies: not immediately prohibited but nevertheless potentially actionable. The actionability of any such subsidy stems from article 5 of the SCM Agreement which provides that no member should cause, through the use of any subsidy, adverse effects to the interests of other members.

It is important to note that the SCM Agreement previously excluded certain subsidies from actionability, namely subsidies which, though specific, fall within the terms of paragraphs 2 (a) through (c) of Article 8, including for pre-competitive research and development, regional development and environmental assistance. The relevant provisions were limited to a five-year application period before their continued applicability came under review. Their validity was not extended past December 31, 1999.[152] Hence, all subsidies are now theoretically actionable under articles 1, 2, 5, 6 and 7 of the SCM Agreement.[153]

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[152] See Anwaral HODA and Rajeev AHUJA, "Agreement on Subsidies and Countervailing Measures: Need for Clarification and Improvement", 2005 39(6) *Journal of World Trade* 1009, p. 1022.

[153] Some authors have noted that re-instituting a "green-light" non-actionable category of subsidies deployed in furtherance of environmental goals should be considered as a way of accomplishing international carbon reduction requirements. See STEYER, note 105 above, p. 796.

A complaining WTO member must, in order to establish an actionable subsidy, demonstrate that the measure causes an "adverse effect", meaning:

(i) some form of injury to another members' domestic industry;

(ii) nullification or impairment of benefits accruing directly or indirectly to other Members under the WTO Agreements; or

(iii) serious prejudice to the interests of another Member.[154]

Determining whether an adverse effect exists requires a predominantly fact-based argumentation. The complainant must gather enough information to show how its domestic industry has been impacted. More importantly however – and more difficult – is the requirement to demonstrate causation between the alleged subsidy and adverse effect.[155]

The *US – Cotton*[156] case examined the extent of the causation requirement, finding that the causality threshold is not very high: the complainant does not need to provide detailed explanations on causality, nor quantify the subsidy and its effect on domestic industry. Rather, both the Panel and Appellate Body found that a strong correlation between the subsidy and domestic industry will

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[154] SCM Agreement, Article 5.
[155] GREEN, note 143 above, p. 402 - 403.
[156] *United States – Subsidies on Upland Cotton*, Report of the Appellate Body, WT/DS267/AB/R (3 March 2005) (hereinafter "**US – Cotton**"). See also Karen Halverson CROSS, "King Cotton, Developing Countries and the 'Peace Clause': the WTO's US Cotton Subsidies Decision", (2006) 9(1) *Journal of International Economic Law* 149.

suffice to meet the SCM Agreement's causality requirement.[157] This approach has been severely critiqued, since it sways from general legal standards, and "reduces the ability of the Panels and the Appellate Body to distinguish subsidies that are detrimental to international trade from those that are not[, sweeping] under the disciplines of the SCM Agreement subsidies that may not legitimately be of concern to international trade."[158]

4.5.1 Injury to domestic industry

Article 15 of the SCM Agreement specifies that "injury" means material injury to a domestic industry, threat of material injury to a domestic industry, or material retardation of the establishment of such an industry. Article 16 of the SCM Agreement provides that the term "domestic industry" refers to domestic producers of like products or those whose collective output constitutes a major proportion of the total domestic production of those like products. A determination of injury or retardation must furthermore be based on positive evidence and involve an objective examination of the volume of the subsidized imports, the effect of the subsidized imports on prices in the domestic market for "like products", and the consequent impact of these imports on domestic producers of such products.

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[157] US – Cotton, para 458.
[158] GREEN, note 143 above, p. 402 - 403.

The issue of "like products" is one of enormous complexity within WTO case law. The *Indonesia – Autos* case does however provide an excellent analytical example, as well as important guidance on the application of the criteria within the SCM Agreement. The Panel determined that whether a product is or is not a 'like product' must be considered on a case-by-case basis and that Panels can only use their best judgment regarding whether in fact products are alike, depending on the evidence available to them.[159]

As for the determination of a "threat of material injury", Article 15 prudently specifies that such determinations must be based on facts and not on mere allegation, conjecture and remote possibility. The SCM Agreement also provides a list of factors to be considered when making a determination of threat of material injury, including:

(i) the nature of the subsidy or subsidies in question and the trade

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[159] Indonesia – Autos, note 131 above, para. 14.173-14.174. The Panel also evidently provided its analysis factors: "In our view, the analysis as to which cars have 'characteristics closely resembling' those of the Timor logically must include as an important element the physical characteristics of the cars in question. This is especially the case because many of the other possible criteria identified by the parties are closely related to the physical characteristics of the cars in question. Thus, factors such as brand loyalty, brand image/reputation, status and resale value reflect, at least in part, an assessment by purchasers of the physical characteristics of the cars being purchased. Although it is possible that products that are physically very different can be put to the same uses, differences in uses generally arise out of, and assist in assessing the importance of, different physical characteristics of products. Similarly, the extent to which products are substitutable may also be determined in substantial part by their physical characteristics. Price differences also may (but will not necessarily) reflect physical differences in products. An analysis of tariff classification principles may be useful because it provides guidance as to which physical distinctions between products were considered by Customs experts."

effects likely to arise therefrom;

(ii) a significant rate of increase of subsidized imports into the domestic market;

(iii) a substantial increase in the capacity of the exporter, indicating the likelihood of substantially increased subsidized exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;

(iv) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and

(v) inventories of the product being investigated.[160]

4.5.2 Nullification or impairment of benefits

The footnote at Article 5(b) of the SCM Agreement explains that the term "nullification or impairment" is used in the same sense as it is used in the relevant provisions of GATT 1994.[161] As such, a member can challenge an actionable subsidy to the extent that it nullifies or impairs the benefits of such member resulting from its participation in the WTO, for instance circumstances where the "effect of a tariff concession is systematically offset or counteracted by a subsidy programme".[162]

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[160] SCM Agreement, Article 15.7.
[161] See GATT 1994, Article XXIII.
[162] *United States — Continued Dumping and Subsidy Offset Act of 2000*, Report of the Panel, WT/DS217/R (16 September 2002), para. 7.127.

4.5.3 Serious prejudice

Article 6.3 of the SCM Agreement provides examples of where a subsidy may cause "serious prejudice" to the interests of another WTO member, including where the subsidy displaces or impedes the import of another member's like product into the market of the subsidizing member. The DSB can also arrive at a finding of "serious prejudice" upon a global analysis of the measure, taking into account all evidence provided.[163] Serious prejudice is, as such, somewhat easier to prove than "injury to a domestic industry" since the DSB is afforded greater discretion in its analysis.[164]

Interestingly, Article 6.7 of the SCM Agreement provides exceptions in that no determination of a displacement or impediment will considered existing where, among others, such is due to a failure to conform to standards or other regulatory requirements concerning the relevant product in the importing country.

4.5.4 Renewable Energy Support Mechanisms as Actionable Subsidies

As discussed above, concluding the existence of an actionable subsidy under the SCM Agreement is effects-based, relying on the alleged measures' impact

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[163] SCM Agreement, Article 6.8.
[164] GREEN, note 128 above, p. 402.

to and injury on another WTO member's interests or its domestic industry. It is therefore difficult to surmise what fact-based arguments a member would raise against the FIT Program or Community CFT.

Considering the various factors outlined above, although the success of such an action would depend on the strength of a complainant's evidence, there does not appear to be any legal barrier preventing a WTO member from alleging – and potentially establishing – the programs' actionability. Having concluded that the programs do indeed constitute a subsidy, a member could argue that a causal link exists between the FIT Program or Community CFT and a downturn in production renewable energy facility components sourced from its domestic industries, or the inability of its local renewable energy developers to source competitively priced components on international markets due to the Ontario and Québec market attracting a disproportionately high level of new and existing manufacturing capacity as a consequence of the subsidies granted.

Having analyzed the various elements that must be proven in order to establish the existence of a subsidy, the following sections review the manner in which WTO members consult on, contest and eventually seek remedies against fellow members' subsidization programs.

4.6 Notification and Consultation

Article 25 of the SCM Agreement calls for notifications and information

exchanges between WTO members in order to guarantee the proper functioning of the subsidy and countervailing duty regime.

For instance, members must notify to the WTO's *Committee on Subsidies and Countervailing Measures*[165] by July of each year the existence of any specific subsidy, as defined in Articles 1 and 2, granted or maintained within their territories. Members must also ensure that the notification contains information on, notably, the form of subsidy, its policy objective, its duration and statistical data permitting an assessment of the trade effects of the subsidy.[166] We note that Canada *has not* notified with respect to either the FIT Program or the Community CFT in its recent 2010 report to the Committee on Subsidies and Countervailing Measures.[167]

The Committee on Subsidies and Countervailing Measures also serves as a forum of discussion between WTO members with respect to subsidization programs. In an effort to guarantee compliance, the SCM Agreement also provides that any member may request from another information on the nature and extent of any subsidy program maintained by the latter.[168] On June 10, 2010, a series of questions asked of Canada by Japan in relation to the FIT

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[165] Established pursuant to SCM Agreement, Article 24.
[166] SCM Agreement, Article 25.3.
[167] COMMITTEE ON SUBSIDIES AND COUNTERVAILING MEASURES, *Semi-Annual Report under Article 25.11 of the Agreement – Canada*, G/SCM/N/203/CAN, March 17, 2010.
[168] SCM Agreement, Article 8.

Program was made public. We have reproduced the document hereto as Annex 1, both to stress the relevance of our review of Québec and Ontario renewable energy support mechanisms and to highlight the process leading towards the disciplining of a subsidy under WTO law. Clearly, at questions (i) and (iv), Japan is attempting to determine whether the OPA is a public body making a financial contribution. Question (iii) seeks to determine whether a benefit is being conferred on the renewable energy developer. Questions (v) and (vi) seek to clarity whether the granting of the financial contribution is contingent on the use of domestic goods. In essence, we believe Japan is attempting to elucidate from Canada whether the FIT Program constitutes a prohibited "red light" subsidy.

4.7 Remedies

As we have seen, the FIT Program and Community CFT may be considered prohibited or actionable under the SCM Agreement. The SCM Agreement provides for a multilateral option and a unilateral option for counteracting subsidies.[169] The following sections highlight the SCM Agreement's dispute resolution mechanism (the multilateral option), as well as the procedure for imposing countervailing duties (the unilateral option), in order to address the

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[169] Petros C. MAVROIDIS, note 108 above, p. 364. No other remedies are possible, note Article 32.1 of the SCM Agreement: "No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."

potential remedies that may be sought after by fellow WTO members against Canada.

4.7.1 Dispute Mechanism

Articles 4 to 7 of the SCM Agreement provide an adjudicative remedy to any WTO member who has reason to believe that a subsidy contrary to the SCM Agreement is being granted or maintained by another member. The process begins by a member requesting consultations with the other member who must then enter into such consultations as quickly as possible. It is important to note that the questions Japan asked of Canada and discussed above do not enter under the auspices of formal consultations within the context of a potential dispute.

Following the request for consultations, if no solution can be reached within 30 days (with respect to prohibited subsidies) or 60 days (in situations dealing with actionable subsidies), a member who was a party to the consultations may refer the matter to the WTO's DSB in order to request the immediate establishment of a Panel. When prohibited subsidies are alleged, the Panel may ask for the assistance of the *Permanent Group of Experts*[170] – a group of five individuals highly trained in subsidies and trade – who are then to review the evidence and

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[170] The Permanent Group of Experts is a SCM Agreement institution established by the Committee on Subsidies and Countervailing Measures pursuant to Article 24.3 of the SCM Agreement.

report findings back to the Panel.

The Panel must distribute a report to the parties in the subsidies dispute within 90 days (prohibited subsidies) or 120 days (actionable subsidies) of its establishment. The DSB then adopts the report within 30 days, unless either of the parties signifies its intention to appeal the report. Once appealed, the Appellate Body is generally required to render a decision quickly, but in no case more that 60 days days (prohibited subsidies) or 90 days (actionable subsidies). The Appellate Body's decision will then generally be adopted by the DSB, unless otherwise unanimously agreed to by the parties to the dispute.[171]

If the Panel or the Appellate Body finds a subsidy to be prohibited or actionable and the respondent does not correct the disallowed policy, the DSB can grant authorization to the complaining member to take appropriate countermeasures such as the elimination of tariff concessions or permission to grant its domestic industry commensurate subsidies.[172] As for the form and amount of countermeasures that will be deemed appropriate, the WTO's dispute settlement bodies have been careful not to limit these to simple nullification and impairment of subsidies. The following clarifies the situation:

> […] requiring that countermeasures in the form of suspension

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[171] SCM Agreement, Article 4.6 and 7.7.
[172] SCM Agreement, Article 7.9., 7.10 and 9.4.

> of concessions or other obligations be equivalent to the level of nullification or impairment would be contrary to the principle of effectiveness by significantly limiting the efficacy of countermeasures in the case of prohibited subsidies. Indeed, concessions or obligations may not always be feasible because of their potential effects on other Members. This would be the case of a counter-subsidy granted in a sector where other members than the parties compete with the products of the parties. In such a case, the Member taking the countermeasure may not be in a position to induce compliance.[173]

Disputes on the appropriateness of the countermeasures are taken to arbitration in accordance with Article 22 of the DSU.

4.7.2 Countervailing Measures

Article 10 of the SCM Agreement allows members to unilaterally decide on the existence of a subsidy and impose countervailing duties against fellow WTO members insofar as the imposition is made in accordance with the provisions of the SCM Agreement and the GATT. Furthermore, members can only impose countervailing duties pursuant to the investigations initiated and conducted in accordance with the SCM Agreement.[174] Similar to the original GATT 1947 text, a "countervailing duty" is understood as a special duty levied for the

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[173] *Brazil – Export Financing Programme for Aircraft*, note 139 above, paragraphs 3.57-3.59.
[174] Article 10 is closely linked to GATT 1994 Article VI. In fact, a member will violate Article 10 if it imposes a countervailing duty that is not "in accordance with" Article VI of the GATT. See Edwin VERMULST and Folkert GRAAFSMA, *WTO Disputes: Anti-Dumping, Subsidies and Safeguards*, London, Cameron May, 2002, p. 377 and 418. See also procedures for imposing countervailing duties provided in the Special Import Measures Act.

purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise. The term is itself not defined within the SCM Agreement, but rather at Article VI, paragraph 3 of GATT 1994.

As discussed, countervailing duty actions have been part of the international trade landscape for over one hundred years. The SCM Agreement builds on this history by imposing a series of procedural obligations that must be met by members in applying countervailing duties against allegedly subsidized imports. It represents, in terms of its length and detail, a significant achievement in international trade law in that it carefully addresses the various issues and avenues present in any countervailing duty context.[175]

As a consequence to the various support mechanisms deployed by Ontario and Québec, subsidized renewable energy may become available for export to the United States.[176] Furthermore, the benefits accruing to local component manufacturers buttressed by the various local content rules may be contested. We therefore turn to an examination of the SCM Agreement's provisions on countervailing measures. Our focus is on those rules dealing with countervailing investigations and the eventual imposition of duties, thereby

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[175] Jeffrey S. THOMAS, note 91 above, 1997, p. 163.
[176] Or, through wheeling arrangements, to Mexico and beyond, depending on the extent and integration of future electricity transmission networks.

illustrating how countervailing duties may eventually be unilaterally imposed on Canada by a fellow WTO member such as Japan or the United-States as a result of Ontario and Québec's renewable energy support mechanisms.[177]

Initiation and Subsequent Investigation

The requirements for initiating an investigation into the possibility of applying countervailing measures are addressed at Article 11 of the SCM Agreement. Such investigation to determine the existence, degree and effect of any alleged subsidy may only be initiated upon a written application by or on behalf of a domestic industry.[178] Furthermore, the request must provide sufficient information on the existence of a subsidy, the injury to a domestic industry as provided for in the definition of countervailing duty and the causal link between the subsidized imports and the alleged injury. It must also contain the additional information specified in subparagraphs (i) through (iv) of Article 11.2.[179]

Once this request has been obtained, domestic authorities review the accuracy and adequacy of the evidence provided in the application to determine whether

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[177] Throughout this Section we reference the provisions of the relevant United States legislation, the *Tariff Act of 1930*, Pub.L. 103-465, as amended by the *Trade Act of 1974*, Public Law 93-618 (the "**US Trade Act**"), in order to showcase how national legislation conforms to the relevant WTO provisions and the provisions of US law that may be used in order to impose countervailing duties against Canada.

[178] US Trade Act, note 177 above, s. 702 (b)(1).

[179] Including (i) the identity of the applicant; (ii) a description of the allegedly subsidized product; (iii) evidence with regards to the existence and amount of the subsidy; and (iv) evidence of the alleged injury to domestic industry.

it is sufficient to warrant the initiation of an investigation.[180] The SCM Agreement places numerous conditions on the pursuance and functioning of a countervailing duty investigation. For example, authorities must refuse to investigate the matter further if they determine that the subsidization is *de minimus* or the injury negligible.[181] Investigations will generally be concluded within one year, and in no case more than eighteen months, after their initiation.

Evidence

Article 12 of the SCM Agreement deals with specific issues surrounding the gathering of evidence during a countervailing duty investigation. WTO members, as well as other parties, such as exporters or foreign producers, named in an investigation must be given notice of the information which the authorities require and ample opportunity to present in writing all evidence considered relevant to the investigation.[182]

Consultation

Article 13 provides detail on consultations between members affected by the countervailing duty investigation. Essentially, WTO members the products of

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[180] US Trade Act, note 177 above, s. 702 (c).
[181] The *de minimus* requirement means those cases where subsidization is less that one percent of a product's value, see SCM Agreement, Article 11.9: "There shall be immediate termination in cases where the amount of a subsidy is *de minimis*, or where the volume of subsidized imports, actual or potential, or the injury, is negligible."
[182] US Trade Act, note 177 above, s. 702 (b)(4).

which may be subject to an investigation must be invited for consultations in order to clarify the situation and hopefully arrive at a mutually agreed solution. Furthermore, such members preserve the right to request consultations throughout the period of the investigation.

Calculation of the Amount of a Subsidy

At some point during a countervailing duty investigation, a country will attempt to calculate the amount of a trading partner's subsidy in order to correctly evaluate its impact. Article 14 of the SCM Agreement provides that the amount of a subsidy for countervailing duty purposes is calculated on the basis of its benefit to the recipient.[183] It goes on to provide four additional guidelines for the drawing up of a calculation method in paragraphs (a) through (d) of Article 14. In all cases, the calculation method used must be spelled out in a transparent and adequately explained statute or regulation of the member seeking to use countervailing measures.[184]

Determination of Injury

A determination of injury is a necessary prerequisite to the lawful application of countervailing measures. As seen, the SCM Agreement dutifully provides

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[183] See Jeffrey S. THOMAS, note 97 above, p. 166. For discussion on meaning of benefit, see *infra* Part II, Section 4.3.2.
[184] US Trade Act, s. 706, 771A, 771B, 772, 773, 773A, 777A.

guidelines for the evidencing of injury.[185]

Provisional Measures

In certain circumstances, provisional measures such as temporary countervailing duties can be applied during the investigation process.[186] Article 17 of the SCM Agreement details how and when these are to be used. Provisional measures may only be applied in circumstances where a countervailing duty investigation has been initiated. Furthermore, a preliminary affirmative determination that a subsidy exists and that there is injury to a domestic industry caused by the subsidized imports must be arrived at prior to the imposition of provisional measures. Finally, the investigating member's authorities must judge such measures necessary to prevent further injury being caused during the investigation.

Undertakings

In some cases, WTO members may agree to eliminate the investigated subsidy in order to avoid any possible countervailing duty. These "undertakings" are provided for in Article 18 of the SCM Agreement. Proceedings may be suspended or terminated without the imposition of provisional measures or

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[185] See *infra* Part II, Section 4.5.1. US Trade Act, note 177 above, s. 701 (a).
[186] US Trade Act, note 177 above, s. 703.

countervailing duties upon receipt of a satisfactory voluntary undertaking whereby, generally, the member agrees to eliminate or limit the subsidy or take other measures concerning its effects, or agrees to revise its prices so that the investigating authorities are satisfied that the injurious effect of the subsidy is eliminated. Undertakings must be completely voluntary and cannot be sought or accepted unless a preliminary determination of subsidization and injury has been made.

Imposition and Collection

Once a WTO member determines the existence of a subsidy and the injury caused thereby, it may impose a countervailing duty in accordance with Article 19 of the SCM Agreement.[187] The countervailing duty must be levied on a non-discriminatory basis on imports of the countervailed product and from all sources found to be subsidized and causing injury. Nonetheless, no duty should be levied on imports from those sources which have renounced any subsidies in question or from which undertakings have been accepted. Furthermore, and in keeping with the purpose of countervailing measures, no duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.

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[187] *Id.*, s. 705.

Duration and Review

Article 21 of the SCM Agreement deals with the duration of countervailing duties and provides that they shall remain in force only as long, and to the extent, as is necessary to counteract the subsidization causing injury. This article also provides an important new obligation, often referred to as the "sunset" clause, whereby a duty can remain in place no more than five years, unless it is specifically determined prior to the end of that five-year period that the elimination of the duty would lead to continued or reoccurring subsidization. Furthermore, Article 23 requires WTO members to maintain appropriate domestic adjudicative bodies that allow interested parties, namely the members against which countervailing duties are levied, the ability to review and contest the relevant measures.[188]

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[188] Jeffrey S. THOMAS, note 97 above, p. 171. See US Trade Act, note 177 above, s. 761 and 762. For more information on the relevant US rules, consult the website of the US *International Trade Administration's Import Administration* at http://www.trade.gov/ia/.

> *I believe that trade opening and reducing trade barriers, has been, is and will remain, essential to promote growth and development, to improve standards of living and to tackle poverty reduction. The World Trade Organization remains the most efficient and most legitimate forum to open and regulate world trade. The most efficient because it works at the service of all the participants and because of its modern system to solve trade disputes. The most legitimate, because it is the fairest system of all, as all the decisions are taken by all the members, large or small, strong or weak.*
>
> Pascal Lamy, 2009

Part III – The WTO, the SCM Agreement and Renewable Energy

An organization's objectives are fundamental to its design and rules. The WTO Agreement's preamble sets out the ultimate objectives of the WTO. These include raising standards of living, ensuring full employment along with growth in income levels and demand, developing the full use of the world's resources through expansion of production and trade, the whole in accordance with sustainable development and the protection of the environment. To accomplish these goals, the preamble lays out what has become the day-to-day objective of the WTO: entering into reciprocal and mutually advantageous arrangements

directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.[189] The WTO therefore, at least theoretically, sees itself as an organization devoted first and foremost to lifting the people of the world out of poverty through sustainable development and ever freer and fairer trade.

We must however acknowledge that the various WTO multilateral and plurilateral agreements do not exist in a vacuum, but rather in concert with each other and the larger WTO system. For instance, although the SCM Agreement must notionally obey the WTO's larger objectives, it seems at first glance to defy those objectives by implicitly and explicitly accepting that in certain circumstances barriers to trade can be legitimate. This incoherence is systemic of an organization that is still defining its role vis-à-vis international trade.[190] As such, an understanding of the WTO's other components, along with an examination of the relationship between the various WTO agreements and principles that combine to regulate a large portion of international trade, will allow us to gain a fuller understanding of the potential actionability of renewable energy support mechanisms.

We begin by assessing the relationship between the SCM Agreement and the

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[189] WTO Agreement, Preamble and Article II.
[190] P. J. LLOYD, "The Architecture of the WTO", (2001) 17 *European Journal of Political Economy* 327, p. 336-337.

WTO's various other multilateral agreements as a matter of treaty interpretation, in order to better understand whether the potential conflicts create avenues whereby domestic renewable energy support mechanisms may be excepted from WTO contestability. Next, we analyze two of the most basic principles of international trade: *most-favored nation* ("**MFN**") and *national treatment* ("**NT**"), deciding on how their nature is affected by subsidies regulation and determining whether renewable energy support mechanisms are in violation of such principles. Finally, we examine the GATS and certain other relevant WTO multilateral agreements. Throughout, we comment on the applicability of such agreements to Québec and Ontario renewable energy support mechanisms.[191]

Section 1 – WTO Treaty Interpretation

Harmonizing the apparent conflicting objectives of the various WTO agreements requires treaty interpretation. On this issue, some guidance is provided by the *Vienna Convention on the Law of Treaties*, applicable to all treaties between states.[192] The convention's third section elaborates rules on the interpretation of treaties. Article 31, for instance, states that treaties must be

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[191] We do not discuss the relationship between the WTO and the various plurilateral trade agreements entered into between countries, such as MERCOSUR or NAFTA. For a discussion on this, see Tegan BRINK, "Which WTO Rules Can a PTA Lawfully Breach? Completing the Analysis in Brazil – Tyres", (2010) 44(4) *Journal of World Trade* 813, p. 813-847.
[192] *Vienna Convention on the Law of Treaties*, note 59 above.

interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The article goes on to specify that the context for the purposes of treaty interpretation must include the preamble and annexes.

The various WTO agreements sometimes include specific priority rules. Furthermore, the WTO Agreement's *General Interpretative Note to Annex 1A* indicates that in the event of a conflict between a provision of the GATT 1994 and a provision of another agreement in Annex 1A, the provision of the other agreement shall prevail to the extent of the conflict. This expresses the basic legal principle of *lex specialis*: specific rules trump general ones. In sum, all instruments apply simultaneously, with more specialized and recent treaties being of preferred application when compared to general rules. [193]

As the WTO shed its infancy however, it became clear that the various WTO agreements and understandings, forming part of a single treaty and thus legally of the same date, are not well coordinated.[194] For example:

> First, there are no rules in case a conflict does not exist. Second, there is no priority rule between the various Annex 1A agreements[, only between them and the GATT 1994]. It

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[193] Thomas COTTIER and Matthias OESCH, *International Trade Regulation: Law and Policy in the WTO, The European Union and Switzerland – Cases, Materials and Comments*, London, Cameron May, 2005, p. 90-91.
[194] Id.

> is not obvious whether provisions of two agreements can operate concurrently or whether one should be considered *lex specialis* to the other in case of conflict or simply in case of overlap.[195]

Panel and Appellate Body jurisprudence has therefore attempted to provide guidance on the relationship between WTO agreements. In an early ruling, the Appellate Body examined the GATS and GATT by reading the two agreements as complementary documents. It concluded that the entry into force of the GATS, did not diminish the scope of application of the GATT 1994.[196] Later, in *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, the Appellate Body refined its thinking on the complementarity rule in WTO agreement interpretation, stating that special or additional provisions prevail only where WTO agreements cannot be read as complementing each other.[197]

Most important, however, are the Appellate Body's teachings in the *Argentina – Safeguard Measures on Imports of Footwear Case*. In that instance, the Appellate Body was asked to clarify the relationship between GATT Article XIX (emergency action on imports of particular products) and safeguard measures. Once again, it found that the two concepts must be applied

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[195] *Ibid*., p. 91.
[196] *Canada – Certain Measures Concerning Periodicals*, Report of the Appellate Body, WT/DS31/AB/R (30 June 1997), p. 18.
[197] *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, Report of the Panel, WT/DS60/AB/R (19 June 1998), paragraph 65.

concurrently:

> The GATT 1994 and the Agreement on Safeguards are both Multilateral Agreements on Trade in Goods contained in Annex 1A of the WTO Agreement, and, as such, are both "integral parts" of the same treaty, the WTO Agreement, that are "binding on all Members". Therefore, the provisions of Article XIX of the GATT 1994 and the provisions of the Agreement on Safeguards are all provisions of one treaty, the WTO Agreement. They entered into force as part of that treaty at the same time. They apply equally and are equally binding on all WTO Members […] a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously.[198]

In sum, the DSB encourages complementarity among WTO instruments, thereby avoiding a finding of conflict between WTO agreements and understandings.

Section 2 – The WTO's Founding Principles

Due to their importance, MFN and NT have sometimes been referred to as constitutional principles of the international trading system.[199] Together, they establish one of the WTO's core concepts: that of non-discrimination between the treatment of local products and foreign ones. In this section, we clarify the meaning of the MFN and NT principles, while illustrating their association with subsidy disciplinary measures, their possible non-application in matters of

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[198] *Argentina – Safeguard Measures on Imports of Footwear*, Report of the Appellate Body, WT/DS121/AB/R (14 December 1999), paragraphs 80-81.
[199] Thomas COTTIER, note 193 above, p. 346.

environmental or health policy and their potential disciplining of renewable energy support mechanisms.

2.1 Most-Favored Nation

MFN has represented a central aspect of trade for at least one millennia and possibly longer. Its genesis is generally attributed to the year 1055, when the Holy Roman Emperor Henry III granted the city of Mantua all customs privileges granted to any other town.[200] One of its earliest surviving MFN clauses, found in a treaty between England and Brittany, dates from the year 1486. It states:

> […] les marchans d'Angleterre auront et pourront avoir et tenir ès villes de Bretagne et soyront illecques de toutes et pareilles franchises comme les autres marchans estrangiers qui ont entrecours et communication de marchans en Bretagne, et seront tractez aussi doulcement et gracieusement comme les autres nations frécantans en icelui Paris, ville et lieux d'icelui, et pareillement les marchans de Bretagne auront et pourront avoir et tenir ès villes du dit royaume d'Angleterre, Irland, ville et marche de Calays et joyront des dites franchises et aussi seront traités comme dessus est dit des dites marchans d'Angleterre.[201]

Its meaning has changed little since those far away days. Essentially, MFN calls for a country to grant every country with which it has signed a MFN treaty the

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[200] Le Baron Borin NOLDE, "La Clause de la nation la plus favorisée et les tarifs préférentiels", (1932) 1932 *R.C.A.D.I.* 23, p. 25.
[201] *Id.*, p. 26.

most favorable treatment that it grants to any other country with respect to imports, exports and related regulations. The only exception to this blanket requirement is if the preferential treatment is applied as part of a preferential trade agreement, such as the North American Free Trade Agreement.[202]

Although the expression suggests offering some sort of special privilege to a trading partner, the intent is in fact quite the opposite. MFN's main objective is to prevent discrimination by generalizing concessions made to a fellow trading partner.[203] GATT 1994 Article 1(1) contains the main MFN obligation imposed on WTO members. It reads:

> With respect to customs duties and charges of any kind imposed […] *any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties*. (emphasis added)

The provision therefore refers to an unconditional form of MFN: a contracting party will be afforded the privilege whether or not they reciprocate. A conditional form of MFN, where its granting is subject to a reciprocal

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[202] GATT Article XXIV. The exception must not be considered too broad and cannot circumvent the WTO's rules, as BRINK, note 19 above, explains at p. 842: "[…] if Article XXIV could excuse breaches of WTO rules that were not necessary for the creation of PTAs sanctioned by these rules, Article XXIV would become a black hole into which the ashes of the WTO's cornerstone MFN principle would disappear for good."

[203] Michael J. TREBILCOCK and Robert HOWSE, *The Regulation of International Trade*, 3rd ed., New York, Routledge, 2005, p. 49.

treatment, is exceptionally present within the GATS at Article VII.[204] Nevertheless, the principle is generally applied in its unconditional form and numerous GATT/WTO disputes have interpreted MFN, broadening or narrowing its extent as required.

United States – Restrictions on Imports of Tuna centered on a Mexican allegation that a US act violated Article I of the GATT 1994 by establishing discriminatory and unfavorable conditions for a specific geographical area. Essentially, the act forbade the use of the label "Dolphin Safe" to tuna products harvested in the Eastern Tropical Pacific ("**ETP**") Ocean using nets that did not meet criteria specified in the law. According to the Panel:

> By imposing the requirement to provide evidence that this fishing technique had not been used in respect of tuna caught in the ETP the United States therefore did not discriminate against countries fishing in that area […]. The labeling regulations governing tuna caught in the ETP thus applied to all countries whose vessels fished in this geographical area and thus did not distinguish between products originating in Mexico and products originating in other countries.[205]

Hence, the term "unconditionally" used in GATT 1994 Article I does not mean

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[204] Dominique CARREAU and Patrick JUILLARD, *Droit international économique*, 2e ed., Paris, Dalloz, 2005, p. 175 and 177; COTTIER, note 165 above, p. 349-350. The unconditional form of MFN has been criticized for encouraging the "Free Ride" effect. Basically, countries that do not wish to liberalize can benefit from another member's concessions without applying their own.

[205] *United States – Restrictions on Imports of Tuna*, Report of the Panel, not adopted, DISD 39S/155 (3 September 1991), para. 5.43.

that no conditions can be imposed on supplier countries in order for them to have access to a privilege. Conditions can be imposed as long as they do not result in discrimination.[206]

In *Indonesia – Autos*, a complaint was lodged against a series of measures adopted by Indonesia with respect to imported motor vehicles, parts and components. The case considered a measure which conditioned the granting of customs duties and sales tax exemptions with respect to imported products on whether Indonesia's national car company had made a deal with the foreign exporter to assemble the car in-country. The Panel made the distinction between conditions imposed on a product *per se*, as opposed to a product originating from a specific country, opining that the measures violated GATT 1994 Article I, which provides that benefits accorded to the products of one member must be afforded "immediately and unconditionally" to the like products of all other members.[207]

In *United States – Import Measures on Certain Products from the European Communities*[208], the United States increased certain bond requirements on imports in order to secure the payment of new import duties imposed in

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[206] TREBILCOCK, note 203 above, p. 61.
[207] Indonesia – Autos, note 131 above, para. 14.147.
[208] *United States – Import Measures on Certain Products from the European Communities*, Report of the Panel, WT/DS165/R (17 July 2000); *United States – Import Measures on Certain Products from the European Communities*, Report of the Appellate Body, WT/DS165/AB/R (11 December 2000).

retaliation to certain EC measures. Examining the measures' consistency with the MFN obligation, the Panel applied the principle in a straightforward manner, deciding that:

> We find that the […] additional bonding requirements violated the most-favoured-nation clause of Article I of GATT, as it was applicable only to imports from the European Communities, although identical products from other WTO Members were not the subject of such additional bonding requirements. The regulatory distinction (whether an additional bonding requirement is needed) *was not based on any characteristic of the product but depended exclusively on the origin of the product* and targeted exclusively some imports from the European Communities. (emphasis added)[209]

The Panel therefore concluded that a condition must produce discrimination between countries for it to violate Article I; discrimination between products themselves would theoretically not violate MFN.[210]

Numerous exceptions to the general MFN principle exist within the WTO system, particularly the provisions of Article XX discussed later on. Furthermore, the SCM Agreement itself allows members the ability to impose countervailing duties. Countries therefore may, in the carefully defined limits of a countervailing duty measure, unilaterally decide to ignore the MFN principle and apply discriminatory conditions on a fellow trading nation in order to offset

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[209] *United States – Import Measures on Certain Products from the European Communities*, Report of the Panel, note 180 above, paragraph 6.54.
[210] TREBILCOCK, note 203 above, p. 61.

a purported subsidy. Contrary to the MFN principle therefore, a WTO member can therefore discriminate between subsidizing and non-subsidizing members.

Hence, although the relationship between the MFN principle and the rights and obligations of the SCM Agreement are complex, the DSB would likely decide to interpret the concepts in a manner complementary to the objectives of both.[211] As such, with respect to Ontario and Québec's renewable energy support mechanisms, clearly such measures do not constitute a violation of MFN in that they do not impose a distinction between products originating from various WTO members. Quite the opposite, foreign products are being treated equally, insofar as they all do not qualify under the FIT Program or Community CFT's local content provisions regardless of their country of origin. Therefore, although the programs could not therefore be easily challenged under the MFN rules, as we shall see in the next section the situation with respect to NT is entirely different.

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[211] See discussion regarding the relationship between the SCM Agreement and NT *supra* Part III, Section 2.2 below. Although we were unable to find any GATT or WTO dispute that expressly discusses the relationship between MFN and the SCM Agreement, both the Panel and Appellate Body have elaborated on the issue with respect to other Annex 1A agreements. The Appellate Body in *Brazil – Measures Affecting Desiccated Coconut*, Report of the Appellate Body WT/DS22/AB/R (21 February 1997), p. 15 stated that "the relationship between the GATT 1994 and the other goods agreements in Annex 1A is complex and must be examined on a case-by-case basis. Although the provisions of the GATT 1947 were incorporated into, and became part of the GATT 1994, they are not the sum total of the rights and obligations of WTO members concerning a particular matter." See also Panel report *Brazil – Measures Affecting Desiccated Coconut*, Report of the Panel, WT/DS22/R (17 October 1996).

2.2 National Treatment

NT provides that a party to a trade treaty which includes an NT provision must not discriminate against imports once they have crossed the border by treating them less favorably than domestic products with which they are in competition. NT, as opposed to MFN which regulates a product's treatment "at the border", governs internal policies: after the product has passed customs.[212] This may appear to be a fairly simple and straightforward dictum: treat the foreign product as you would your own domestic ones. The intricacies of applying NT can however at times be quite daunting.

The WTO's provisions on NT are principally located at Article III of GATT 1994, dealing with the concept by specifically limiting discriminatory treatment of foreign products with respect to taxes and other domestic laws:

> 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* (our emphasis).[213]

NT has been interpreted extensively, both during the GATT 1947 era and more recently by the DSB, and is intimately linked with the concept of "likeness". In

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[212] TREBILCOCK, note 203 above, p. 83.
[213] GATT 1994, Article III:4.

Korea – Various Measures on Beef, the Appellate body determined that simply showing a formal difference in treatment between imported and like domestic products was not sufficient to show a violation of Article III(4). The issue of concern is whether or not imported products are treated "less favorably" than like domestic products.[214]

Certainly, the most important pre-WTO dispute regarding NT is *Japan – Alcoholic Beverages*, where an origin neutral taxation provision was found to violate GATT 1947 Article III(2).[215] The EC's complaint centered on a Japanese tax measure that categorized alcoholic beverages according to various qualities and set different tax rates on each category. The EC believed that such a measure violated Article III(2) by taxing imports at higher rates than "like" domestic products and by affording protection to "directly competitive and substitutable" domestic products. Japan countered that it was free to classify products for tax purposes in whatever way it chose, and the likeness issue was totally irrelevant in the context of a law that treated domestic and foreign

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[214] *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS169/AB/R, (11 December 2000), para 128.

[215] Article III, paragraph 2 reads "The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1."

products in exactly the same way.[216]

Having determined that an examination of likeness was necessary considering the wording in Article III(2), the Panel found that many of the EC products were "like" Japanese products. Furthermore, it noted that tax rates on imported and special grade whiskies and brandies (which it considered "like products") were considerably higher than tax rates on first and second grade whiskies and brandies. Since most of the spirits imported from the EC were of higher grade, the Panel found that because of the differential taxation of these "like products", almost all whiskies and brandies from the imported EC were subject to the higher tax rates, whereas more than half of the whiskies and brandies products in Japan were subject to a lower rate.[217] This was ruled as constituting discrimination in violation of the NT principle.

Not long after the WTO was established, a second *Japan – Taxes on Alcoholic Beverages*[218] dispute commenced, centered on essentially the same facts as the first. The Appellate Body, seeking to refine the meaning of NT, began by clarifying that the concept obliges WTO members to provide equality of competitive conditions for imported products in relation to domestic

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[216] TREBILCOCK, note 203 above, p. 86.
[217] *Id.*, p. 87.
[218] *Japan – Taxes on Alcoholic Beverages*, Report of the Panel, WT/DS10/R WT/DS11/R WT/DS8/R (11 July 1996); *Japan – Taxes on Alcoholic Beverages*, Report of the Appellate Body, WT/DS10/AB/R WT/DS11/AB/R WT/DS8/AB/R (04 October 1996).

products.[219] With respect to the issue of likeness, as applicable in all WTO matters generally and in NT matters specifically, the Appellate Body rendered the determination process essentially a case-by-case matter:

> The concept of "likeness" is a relative one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the WTO are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term "like" is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply. We believe that, in Article III:2, first sentence of the GATT 1994, the accordion of "likeness" is meant to be narrowly squeezed.[220]

Next, the Appellate Body provided that following a determination of likeness, the only remaining step to determine the conformity of an internal tax measure with the NT principle is the examination of whether the taxes on imported products are higher that those on like domestic ones. If so, a finding that measure is not in compliance with Article III must be arrived at, since a distinction between the treatment of internal versus external products is clearly present.[221]

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[219] TREBILCOCK, note 203 above, p. 91.
[220] *Japan – Taxes on Alcoholic Beverages*, Report of the Appellate Body, note 218 above, p. 22 – 23.
[221] *Id.*, page 25: "The only remaining issue under Article III:2, first sentence, is whether the taxes on imported products are "in excess of" those on like domestic products. If so, then the Member that has imposed the tax is not in compliance with Article III. Even the smallest amount of "excess" is too much."

With respect to the issue of discrimination, the *India – Measures Affecting the Automotive Sector*[222] case is notable. Indian measures imposed upon its automotive sector were at issue, namely an "indigenization" requirement whereby each car manufacturer was obliged to achieve local content of a minimum level of 50 to 70 percent of the components of cars manufactured domestically.[223] The Panel determined that India's program clearly violated the NT principle.[224]

As mentioned previously, the NT principle is subject to a number of exceptions related to subsidies, including those contained in GATT 1994 Article III(8) with respect to government procurement.[225] More importantly, the issue of whether a general conflict exists between the SCM Agreement and the GATT 1994 NT principle has been raised. In *Indonesia – Autos*, the Panel decided that no such conflict could be found:

> Article III [of GATT 1994] continues to prohibit discrimination between domestic and imported products in

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[222] *India – Measures Affecting the Automotive Sector*, Report of the Panel, WT/DS146/R, WT/DS175/R, 21 December 2001.
[223] *Id.*, para 2.
[224] *Id.*, page 7.204.
[225] Which paragraph reads: "(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. (b) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products."

> respect of internal taxes and other domestic regulations, including local content requirements. It does not "proscribe" nor does it "prohibit" the provision of any subsidy *per se*. By contrast, the SCM Agreement prohibits subsidies which are conditional on export performance and on meeting local content requirement, provides remedies with respect to certain subsidies where they cause adverse effects to the interests of another Member and exempts certain subsidies from actionability under the SCM Agreement. In short, Article III prohibits discrimination between domestic and imported products while the SCM Agreement regulates the provision of subsidies to enterprises.[226]

Hence in our view the Panel saw the two agreements as completely separate, dealing with separate issues, in separate ways and providing separate remedies.

With respect to the FIT Program and Community CFT, both programs are potentially in violation of the NT principle, irrespective of a determination of the presence or not of a prohibited or actionable subsidy, due to their respective local content requirements. Analyzing solely the example of wind turbines, many countries produce similar turbines as those now available for production locally in Ontario and Québec.[227] As such, these foreign turbines may be considered as "like" for the purposes of GATT 1994 Article III. Furthermore, a clear distinction between foreign and domestic products is provided, due to the "indigenization" or local content requirements present in both programs and

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[226] Indonesia – Autos, note 131 above, para. 14.33.

[227] We note Québec has a "winterization" requirement for turbines used in Community CFT facilities. See s. 1.4 of Community CFT requiring turbines to be able to withstand temperatures of -30°C. It is possible that other countries do not produce such turbines. We discuss the issue *supra* Part III, Section 4.2 with respect to technical barriers to trade.

discussed in detail above.[228] The programs can therefore be viewed as treating comparable foreign products less favorably than their domestic counterparts, rendering them actionable under Article III. Notwithstanding, it is possible for a WTO member to legitimately violate the NT principle by relying on the most notable exception to both the MFN and NT principles: GATT 1994 Article XX.

2.3 The "Chapeau" of GATT Article XX

Article XX (general exceptions) of GATT 1994 provides that so long as a measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries or a disguised restriction on international trade, WTO law does not prevent the adoption or enforcement of measures necessary, among others, (i) to protect human, animal or plant life or health (Article XX(b)) or (ii) relating to the conservation of exhaustible natural resources in conjunction with restrictions on domestic production or consumption (Article XX(g)).[229]

Article XX therefore calls for a two-tier test prior to determining whether a measure may benefit from the exception outlined therein. First, the measure

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[228] *Infra* Part II, Section 4.4.2.
[229] As noted *infra* Part II, Section 4.5 concerning actionable subsidies, the SCM Agreement also included exceptions rendered permissible subsidies ties to environmental assistance. That provision has since lapsed. Although the present Section's analysis focuses more closes on using Article XX as an exception to a violation of GATT 1994 NT or MFN provisions, it is possible that a member could offer Article XX as a defense exempting the finding of an actionable subsidy under Article 5 of the SCM Agreement.

must fall under one of the two categories provided at paragraphs (b) and (g) of Article XX. Second, the introductory paragraph or "chapeau" of Article XX must be satisfied in that the measure is not discriminatory or detrimental to world trade. Hence, the "necessity" of the measure is the guiding principle required to arrive at a determination that a measure falls under the chapeau. DSB decisions have consistently required a detailed examination of the reasoning behind the measure, focusing on three principle analyses: "(i) the importance of the objective or common interest that is the target of the measure, (ii) the effectiveness of the measure at meeting the target, and (iii) the impact of the measure on international trade."[230] The DSB has therefore elaborated a cost-benefit analysis of the measure as a basis for determining the likelihood that the measure can support environmental goals.[231]

Article XX has successfully been used to defend against DSU actions contesting measures aimed at reducing the consumption of cigarettes, protecting dolphins, reducing the risks to human health posed by asbestos and waste tires,

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[230] GREEN, note 128 above, p. 408.
[231] Id.

and the conservation of tuna, salmon, herring, dolphins and turtles.[232] Of particular relevance to the issue of renewable energy support mechanisms is the *US – Gasoline* case. The Panel found that a measure to reduce the consumption of gasoline in order to lower air pollution was within the range of those concerning the protection of human, animal and plant life or health mentioned in Article XX(b). Furthermore, the Panel determined that a policy to reduce the depletion of clean air was a policy to conserve a natural resource within the meaning of Article XX(g).[233] Pursuant to this decision a WTO-UNEP report stated that:

> […] some authors have noted that policies aimed at reducing CO_2 emissions could fall under Article XX(b), as they intend to protect human beings from the negative consequences of

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[232] WTO SECRETARIAT, *Trade and Climate Change*, WTO-UNEP Report, Ludivine TAMIOTTI et al (eds), World Trade Organization, 2009, p. 107, citing: GATT Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R, adopted 7 November 1990, BISD 37S/200; GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS21/R, DS21/R, 3 September 1991, unadopted, BISD 39S/155; Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243; Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, 1527; GATT Panel Report, *United States – Prohibition of Imports of Tuna and Tuna Products from Canada*, L/5198, adopted 22 February 1982, BISD 29S/91; GATT Panel Report, *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, L/6268, adopted 22 March 1988, BISD 35S/98 GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS21/R, DS21/R, 3 September 1991, unadopted, BISD 39S/155; GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS29/R, 16 June 1994, unadopted; Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755; Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481; GATT Panel Report, *United States – Taxes on Automobiles*, DS31/R, 11 October 1994, unadopted.

[233] *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, Report of the Panel, 29 January 1996, para. 6.21 and 6.37.

> climate change (such as flooding or sea-level rise), or under Article XX(g), as they intend to conserve not only the planet's climate but certain plant and animal species that may disappear because of global warming.[234]

The Appellate Body has however indicated that a balance must be maintained between a member's rights to invoke Article XX and the substantive rights of other WTO members, since, as mentioned during the *US – Shrimp* case which analyzed the exception in detail, if "every WTO Member were free to pursue its own trade policy solutions to what it perceives to be environmental concerns, the multilateral trade system would cease to exist."[235]

As such, it may be possible for Canada to successfully repel an action brought against the FIT Program and/or Community CFT with respect to a violation of NT due to local content requirements by claiming that such programs are necessary to ensure, for example, abundant clean air or lower CO_2 emissions, or even to prevent the overexploitation of exhaustible natural resources used in conventional power generation such as coal and oil.

We can only speculate at the chances of success of such a defense, however we believe it may fail due to the Appellate Body's concerns raised in *US – Shrimp*: these goals can arguably be arrived at without imposing local content

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[234] WTO SECRETARIAT, note 203 above, p. 108.
[235] *United States – Import prohibition of Certain Shrimp and Shrimp Products*, Report of the Panel, WT/DS58/AB/R (12 October 1998), para 35. See extensive discussion of the case in RANCOURT, note 9 above.

restrictions that discriminate against foreign produced components, since allowing the import of foreign manufactured wind turbines, for instance, would logically not impact the environmental benefits associated with such programs. Canada would therefore be unlikely to satisfy the "necessity" component of the "chapeau".

Section 3 – GATS

The GATS was one of the more impressive achievements of the Uruguay Round. Trade in services had become an increasing aspect of world trade and the GATT, designed exclusively for trade in goods, provided an insufficient regulatory framework.[236] The GATS is nevertheless modeled on the GATT's structure and seeks to liberalize trade in services. The SCM Agreement however does not apply to subsidies in the service sector. GATS Article XV deals with such subsidies, controversially providing that such subsidies are in no way actionable, but that a member can request consultations where it considers itself to have been adversely affected by another members' subsidy. That is the extent of a member's recourse: there is currently no legal remedy for the prevention of service industry subsidization and no dispute report has

[236] Petros C. MAVROIDIS, note 108 above, p. 634; For a discussion on the relationship between the GATT and GATS, see *Canada – Certain Measures Concerning Periodicals*, note 167 above, p. 39.

discussed this practice.[237]

With respect to renewable energy, electricity is generally classified as a good, not a service, even though its characteristics lend it to perhaps being considered a service.[238] Unlike most goods, electricity is a *process* happening throughout the electricity transmission network's wires simultaneously and must be generated more or less exactly as it is being used.[239] Were it to be classified as a service in future DSB case-law, it is possible that both the Ontario and Québec programs be considered as falling outside the ambit of the SCM Agreement and WTO's other provisions dealing with goods.

Section 4 – The WTO's Multilateral Agreements

Annex 1A of the WTO Agreement contains numerous legal texts dealing with a variety of issues, including the SCM Agreement. Many of these agreements are extremely technical in nature, such as those agreements dealing with pre shipment inspection or rules of origin. Others, however, provide a great deal of substantive law. The following sections examine certain Annex 1A agreements, specifying, when applicable, their relationship with the SCM Agreement and potential applicability to Québec and Ontario renewable energy support

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[237] *Id.*
[238] See HS Nomenclature, governed by the *Convention on the Harmonized Commodity Description and Coding System*.
[239] COTTIER, note 18 above, p. 4.

mechanisms.

4.1 TRIMs

The *Agreement on Trade-Related Investment Measures*[240] ("**TRIMs**") recognizes that certain domestic investment measures can restrict and distort trade in goods.

TRIMs provides that no contracting party shall apply any investment measure inconsistent with Articles III (NT) and XI (prohibition of quantitative restrictions) of the GATT. To this end, an illustrative list of TRIMs agreed during the Uruguay Round negotiations to be inconsistent with these articles is annexed to the agreement. The list includes, among others, measures requiring the purchase 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.[241]

Evidently, there is a potential overlap between TRIMs, the general NT provisions contained at GATT 1994 Article III and the SCM Agreement's provisions on prohibited subsidies, since all local content provisions affect the

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[240] *Agreement on Trade-Related Investment Measures*, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186 (15 April 1994), Article 5.1 and 6.2.
[241] TRIMs, Article 2.1.

import of foreign manufactured goods. Furthermore, similarly to TRIMs, Article III(4) of GATT 1994 specifically restricts measures that require an investor to use domestic content in manufactures.[242]

The WTO's Panel in the *Indonesia – Autos* case considered whether a measure covered by the SCM Agreement could also be subject to the TRIMs Agreement. The decision interprets the substantive provisions of TRIMs as applied to local content requirements placed upon manufacturers seeking to benefit from more favorable tax measures. The Panel analyzed a measure that conditioned the granting of customs duties and sales tax exemptions to imported products on whether Indonesia's national car company had made a deal with the foreign exporter to assemble the car in-country.

> […] *if a Member were to apply a TRIM (in the form of local content requirement), as a condition for the receipt of a subsidy, the measure would continue to be a violation of the TRIMs Agreement if the subsidy element were replaced with some other form of incentive.* By contrast, if the local content requirements were dropped, the subsidy would continue to be subject to the SCM Agreement, although the nature of the relevant discipline under the SCM Agreement might be affected. Clearly, the two agreements prohibit different measures. (our emphasis) [243]

The Panel determined that the SCM Agreement and TRIMs were not in

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[242] Petros C. MAVROIDIS, note 108 above, p. 839.
[243] Indonesia – Autos, note 131 above, para. 14.50-14.52.

conflict, as they cover different subject matters and do not impose mutually exclusive obligations.[244]

The applicability to renewable energy support measures therefore becomes clear. Whereas the finding of a prohibited or actionable subsidy contained in the FIT Program or Community CFT is far from certain, the conditionality element linking local content to entry into the relevant program is not. A renewable energy developer must meet local content requirements prior to payment under the PPA awarded pursuant to both programs. Hence, Québec's and Ontario's renewable energy support mechanisms trigger all elements of the test set forth in TRIMs and outlined in the *Indonesia – Autos* case. A trade related investment measure exists: investment in the renewable energy facility is conditional upon entering into the relevant FIT Program or Community CFT contract, which itself is conditional on meeting local content requirements.

Furthermore, the incentive does not need to be tied to the receipt of a subsidy or clear financial contribution and benefit as is the case under the SCM Agreement. *Indonesia – Autos* provides that the advantage made conditional on meeting a local content requirement may include a wide variety of incentives

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[244] Once again, we note the WTO DSB's application of the general international treaty law interpretive method. Agreements will be interpreted in such a way as to avoid finding any conflict between them, either by providing that different texts complement each other or by finding that they deal with separate subject matters. See Part III, Section 1 hereto.

and advantages, other than subsidies. Finally, in the case of Québec, the requirement for wind turbine manufacturers to invest in the province by setting up local turbine manufacturing plants as a condition to providing turbines to Québec wind energy facilities is equally in violation of TRIMs. In our view, this renders these programs potentially actionable under TRIMS and subject to DSB disciplining.

4.2 Technical Barriers to Trade

The *Agreement on Technical Barriers to Trade*[245] ("**TBT**") seeks to ensure that technical regulations and standards, as well as testing and certification procedures, do not create unnecessary obstacles to trade. The TBT's Article 2.1 reads:

> Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

Nevertheless, Article 2.2 recognizes that countries have the right to establish technical regulations necessary for the protection of human, animal or plant life, health or the environment. Climate objectives may therefore be considered legitimate purposes for which technical standards are deployed. Nevertheless,

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[245] *Agreement on Technical Barriers to Trade*, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, (15 April 1994).

these standards must not discriminate against other members' products or create unnecessary obstacles to trade.[246] The TBT therefore encourages countries to use international standards where these are appropriate, but it does not require them to change their levels of protection as a result of standardization.[247]

As mentioned, the Community CFT requires all wind turbines used by bidders to be manufactured in the Gaspésie region of the province. The tender documentation further provides technical standards applicable to the turbines with respect to their ability to withstand cold climates.[248] These technical requirements could be used as a defence against the Community CFT's local content requirement's with respect to turbines, in that sourcing cold climate-appropriate turbines is necessary for the protection of safety, for example. Nevertheless, we believe this defence would be fairly easy to repel, since the necessity of such a measure is suspect, insofar as the Community CFT could have simply required bidders to source turbines certified to the applicable standards without imposing local content restrictions. The Community CFT requirements therefore may be considered as unnecessarily discriminating

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[246] Malena SELL et al, Emerging Issues in the Interface between Trade, Climate Change and Sustainable Energy, International Centre for Trade and Sustainable Development, ICTSD Discussion Paper, May 2005, p. 16.
[247] TBT, Article 2.4
[248] Community CFT, s. 1.4: "The wind turbines and the other wind farm equipments must continue to operate normally at low temperatures, down to - 30°C […]. In this regard, a certification shall be produced by a certification organization accredited in the field of modern commercial wind turbines such as DEWI-Offshore and Certification Centre GmbH […].

against foreign products.

With an open trade in corn and a fixed duty we should have every man in the country fully fed and happy, instead of our present situation in which so much distress exists - distress of our own producing.

Joseph Hume

The case for trade is not just monetary, but moral - not just a matter of commerce, but a matter of conviction. Economic freedom creates habits of liberty. And habits of liberty create expectations of democracy.

George W. Bush, *Speech*, 17 May 2000

Conclusion – The Morals of Support Mechanisms

Joseph Hume touched so many years ago upon that most central goal of trade: the development and improvement of the human condition. Since subsidies, domestic restrictions and barriers to foreign investment disrupt international trade, thereby harming the development of many for the betterment of a few, they must be regulated and limited.

The WTO Agreement seeks to do just that. Through its multiple provisions dealing with discrimination between WTO members and the use of subsidies, it seeks to prevent countries from adopting policies that negatively affect free

trade. Furthermore, the various WTO multilateral agreements seek to provide a complete framework through which all aspects of government policy can be evaluated so that they can be effectively regulated. Finally, the WTO's dispute settlement system and provisions on countervailing duties seek to effect real change on members' use and misuse of policy by disciplining those that may limit free trade.

Our overview of many of the rules established by the WTO Agreement indicates that both Ontario's FIT Program and Québec's Community CFT are potentially actionable under WTO law. Hence, although they have not been challenged at the WTO level yet – perhaps due to the relative size of the sector, compared to other industries, such as automobiles[249] – renewable energy support mechanisms may be disciplined as follows:

(i) Where the program requires the use of local products instead of like foreign products, they may be pursued as a violation of GATT 1994 Article III concerning NT.

(ii) Where the program provides a subsidy, as defined in Articles I and

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[249] Vestas, the world's largest wind turbine manufacturer, posted revenue of EUR 6.6 billion in 2009, compared to Ford Motor Company's $118 billion in revenue in 2009. See Vestas 2009 Annual Report at http://www.vestas.com/files//Filer/EN/Investor/Company_announcements/2010/100210-CA_UK_AR.pdf and Ford's at http://www.ford.com/doc/2009_annual_report.pdf.

II of the SCM Agreement, which causes an adverse effect to a fellow WTO members' domestic industry, the program may be contested as an actionable subsidy under Article 5 of the SCM Agreement.

(iii) Where the program conditions receipt of a subsidy, as defined in Articles I and II of the SCM Agreement, on the use of local content, it may be considered prohibited under Article 3.1(b) of the SCM Agreement.

(iv) Where entry into the relevant program is contingent on the use of local content, regardless of whether a subsidy is provided or not, the program may be considered a violation of TRIMs and possibly TBT.

Renewable energy support mechanisms are nevertheless laudable, since they may allow for local development and the reduction of greenhouse gas emissions. Without these subsidies, one can theorize as to whether the increased adoption of renewable energy production would have occurred. As such, members can present the following defenses in order to justify their renewable energy support mechanisms' violation of WTO law:

(i) Members may argue that the measure is necessary for the protection of (a) human, animal or plant life or health or (b) the conservation of exhaustible natural resources, thereby rendering it a valid exception

to WTO trade rules pursuant to the "chapeau" of GATT 1994 Article XX.

(ii) Members may argue that the local content requirements are in fact legitimate technical barriers to trade pursuant to technical regulations and standards necessary for the protection of human, animal or plant life, health or the environment.

(iii) Where the program does not contain local content restrictions, Members may argue that, notwithstanding the existence of a subsidy as defined in Articles I and II of the SCM Agreement, no adverse effect is caused to fellow WTO members domestic industries.

(iv) Members may argue that electricity is a service, not a good, subjecting the programs to GATS discipline and rendering all WTO Agreement rules governing goods inapplicable.

Considering a recent study estimating the total annual amount of subsidies provided to renewable energy generation (excluding hydro-electricity) at US $27 billion in OECD[250] countries, we believe that renewable energy support

[250] Organization for Economic Co-operation and Development.

mechanisms will inevitably be tested before the WTO's DSB.[251] Indeed, the recent questions asked of Canada by Japan before the WTO's Committee on Subsidies and Countervailing Duties are the strongest indication yet that a dispute may be forthcoming.[252]

Evidently however, the current WTO rules potential disciplining and limiting of renewable energy support mechanisms conflicts with the international community's stated desire to avoid climate change and reduce carbon emissions. The Doha Round is therefore of utmost importance, since it allows trading nations to re-think and re-negotiate WTO law with a view to reconciling these important and discordant goals. For instance, it may be prudent to reinstate "green-light" subsidies for measures aimed at reducing carbon emissions. Alternatively, one can consider clarifying and expanding the scope of GATT 1994 Article XX, thereby creating an all-encompassing exception to any measure aimed at reducing the effects of climate change. Nevertheless, we believe local content restrictions should continue to be strictly prohibited and any justifiable subsidization of environmental programs must be structured in such a way as to prevent governments from pursuing trade distorting subsidization programs behind a veil of "green" and "clean" legislation.

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[251] INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, *Relative Subsidies to Energy Sources: GSI estimates*, Global Subsidies Initiative, 19 April 2010.
[252] See Annex 2 hereto.

Countries seem extremely guarded on the issue of continuing efforts to regulate subsidization programs and expanding limits on domestic content restrictions. As one author notes in his study of proposed SCM Agreement modifications, the amendments presented during the Doha Round may actually limit its effectiveness in controlling WTO members' subsidy practice:

> "[…] the ASCM regime appears likely to be further weakened rather than bolstered. For subsidy discipline, the DDA is looking very much like a "Retrenchment Round". The proposals tabled to date are overwhelmingly weighted toward loosening direct disciplines on subsidies and/or making it harder to use the CVD remedy (itself a key to discipline on subsidies)."[253]

WTO members therefore seem to believe their programs will serve the domestic good and are less concerned with whether or not this will negatively impact global welfare.[254]

More concerning is the fact that governments are beginning to frame their arguments with respect to their various domestic support programs around values. If a country values its local industry, it should be able to subsidize it to prevent it from failing. If a country values its environment, it should be able to subsidize its industries to make them "greener". If a country values its people, it

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[253] MAGNUS, John R. "World Trade Organization Subsidy Discipline: Is This the 'Retrenchment Round'?", (2004) 38(6) *Journal of World Trade* 985, p. 989.
[254] See WTO SECRETARIAT, note 5 above, for detailed illustrations and explanations on the various pretexts countries use to justify the disbursement of subsidies.

should be able to create conditions that force local development thereby guaranteeing employment and provide clean air. When we talk about support mechanisms, we are increasingly talking about values.

Reading George W. Bush's words above, it seems undeniable that the rhetoric in international trade has changed. The Doha Round's current stalemate is, in our opinion, symptomatic of this. As current WTO Director-General Pascal Lamy notes, "trade restrictions will become more and more value-based."[255] The danger however with providing value and morality based arguments is their inherent irrefutability. No one can judge another's values and morals, and so no one can present arguments convincing enough to contest trade distorting practices founded on such considerations. International trade regulation can quickly come to a standstill.

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[255] WTO SECRETARIAT, *The WTO is "a laboratory for harnessing globalization" – Lamy*, News Release, 1 November 2006.

Bibliography

INTERNATIONAL TREATIES, AGREEMENTS, CONVENTIONS AND DECLARATIONS

Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, reprinted in GATT, Basic Instruments and Selected Documents (BISD) 26th Supp. at 56 (1980)

Agreement on Subsidies and Countervailing Measures, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 14 (15 April 1994)

Agreement on Technical Barriers to Trade, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, (15 April 1994)

Agreement on Trade-Related Investment Measures, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186 (15 April 1994)

Copenhagen Accord to the United Nations Framework Convention on Climate Change, Copenhagen (18 December 2009)

Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 1867 U.N.T.S. 14, 1994

General Agreement on Tariffs and Trade, 55 U.N.T.S. 194 (30 Oct. 1947)

General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 (15 April 1994)

General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 (15 April 1994)

International Convention on the Harmonized Commodity Description and Coding System, 1503 U.N.T.S. 167 (14 June 1983)

Kyoto Protocol to the United Nations Framework Convention on Climate Change, UN Doc FCCC/CP/1997/7/Add.1, 37 ILM 22 (11 December 1997)

Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 154 (15 April 1994)

Ministerial Declaration on the Uruguay Round (Punta Del Este Declaration),

GATT Doc. No. MIN. DEC. (Sept. 20, 2986)

Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 (15 April 1994)

United Nations Framework Convention on Climate Change, 1771 U.N.T.S. 107 (21 March 1994)

Vienna Convention on the Law of Treaties, 1155 UNTS 331 (23 May 1969)

NATIONAL LAWS

CANADA – FEDERAL

Special Import Measures Act, R.S.C. 1985, c. S-15

World Trade Organization Agreement Implementation Act, S.C. 1994, c. 47

CANADA – PROVINCE OF ONTARIO

Electricity Act, 1998, S.O. 1998, c. 15

Green Energy Act, 2009, S.O. 2009, c. 12

CANADA – PROVINCE OF QUÉBEC

An Act respecting the implementation of international trade agreements, R.S.Q. c. M-35.2

An Act respecting the Régie de l'énergie, R.S.Q. c. R-6.01

Hydro-Québec Act, R.S.Q. c. H-5

UNITED STATES - FEDERAL

Tariff Act of 1890, ch. 1244, 26 Stat. 584

Tariff Act of 1897, 30 Cong. Rec. 1634

Tariff Act of 1930, Pub. L. 103-465

CASE LAW

WTO

Argentina – Safeguard Measures on Imports of Footwear, Report of the Appellate Body, WT/DS121/AB/R (14 December 1999)

Brazil – Measures Affecting Desiccated Coconut, Report of the Panel, WT/DS22/R (17 October 1996)

Brazil – Measures Affecting Desiccated Coconut, Report of the Appellate Body WT/DS22/AB/R (21 February 1997)

Brazil – Export Financing Programme for Aircraft, Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement, Decision of the Arbitrators, WT/DS46/ARB (28 August 2000)

Brazil – Export Financing Programme for Aircraft, Recourse by Canada to Article 21.5 of the DSU, Report of the Panel, WT/DS46/RW (9 May 2000)

Canada – Measures Affecting the Export of Civilian Aircraft, Report of the Appellate Body, WT/DS70/AB/R (2 August 1999)

Canada – Certain Measures Concerning Periodicals, Report of the Appellate Body, WT/DS31/AB/R (30 June 1997)

Canada – Certain Measures Affecting the Automotive Industry, WT/DS139/AB/R, WT/DS142/AB/R, (19 June 2000)

EC – Countervailing Measures on Dynamic Random Access Memory Chips from Korea, Report of the Panel, WT/DS299/R (17 June 2005)

Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico, Report of the Panel, WT/DS60/AB/R (19 June 1998)

Indonesia – Certain Measures Affecting the Automobile Industry, Report of the Panel, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (2 July 1998)

India – Measures Affecting the Automotive Sector, Report of the Panel, WT/DS146/R, WT/DS175/R, 21 December 2001

Japan – Taxes on Alcoholic Beverages, Report of the Panel, WT/DS10/R WT/DS11/R WT/DS8/R (11 July 1996)

Japan – Taxes on Alcoholic Beverages, Report of the Appellate Body, WT/DS10/AB/R WT/DS11/AB/R WT/DS8/AB/R (04 October 1996)

Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS169/AB/R, (11 December 2000)

United States — Continued Dumping and Subsidy Offset Act of 2000, Report of the Panel, WT/DS217/R (16 September 2002)

United States – Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada, Report of the Panel, WT/DS257/R (29 August 2003)

United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs), Report of the Appellate Body, WT/DS296/AB/R (27 June 2005)

United States – Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/RW (1 September 2006)

United States – Import Measures on Certain Products from the European Communities, Report of the Panel, WT/DS165/R (17 July 2000)

United States – Import Measures on Certain Products from the European Communities, Report of the Appellate Body, WT/DS165/AB/R (11 December 2000)

United States – Import prohibition of Certain Shrimp and Shrimp Products, Report of the Panel, WT/DS58/AB/R (12 October 1998)

United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, Report of the Appellate Body, WT/DS138/AB/R (10 May 1993)

United States – Measures Treating Export Restraints as Subsidies, Report of the Panel, WT/DS194/R (29 June 2001)

United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada, Report of the Panel, WT/DS236/R (27 September 2002)

United States – Restrictions on Imports of Tuna, Report of the Panel, not adopted, DISD 39S/155 (3 September 1991)

United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/R, Report of the Panel, 29 January 1996

United States – Subsidies on Upland Cotton, Report of the Panel, WT/DS267/R (8 September 2004)

United States – Subsidies on Upland Cotton, Report of the Appellate Body, WT/DS267/AB/R (3 March 2005)

EU

PreussenElektra Aktiengesellschaft v. Schleswag Aktiengesellschaft, European Court of Justice, 13 March 2001, Case C-379/98

MONOGRAPHS AND COLLECTIONS

BRONKERS, Marco C.E.J. and Gary N. HORLICK, *WTO Jurisprudence and Policy: Practitioners' Perspectives*, London, Cameron May, 2004

CARREAU, Dominique and Patrick JUILLARD, *Droit international économique*, 2e ed., Paris, Dalloz, 2005

COTTIER, Thomas and Matthias OESCH, *International Trade Regulation: Law and Policy in the WTO, The European Union and Switzerland – Cases, Materials and Comments*, London, Cameron May, 2005

GOODE, Walter, *Dictionary of Trade Policy Terms*, World Trade Organization, Cambridge University Press, 4th edition, 2003

HOGG, Peter W., *Constitutional Law of Canada*, vol. 1, Carswell, 5th ed. supp., 2010

HOWSE, Robert and Antonia ELIASON, "Countervailing Duties and Subsidies for Climate Mitigation: What Is, and What Is Not, WTO-Compatible?" in Richard B. STEWARD et al (ed.), *Climate Finance, Regulatory and Funding Strategies for Climate Change and Global Development*, New York University Abu Dhabi Institute, New York University Press, 2009

JACKSON, John H. and William J. DAVEY, *Legal Problems of International Economic Relations: Cases, Materials and Text on the National and International Regulations of Transnational Economic Relations*, 2nd ed., St. Paul, West Publishing Co., 1986

MAVROIDIS, Petros C., SHOENBAUM, Thomas J. and Mitsuo MATSUSHITA, *The World Trade Organization: Law, Practice, and Policy*, 2nd ed., Oxford, Oxford University Press, 2006

MCGOVERN, Edmond, *International trade regulation: GATT, the United States, and the European Community*, Exeter, Globefield Press, 1986

STEWART, Terence P. (ed), *The GATT Uruguay Round: A Negotiating History (1986-1992)*, vol. 1: commentary, Deventer, Kluwer Law and Taxation

Publishers, 1993

THOMAS, Jeffrey S. and Michael A. MEYER, *The New Rules of Global Trade: A Guide to the World Trade Organization*, Toronto, Carswell, 1997

TREBILCOCK, Michael J. and Robert HOWSE, *The Regulation of International Trade*, 3rd ed., New York, Routledge, 2005

TWIDELL, John and Tony WEIR, *Renewable Energy Resources*, 2nd ed., Taylor & Francis, 2006

VERMULST, Edwin and Folkert GRAAFSMA, *WTO Disputes: Anti-Dumping, Subsidies and Safeguards*, London, Cameron May, 2002

WANG, Guiguo, *The Law of the WTO: China and the Future of Free Trade*, Hong Kong, Sweet & Maxwell Asia, 2005

WORLD TRADE ORGANIZATION, *Guide to GATT Law and Practice*, vol. 1: Articles I-XXI, Geneva, World Trade Organization, 1995

ARTICLES

BRINK, Tegan, "Which WTO Rules Can a PTA Lawfully Breach? Completing the Analysis in Brazil – Tyres", (2010) 44(4) *Journal of World Trade* 813

CROSS, Karen Halverson, "King Cotton, Developing Countries and the 'Peace Clause': the WTO's US Cotton Subsidies Decision", (2006) 9(1) *Journal of International Economic Law* 149

EVANS, John W., "Subsidies and Countervailing Duties in the GATT: Present Law and Future Prospects", (1977-1978) 3 *Int'l Trade L. J.* 211

GREEN, Andrew, "Trade Rules and Climate Change Subsidies", (2006) 5:3 *World Trade Review* 377

HODA, Anwaral and Rajeev AHUJA, "Agreement on Subsidies and Countervailing Measures: Need for Clarification and Improvement", 2005 39(6) *Journal of World Trade* 1009

LLOYD, P. J., "The Architecture of the WTO", (2001) 17 *European Journal of Political Economy* 327

LODEFALK, Magnus and Mark STOREY, "Climate Measures and WTO Rules on Subsidies", (2005) 39(1) *Journal of World Trade* 23

MAGNUS, John R., "World Trade Organization Subsidy Discipline: Is This the

'Retrenchment Round'?", (2004) 38(6) *Journal of World Trade* 985

NOLDE, Le Baron Borin, "La Clause de la nation la plus favorisée et les tarifs préférentiels", (1932) 1932 *R.C.A.D.I.* 23

PINEAU, Pierre-Olivier, "Electricity Subsidies in Low-Cost Jurisdictions: The Case of British Columbia", (2008) 4(3) *Canadian Public Policy* 379

RANCOURT, Marie-Ève, "Promoting Sustainable Biofuels Under the WTO Legal Regime", (2009) 5 *McGill J.S.D.L.P.* 73

STEYER, Debra P., "The Subsidies and Countervailing Measures Agreement: Ahead of its Time or Time for Reform?", (2010) 44(4) *Journal of World Trade* 779

SULLIVAN, R.E., "Jurisdiction to Negotiate and Implement Free Trade Agreements in Canada: Calling the Provincial Bluff", (1987) 24 *U. W. Ontario L. Rev.* 63

VERMULST, Edwin and Folkert GRAAFSMA, "WTO Dispute Settlement with Respect to Trade Contingency Measures: Selected Issues", 2001 35(2) *Journal of World Trade* 209

REPORTS, POSITION PAPERS AND NEWS RELEASES

COMMITTEE ON SUBSIDIES AND COUNTERVAILING MEASURES, *Semi-Annual Report under Article 25.11 of the Agreement – Canada*, G/SCM/N/203/CAN, March 17, 2010

COMMITTEE ON SUBSIDIES AND COUNTERVAILING MEASURES, *Replies to Questions Posed by Japan Regarding the New and Full Notification of Canada*, G/SCM/136, (10 June 2010).

COTTIER, Thomas et al, *Energy in WTO law and policy*, NCCR Trade Regulation, Working Paper No 2009/25, May 2009

CUST, James and Karsten NEUHOFF, *The Economics, Politics and Future of Energy Subsidies*, Report from Climate Policy Initiative Workshop, DIW Berlin, 21 March 2010

EUROPEAN COMMUNITIES, *Report of the working party on EC refunds on exports of sugar*, BISD 28S/80, 1982

GARCIA, Claude, *How would the privatization of Hydro-Québec make Québecers richer?*, Montreal Economic Institute Research Papers, February 2009

GENERAL AGREEMENT ON TARIFFS AND TRADE (ORGANIZATION), *The Tokyo Round of Multilateral Trade Negotiations: Report by the Director-General of GATT*, 1979

GATT CONTRACTING PARTIES, *Report of the panel on subsidies*, BISD 10S/201, 1962

GENERAL AGREEMENT ON TARIFFS AND TRADE (ORGANIZATION), *Trade Policies for a Better Future*, 1985

HOWSE, Robert, *World Trade Law and Renewable Energy: The Case of Non-Tariff Barriers*, United Nations Conference on Trade and Development, UNCTAD/DITC/TED/2008/5, 2009

HYDRO-QUÉBEC DISTRIBUTION, *Appel d'offres de 500 MW d'énergie éolienne : Hydro-Québec Distribution reçoit 44 soumissions totalisant 1 051 MW*, News Release, 7 July 2010

INTERNATIONAL ENERGY AGENCY, *Renewables Information 2010*, OECD/IEA, 2010

INTERNATIONAL ENERGY AGENCY, *World Energy Outlook 2009*, OECD/IEA, 2009

INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, *Relative Subsidies to Energy Sources: GSI estimates*, Global Subsidies Initiative, 19 April 2010

LEWIS, Joanna I. and Ryan H. WISER, *Supporting Localization of Wind Technology through Large Utility Tenders in Québec: Lessons for China*, Center for Resource Solutions for the Energy Foundation's China Sustainable Energy Program, 8 June 2006

LEWIS, Joanna I., *A review of the Potential International Trade Implications of Key Wind Power Industry Policies in China*, Report for the Energy Foundation's China Sustainable Energy Program, Center for Resource Solutions, 1 November 2007

ONTARIO POWER AUTHORITY, *Ontario Announces 184 Large-Scale Renewable Energy Projects*, News Release, 8 April 2010

PERSHING, Jonathan and Jim MACKENZIE, *Removing Subsidies: Leveling the Playing Field for Renewable Energy Technologies*, Thematic Background Paper, International Conference for Renewable Energies, Secretariat of the International Conference for Renewable Energies, March 2004

SELL, Malena et al, Emerging Issues in the Interface between Trade, Climate Change and Sustainable Energy, International Centre for Trade and Sustainable Development, ICTSD Discussion Paper, May 2005

TREBILCOCK, Michael J. and James S.F. WILSON, *The Perils of Picking Technological Winners in Renewable Energy Policy: An Energy Probe Study*, Energy Probe, 5 March 2010

UNITED NATIONS ENVIRONMENT PROGRAM, *Reforming Energy Subsidies – An explanatory summary of the issues and challenges in removing or modifying subsidies on energy that undermine the pursuit of sustainable development*, United Nations Environment Program and the International Energy Agency, 2002

WTO COUNCIL FOR TRADE IN GOODS, *Japan questions local-content requirements in Canadian province's energy programme*, News Release, 21 May 2010

WTO SECRETARIAT, *World Trade Report 2006: Exploring the Links Between Subsidies, Trade and the WTO*, Geneva, World Trade Organization, 2006

WTO SECRETARIAT, *The WTO is "a laboratory for harnessing globalization" – Lamy*, News Release, 1 November 2006

WTO SECRETARIAT, *Trade and Climate Change*, WTO-UNEP Report, Ludivine TAMIOTTI et al (eds), World Trade Organization, 2009

ZHANG, ZhongXiang and Lucas ASSUNÇÂO, *Domestic climate policies and the WTO*, FEEM Working Paper No. 91, December 2001

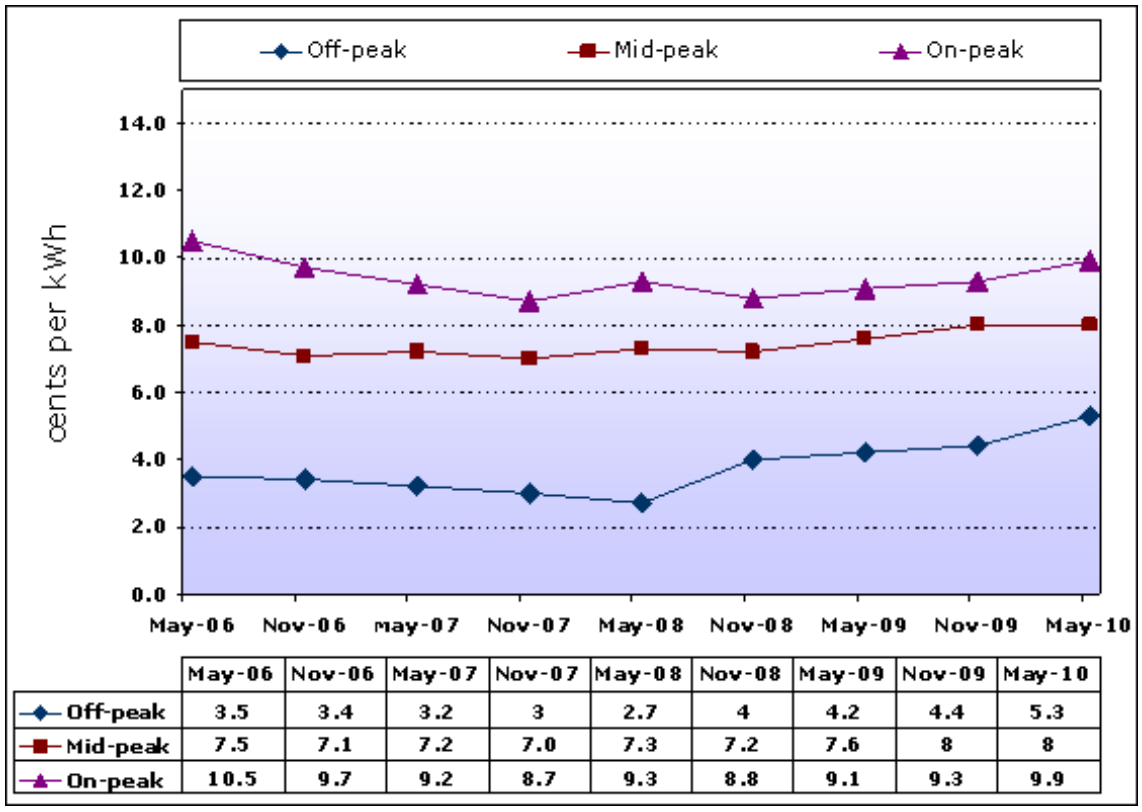
Table 1 – Ontario FIT Prices

(source: OPA, 2010)

Feed-In Tariff Prices for Renewable Energy Projects in Ontario Base Date: July 2, 2010			
Renewable Fuel	**Size tranches**	**Contract Price ¢/kWh**	**Escalation Percentage[5]**
Biomass[1,2]			
	≤ 10 MW	13.8	20%
	> 10 MW	13.0	20%
Biogas[1,2]			
On-Farm	≤ 100 kW	19.5	20%
On-Farm	> 100 kW ≤ 250 kW	18.5	20%
Biogas	≤ 500 kW	16.0	20%
Biogas	>500 kW ≤ 10 MW	14.7	20%
Biogas	> 10 MW	10.4	20%
Waterpower[1,2,3]			
	≤ 10 MW	13.1	20%
	> 10 MW ≤ 50 MW	12.2	20%
Landfill gas[1,2]			
	≤ 10MW	11.1	20%
	> 10 MW	10.3	20%
Solar PV			
Rooftop	≤10 kW	80.2	0%
Rooftop	> 10 ≤ 250 kW	71.3	0%
Rooftop	> 250 ≤ 500 kW	63.5	0%
Rooftop	> 500 kW	53.9	0%
Ground Mounted (proposed)	≤ 10 kW	58.8	0%
Ground Mounted[2,4]	> 10 kW ≤ 10 MW	44.3	0%
Wind[2]			
Onshore	Any size	13.5	20%
Offshore	Any size	19.0	20%

Table 2 – Ontario Consumer Electricity Prices

(source: Ontario Energy Board, 2010)



	May-06	Nov-06	May-07	Nov-07	May-08	Nov-08	May-09	Nov-09	May-10
Off-peak	3.5	3.4	3.2	3	2.7	4	4.2	4.4	5.3
Mid-peak	7.5	7.1	7.2	7.0	7.3	7.2	7.6	8	8
On-peak	10.5	9.7	9.2	8.7	9.3	8.8	9.1	9.3	9.9

Table 3 – Ontario Monthly Average Electricity Prices

Average Weighted Hourly Price (¢/kWh)													
Year	**Average**	**Jan**	**Feb**	**Mar**	**Apr**	**May**	**Jun**	**Jul**	**Aug**	**Sep**	**Oct**	**Nov**	**Dec**
2010	**3.63**	3.83	3.64	2.88	3.17	4.04	4.16						
2009	**3.16**	5.48	4.86	3.06	1.96	2.91	2.48	2.01	2.84	2.21	3.03	2.76	3.60
2008	**5.17**	4.25	5.44	5.82	5.14	3.65	6.23	6.23	5.00	5.23	4.71	5.36	4.83
2007	**5.05**	4.62	6.08	5.69	4.80	4.11	4.80	4.72	5.73	4.76	5.12	4.85	5.18
2006	**4.88**	5.71	4.90	5.01	4.54	4.96	4.82	5.43	5.67	3.68	4.17	5.14	4.17
2005	**7.21**	5.98	5.05	6.10	6.36	5.47	7.12	8.20	9.52	9.97	8.02	6.07	8.39
2004	**5.22**	6.95	5.43	5.02	4.73	5.05	4.94	4.78	4.55	5.13	5.04	5.38	5.28
2003	**5.76**	6.23	8.86	8.48	6.16	4.51	4.53	4.27	5.15	5.05	5.90	4.19	4.68
2002	**5.59**	-	-	-	-	3.00	3.71	6.20	6.94	8.31	5.09	5.12	5.93

(Source: Ontario Independent Electricity System Operator, 2010)

Annex 1 – Selected Definitions of Trade Policy Terms

All definitions taken from Walter GOODE, Dictionary of Trade Policy Terms, World Trade Organization, Cambridge University Press, 4th edition, 2003.

Actionable subsidies: a category of subsidies described in the WTO ***Agreement on Subsidies and Countervailing Measures***. Subsidies may be actionable, and therefore illegal, if they cause **injury** to the domestic industry of another member, negate other commitments made under the GATT, or cause serious prejudice to the interests of another member. If such adverse effects exist, the country maintaining the subsidy must withdraw it or remove its adverse effects.

Benefit: under the WTO ***Agreement on Subsidies and Countervailing Measures*** this is a criterion necessary to establish whether a ***subsidy*** exists. The Agreement describes six types of governmental measures that may be considered benefits or subsidies. These are (a) a financial contribution by a government or public body, (b) a government practice involving a direct transfer of funds, (c) government revenue foregone or not collected, (d) provision by a government of goods and services other than infrastructure, (3) payments made by a government through a funding mechanism payments made through a private body on behalf of a government, and (f) any form of income or price support in the sense of GATT Article XVI (subsidies) which confers a benefit.

Consultation: the first stage in the WTO dispute settlement procedure, aimed at resolving issues cooperatively, sometimes through the good offices or mediation of a disinterested party. The fact-finding nature of consultation between parties often leads to a solution. If the consultations fail to settle a dispute within sixty days after a request has been made, the complaining party may request the establishment of a dispute settlement panel. The parties may go to a panel earlier if they conclude that the consultations will not settle the dispute. WTO members receiving a request for such consultations must therefore treat them seriously. They cannot use them to gain extended breathing space.

Countermeasures: the means available to WTO members for dealing with exceptional circumstances and alleged breaches of the rules fall into two main categories. The first is made up of ***trade remedies***, also known as trade defence mechanisms and contingent protection. They include s***afeguards, anti-dumping measures*** and ***countervailing duties***. This group of measures can be initiated by any WTO member as long as it follows the relevant rules. The second group of countermeasures, i.e. the ***suspension of concessions and obligations***, can only

be taken with the authorization of the ***Dispute Settlement Body***. In other words, to obtain redress for an alleged breach of the rules by another member one has to launch a case.

Countervailing duties: action taken by the importing country, usually in the form of increased duties, to offset subsidies given to producers or exporters in the exporting country. GATT Article VI and the WTO ***Agreement on Subsidies and Countervailing Measures*** set out the rules for imposing such duties. Countervailing duties can be applied under certain restrictive conditions and subject to material injury being caused to a domestic industry.

Duty: a levy, tax or impost charged by governments within their entire jurisdiction on production, transactions and, less frequently, the ownership of an asset. The amount of duty levied is usually related to the value of the transaction, ***Customs duties***, consisting of import and export tariffs, are such charges. They are levied at the border. A WTO requirement is that duties must not used to discriminate against imported products once they have passed legally through the border. Whatever clear distinction there may have been once between a duty and a tax has now become blurred in day-to-day use. To the economist, their impact is the same, but for the lawyer and the tax administrator the distinction may be important.

Domestic support: another term for ***assistance*** or ***subsidy***.

Export subsidies: government payments or other financial contributions by governments provided to domestic producers or exporters if they export their goods or services. They are illegal for manufactured products under the ***Agreement on Subsidies*** and ***Countervailing Measures***. See also ***export incentives***.

Export incentives: measures adopted by governments to promote the expansion of exports by domestic companies. Such measures can include direct subsidies, bounties, reduces import tariffs for components where they are incorporated into exported products, taxation concession, etc. The ***Agreement on Subsidies and Countervailing Duties*** makes some types of export incentives illegal, including subsidies related to the export of products.

Injury (and material injury): an adverse effect on domestic industry assumed to be caused by the actions of exporters from other countries, for example, through dumping, subsidies or import surges. In the case of dumping, action can be taken if there is material injury. In s***afeguards***, serious injury must be threatening or have occurred. Both terms allow for a subjective assessment, but serious injury is deemed to be more grave than **material injury**. The WTO has a highly developed framework for the assessment of injury and any remedial

action in the case of injury or threat of injury.

GATT: General Agreement on Tariffs, and Trade, which has been superseded as an international organisation by the WTO. An updated General Agreement is now one of the WTO's agreements. The GATT entered into force on 1 January 1948 as a provisional agreement and remained so until it was superseded by the WTO framework on 1 January 1995. It establishes multilateral obligations for trade in goods. Including ***most-favoured-nation treatment and national treatment, transparency, freedom of transit, anti-dumping and countervailing duties, customs valuation***, import and export fees and formalities, marks of origin, quantitative restrictions, balance-of-payments provisions, subsidies, state trading enterprises, emergency action on imports (safeguards), ***customs unions and free-trade areas***, etc.

Local Content Requirements: sometimes also called mixing requirements. Governmental measures setting out certain minimum levels of locally made components to be incorporated in goods or services produced domestically. Minimum levels of local content may be set in the form of weight, volume, value, etc. The aims of such programmes include, among others, encouraging the development of local industry, finding an assured market for an uncompetitive industry and the promotion of regional development. All local content schemes entail a degree of ***protection*** for the supplies of the component in question and therefore a higher cost for consumers. This is self-evident, since competitive industries have no need to search for captive markets. However, governments may decide that these costs are outweighed by the prospective benefits of the programme. GATT Article III:5 (National Treatment on Internal Taxation and Regulation) prohibits internal quantitative regulations relating to the mixture, processing or use of products in specified amounts or the mandatory use of domestic products.

Marrakesh Agreement Establishing the World Trade Organization: this Agreement, sometimes known as the WTO Agreement, was adopted on 15 April 1994 at the Marrakesh Ministerial Meeting. It established the ***World Trade Organization***. It also sets out, in four annexes, the multilateral and plurilateral agreements under its jurisdiction. The Agreement entered into force on 1 January 1995. Annex 1 contains the following multilateral agreements: ***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*** *[Customs Valuation]* ***1994, Agreement on Preshipment Inspection, Agreement on Rules of Origin, Agreement on Import Licensing***

Procedures, Agreement on Subsidies and Countervailing Measures and the ***Agreement on Safeguards.*** Annex 2 consists of the ***General Agreement on Trade in Services***. Annex 3 is the ***Agreement on Trade-Related Aspects of Intellectual Property Rights***. Annex 4 consists of the ***Understanding on Dispute Settlement, Trade Policy Review Mechanism*** and the ***WTO plurilateral trade agreements.*** Appendix 1 to this Dictionary contains an outline of the provisions of the Marrakesh Agreement.

Most-favoured-nation treatment: MFN. This is the rule, usually established through a trade agreement, that a country gives each of the trading partners with which it has concluded relevant agreements the best treatment it gives to any of them in a given product. MFN is not in itself an obligation to extend any favourable treatment to another party, nor is it an obligation to negotiate for better treatment. The fundamental point of MFN therefore is equality of treatment of other countries, and in some older treatises it is indeed called "foreign parity".

National Treatment: the principle of giving others the same treatments as one's own nationals. GATT Article III requires that imports be treated no less favourably than the same or similar domestically produced goods once they have passed customs. GATTS Article XVII and TRIPS Article 3 also deal with national treatment for services and intellectual property protection. In the older literature, this principle is sometimes called "inland parity". It is a simple proposition, but it has been the cause of many disputes, partly because a strict interpretation of national treatment may in fact disadvantage foreign suppliers.

Notification: an obligation to report to the relevant body of the WTO the adoption of trade measures that might have an effect on the members of the agreement it administers. Notifying promotes ***transparency*** and assists ***surveillance***. Notifying has no bearing on whether the measure itself will be judged to be in conformity with the rules.

Non-Actionable Subsidies: a class of subsidies identified in the WTO ***Agreement on Subsidies and Countervailing Measures***. It includes assistance to research and development, assistance to disadvantaged regions and assistance to promote the adaptation of existing facilities to new, more burdensome, environmental requirements.

Prohibited Subsidies: a concept used in the WTO ***Agreement on Subsidies and Countervailing Measures*** to denote subsidies contingent on export performance or subsidies contingent on the use of domestic rather than imported goods. WTO members are not allowed to maintain this type of subsidies.

Subsidies: Financial or in-kind assistance by governments to producers or exporters of commodities, manufacturers and services. There are two general types of subsidies: export and domestic. An export subsidy is a benefit contingent on exports conferred on a firm by the government. A domestic subsidy is a benefit not directly linked to exports. Subsidies are paid for many reasons, including the need to prop up an inefficient production structure, the wish to raise the income of one sector, the wish to promote regional development, the aim to develop export markets, etc. broadly, the WTO ***Agreement on Subsidies and Countervailing Measures*** defines subsidies as financial contributions by a government or public body, direct transfer of funds or potential transfer of funds (e.g. grants, loans, equity infusions), government revenue foregone or not collected, government provision of goods and services other than general infrastructure, payments to a funding mechanism or a private body to perform these functions, income or price support. Agricultural subsidies are covered by the ***Agreement on Agriculture***.

Specificity: a concept embodied in Article 2 of the WTO ***Agreement on Subsidies and Countervailing Measures***. It is a test to determine whether a ***subsidy*** is available only to an enterprise or industry, or group of enterprises or industries. A subsidy is considered specific when the granting authority, or the legislation on which it operates, explicitly limits access to it to certain enterprises. A subsidy may also be considered specific when there is use of a subsidy programme by a limited number of enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. Depending on the type of subsidies and the impact they have, they may be ***prohibited subsidies, actionable subsidies*** or ***non-actionable subsidies***. Subsidies dependent on export performance are also considered specific. They are always prohibited.

TRIMS: Trade-Related Investment Measures. These include export targets, import limitations, local-purchase requirements or ***local-content requirements***, research and development requirements and similar conditions imposed on an enterprise as part of receiving permission to invest in another country.

WTO: World Trade Organization, established on 1 January 1995 as the successor to the ***GATT*** *(General Agreement on Tariffs and Trade)* and its secretariat. The GATT now is one of the agreements administered by the WTO.

Annex 2 – Japan Questions to Canada on FIT Program

SUBSIDIES

WORLD TRADE ORGANIZATION

G/SCM/Q2/CAN/44
10 June 2010
(10-3176)

Committee on Subsidies and Countervailing Measures

Original: English

Replies to Questions Posed by JAPAN[256] Regarding the New and Full Notification of CANADA

The following communication, dated 8 June 2010, is being circulated at the request of the Delegation of Canada.

(i) Is it a correct understanding that the OPA ensures the payment of the "contract price" if the suppliers of renewable energy run the Contract Facilities which are developed and constructed such that the Domestic Content Level is equal to or greater than the Minimum Required Domestic Content Level"?

Reply

Under the Feed in Tariff program the OPA will enter into contracts with renewable energy suppliers. The FIT program provides a price schedule for renewable generating facilities by technology (onshore wind, offshore wind etc.). The FIT program includes a domestic content requirement for wind power projects with a capacity greater than 10kW and solar projects.

(ii) Is it a correct understanding that the "contract price" is set to support the income of the suppliers or the price of renewable energy, which is traded at the market price without the FIT Programme?

Reply

The FIT tariff is calculated so as to provide a price that will allow the generator to recover all of its capital and operating costs and earn a commercial return on equity.

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[256] COMMITTEE ON SUBSIDIES AND COUNTERVAILING MEASURES, *Replies to Questions Posed by Japan Regarding the New and Full Notification of Canada*, G/SCM/136, (10 June 2010).

(iii) Is the "contract price" higher than the market price?

Reply

As indicated above, the FIT tariff is calculated so as to provide a price that will allow the generator to recover all of its capital and operating costs and earn a commercial return on equity.

(iv) Is the OPA, established by the Electricity Restructuring Act, 2004, a public body owned by the Government of Ontario?

Reply

The Ontario Power Authority is a corporation without share capital (*Electricity Act* (25.1 (1)). It has the capacity, rights, powers and privileges of a natural person (*Electricity Act* (25.2(4)). It has the right to enter into contracts relating to the procurement of electricity supply and capacity using alternative energy sources or renewable energy sources to assist the Government of Ontario in achieving goals in the development and use of alternative or renewable energy technology and resources (25.2 (5) (c)).

(v) Is it a correct understanding that the "contract price" is not applicable to suppliers who run the Contract Facilities which do not meet the Minimum Required Domestic Content Level?

Reply

The contract price under FIT is applicable to projects meeting the program's eligibility requirements. For wind power projects with a capacity greater than 10kW and solar projects, eligibility requirements include meeting a domestic content level.

(vi) Are there any supplier who has met the Minimum Required Domestic Content Level since last October when the FIT programme was initiated? If any, what percentage of FIT contractors has met it?

Reply

In April 2010, 184 contracts were approved under the FIT program (contracts were approved earlier for smaller projects under the microfit and capacity exempt categories). In agreeing to these contract conditions these suppliers have accepted the domestic content requirements. Projects have not yet been built given approvals and construction requirements.

Annex 3 – SCM Agreement

(see attached)

AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

Members hereby *agree* as follows:

PART I: GENERAL PROVISIONS

Article 1

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:

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

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

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

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

or

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

and

(b) a benefit is thereby conferred.

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.

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[1] In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

Article 2

Specificity

2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:

(a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.

(b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions[2] governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

(c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.[3] In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

2.2 A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement.

2.3 Any subsidy falling under the provisions of Article 3 shall be deemed to be specific.

2.4 Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.

PART II: PROHIBITED SUBSIDIES

Article 3

Prohibition

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[2] Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.

[3] In this regard, in particular, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered.

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

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

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

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

Article 4

Remedies

4.1 Whenever a Member has reason to believe that a prohibited subsidy is being granted or maintained by another Member, such Member may request consultations with such other Member.

4.2 A request for consultations under paragraph 1 shall include a statement of available evidence with regard to the existence and nature of the subsidy in question.

4.3 Upon request for consultations under paragraph 1, the Member believed to be granting or maintaining the subsidy in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually agreed solution.

4.4 If no mutually agreed solution has been reached within 30 days[6] of the request for consultations, any Member party to such consultations may refer the matter to the Dispute Settlement Body ("DSB") for the immediate establishment of a panel, unless the DSB decides by consensus not to establish a panel.

4.5 Upon its establishment, the panel may request the assistance of the Permanent Group of Experts[7] (referred to in this Agreement as the "PGE") with regard to whether the measure in question is a prohibited subsidy. If so requested, the PGE shall immediately review the evidence with regard to the existence and nature of the measure in question and shall provide an opportunity for the Member applying or maintaining the measure to demonstrate that the measure in question is not a prohibited subsidy. The PGE shall report its conclusions to the panel within a time-limit determined by the panel. The PGE's conclusions on the issue of whether or not the measure in question is a prohibited subsidy shall be accepted by the panel without modification.

4.6 The panel shall submit its final report to the parties to the dispute. The report shall be circulated to all Members within 90 days of the date of the composition and the establishment of the panel's terms of reference.

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[4] This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.

[5] Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement.

[6] Any time-periods mentioned in this Article may be extended by mutual agreement.

[7] As established in Article 24.

4.7 If the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay. In this regard, the panel shall specify in its recommendation the time-period within which the measure must be withdrawn.

4.8 Within 30 days of the issuance of the panel's report to all Members, the report shall be adopted by the DSB unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

4.9 Where a panel report is appealed, the Appellate Body shall issue its decision within 30 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 30 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 60 days. The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members.[8]

4.10 In the event the recommendation of the DSB is not followed within the time-period specified by the panel, which shall commence from the date of adoption of the panel's report or the Appellate Body's report, the DSB shall grant authorization to the complaining Member to take appropriate[9] countermeasures, unless the DSB decides by consensus to reject the request.

4.11 In the event a party to the dispute requests arbitration under paragraph 6 of Article 22 of the Dispute Settlement Understanding ("DSU"), the arbitrator shall determine whether the countermeasures are appropriate.[10]

4.12 For purposes of disputes conducted pursuant to this Article, except for time-periods specifically prescribed in this Article, time-periods applicable under the DSU for the conduct of such disputes shall be half the time prescribed therein.

PART III: ACTIONABLE SUBSIDIES

Article 5

Adverse Effects

No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members, i.e.:

(a) injury to the domestic industry of another Member[11];

(b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994[12];

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[8] If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.

[9] This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.

[10] This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.

[11] The term "injury to the domestic industry" is used here in the same sense as it is used in Part V.

(c) serious prejudice to the interests of another Member.[13]

This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture.

Article 6

Serious Prejudice

6.1 Serious prejudice in the sense of paragraph (c) of Article 5 shall be deemed to exist in the case of:

(a) the total ad valorem subsidization[14] of a product exceeding 5 per cent[15];

(b) subsidies to cover operating losses sustained by an industry;

(c) subsidies to cover operating losses sustained by an enterprise, other than one-time measures which are non-recurrent and cannot be repeated for that enterprise and which are given merely to provide time for the development of long-term solutions and to avoid acute social problems;

(d) direct forgiveness of debt, i.e. forgiveness of government-held debt, and grants to cover debt repayment.[16]

6.2 Notwithstanding the provisions of paragraph 1, serious prejudice shall not be found if the subsidizing Member demonstrates that the subsidy in question has not resulted in any of the effects enumerated in paragraph 3.

6.3 Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:

(a) the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member;

(b) the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market;

(c) the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market;

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[12] The term "nullification or impairment" is used in this Agreement in the same sense as it is used in the relevant provisions of GATT 1994, and the existence of such nullification or impairment shall be established in accordance with the practice of application of these provisions.

[13] The term "serious prejudice to the interests of another Member" is used in this Agreement in the same sense as it is used in paragraph 1 of Article XVI of GATT 1994, and includes threat of serious prejudice.

[14] The total ad valorem subsidization shall be calculated in accordance with the provisions of Annex IV.

[15] Since it is anticipated that civil aircraft will be subject to specific multilateral rules, the threshold in this subparagraph does not apply to civil aircraft.

[16] Members recognize that where royalty-based financing for a civil aircraft programme is not being fully repaid due to the level of actual sales falling below the level of forecast sales, this does not in itself constitute serious prejudice for the purposes of this subparagraph.

(d) the effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity[17] as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted.

6.4 For the purpose of paragraph 3(b), the displacement or impeding of exports shall include any case in which, subject to the provisions of paragraph 7, it has been demonstrated that there has been a change in relative shares of the market to the disadvantage of the non-subsidized like product (over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product concerned, which, in normal circumstances, shall be at least one year). "Change in relative shares of the market" shall include any of the following situations: *(a)* there is an increase in the market share of the subsidized product; *(b)* the market share of the subsidized product remains constant in circumstances in which, in the absence of the subsidy, it would have declined; *(c)* the market share of the subsidized product declines, but at a slower rate than would have been the case in the absence of the subsidy.

6.5 For the purpose of paragraph 3(c), price undercutting shall include any case in which such price undercutting has been demonstrated through a comparison of prices of the subsidized product with prices of a non-subsidized like product supplied to the same market. The comparison shall be made at the same level of trade and at comparable times, due account being taken of any other factor affecting price comparability. However, if such a direct comparison is not possible, the existence of price undercutting may be demonstrated on the basis of export unit values.

6.6 Each Member in the market of which serious prejudice is alleged to have arisen shall, subject to the provisions of paragraph 3 of Annex V, make available to the parties to a dispute arising under Article 7, and to the panel established pursuant to paragraph 4 of Article 7, all relevant information that can be obtained as to the changes in market shares of the parties to the dispute as well as concerning prices of the products involved.

6.7 Displacement or impediment resulting in serious prejudice shall not arise under paragraph 3 where any of the following circumstances exist[18] during the relevant period:

(a) prohibition or restriction on exports of the like product from the complaining Member or on imports from the complaining Member into the third country market concerned;

(b) decision by an importing government operating a monopoly of trade or state trading in the product concerned to shift, for non-commercial reasons, imports from the complaining Member to another country or countries;

(c) natural disasters, strikes, transport disruptions or other *force majeure* substantially affecting production, qualities, quantities or prices of the product available for export from the complaining Member;

(d) existence of arrangements limiting exports from the complaining Member;

(e) voluntary decrease in the availability for export of the product concerned from the complaining Member (including, *inter alia*, a situation where firms in the

[17] Unless other multilaterally agreed specific rules apply to the trade in the product or commodity in question.

[18] The fact that certain circumstances are referred to in this paragraph does not, in itself, confer upon them any legal status in terms of either GATT 1994 or this Agreement. These circumstances must not be isolated, sporadic or otherwise insignificant.

complaining Member have been autonomously reallocating exports of this product to new markets);

(f) failure to conform to standards and other regulatory requirements in the importing country.

6.8 In the absence of circumstances referred to in paragraph 7, the existence of serious prejudice should be determined on the basis of the information submitted to or obtained by the panel, including information submitted in accordance with the provisions of Annex V.

6.9 This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture.

Article 7

Remedies

7.1 Except as provided in Article 13 of the Agreement on Agriculture, whenever a Member has reason to believe that any subsidy referred to in Article 1, granted or maintained by another Member, results in injury to its domestic industry, nullification or impairment or serious prejudice, such Member may request consultations with such other Member.

7.2 A request for consultations under paragraph 1 shall include a statement of available evidence with regard to *(a)* the existence and nature of the subsidy in question, and *(b)* the injury caused to the domestic industry, or the nullification or impairment, or serious prejudice[19] caused to the interests of the Member requesting consultations.

7.3 Upon request for consultations under paragraph 1, the Member believed to be granting or maintaining the subsidy practice in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually agreed solution.

7.4 If consultations do not result in a mutually agreed solution within 60 days[20], any Member party to such consultations may refer the matter to the DSB for the establishment of a panel, unless the DSB decides by consensus not to establish a panel. The composition of the panel and its terms of reference shall be established within 15 days from the date when it is established.

7.5 The panel shall review the matter and shall submit its final report to the parties to the dispute. The report shall be circulated to all Members within 120 days of the date of the composition and establishment of the panel's terms of reference.

7.6 Within 30 days of the issuance of the panel's report to all Members, the report shall be adopted by the DSB[21] unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

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[19] In the event that the request relates to a subsidy deemed to result in serious prejudice in terms of paragraph 1 of Article 6, the available evidence of serious prejudice may be limited to the available evidence as to whether the conditions of paragraph 1 of Article 6 have been met or not.

[20] Any time-periods mentioned in this Article may be extended by mutual agreement.

[21] If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.

7.7 Where a panel report is appealed, the Appellate Body shall issue its decision within 60 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days. The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members.[22]

7.8 Where a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy.

7.9 In the event the Member has not taken appropriate steps to remove the adverse effects of the subsidy or withdraw the subsidy within six months from the date when the DSB adopts the panel report or the Appellate Body report, and in the absence of agreement on compensation, the DSB shall grant authorization to the complaining Member to take countermeasures, commensurate with the degree and nature of the adverse effects determined to exist, unless the DSB decides by consensus to reject the request.

7.10 In the event that a party to the dispute requests arbitration under paragraph 6 of Article 22 of the DSU, the arbitrator shall determine whether the countermeasures are commensurate with the degree and nature of the adverse effects determined to exist.

PART IV: NON-ACTIONABLE SUBSIDIES

Article 8

Identification of Non-Actionable Subsidies

8.1 The following subsidies shall be considered as non-actionable[23]:

(a) subsidies which are not specific within the meaning of Article 2;

(b) subsidies which are specific within the meaning of Article 2 but which meet all of the conditions provided for in paragraphs 2(a), 2(b) or 2(c) below.

8.2 Notwithstanding the provisions of Parts III and V, the following subsidies shall be non-actionable:

(a) assistance for research activities conducted by firms or by higher education or research establishments on a contract basis with firms if:[24] ,[25] ,[26]

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[22] If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.

[23] It is recognized that government assistance for various purposes is widely provided by Members and that the mere fact that such assistance may not qualify for non-actionable treatment under the provisions of this Article does not in itself restrict the ability of Members to provide such assistance.

[24] Since it is anticipated that civil aircraft will be subject to specific multilateral rules, the provisions of this subparagraph do not apply to that product.

[25] Not later than 18 months after the date of entry into force of the WTO Agreement, the Committee on Subsidies and Countervailing Measures provided for in Article 24 (referred to in this Agreement as "the Committee") shall review the operation of the provisions of subparagraph 2(a) with a view to making all necessary modifications to improve the operation of these provisions. In its consideration of possible

the assistance covers[27] not more than 75 per cent of the costs of industrial research[28] or 50 per cent of the costs of pre-competitive development activity[29], [30]; and provided that such assistance is limited exclusively to:

(i) costs of personnel (researchers, technicians and other supporting staff employed exclusively in the research activity);

(ii) costs of instruments, equipment, land and buildings used exclusively and permanently (except when disposed of on a commercial basis) for the research activity;

(iii) costs of consultancy and equivalent services used exclusively for the research activity, including bought-in research, technical knowledge, patents, etc.;

(iv) additional overhead costs incurred directly as a result of the research activity;

(v) other running costs (such as those of materials, supplies and the like), incurred directly as a result of the research activity.

(b) assistance to disadvantaged regions within the territory of a Member given pursuant to a general framework of regional development [31] and non-specific (within the meaning of Article 2) within eligible regions provided that:

(i) each disadvantaged region must be a clearly designated contiguous geographical area with a definable economic and administrative identity;

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modifications, the Committee shall carefully review the definitions of the categories set forth in this subparagraph in the light of the experience of Members in the operation of research programmes and the work in other relevant international institutions.

[26] The provisions of this Agreement do not apply to fundamental research activities independently conducted by higher education or research establishments. The term "fundamental research" means an enlargement of general scientific and technical knowledge not linked to industrial or commercial objectives.

[27] The allowable levels of non-actionable assistance referred to in this subparagraph shall be established by reference to the total eligible costs incurred over the duration of an individual project.

[28] The term "industrial research" means planned search or critical investigation aimed at discovery of new knowledge, with the objective that such knowledge may be useful in developing new products, processes or services, or in bringing about a significant improvement to existing products, processes or services.

[29] The term "pre-competitive development activity" means the translation of industrial research findings into a plan, blueprint or design for new, modified or improved products, processes or services whether intended for sale or use, including the creation of a first prototype which would not be capable of commercial use. It may further include the conceptual formulation and design of products, processes or services alternatives and initial demonstration or pilot projects, provided that these same projects cannot be converted or used for industrial application or commercial exploitation. It does not include routine or periodic alterations to existing products, production lines, manufacturing processes, services, and other on-going operations even though those alterations may represent improvements.

[30] In the case of programmes which span industrial research and pre-competitive development activity, the allowable level of non-actionable assistance shall not exceed the simple average of the allowable levels of non-actionable assistance applicable to the above two categories, calculated on the basis of all eligible costs as set forth in items (i) to (v) of this subparagraph.

[31] A "general framework of regional development" means that regional subsidy programmes are part of an internally consistent and generally applicable regional development policy and that regional development subsidies are not granted in isolated geographical points having no, or virtually no, influence on the development of a region.

(ii) the region is considered as disadvantaged on the basis of neutral and objective criteria[32], indicating that the region's difficulties arise out of more than temporary circumstances; such criteria must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification;

(iii) the criteria shall include a measurement of economic development which shall be based on at least one of the following factors:

- one of either income per capita or household income per capita, or GDP per capita, which must not be above 85 per cent of the average for the territory concerned;

- unemployment rate, which must be at least 110 per cent of the average for the territory concerned;

as measured over a three-year period; such measurement, however, may be a composite one and may include other factors.

(c) assistance to promote adaptation of existing facilities[33] to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms, provided that the assistance:

(i) is a one-time non-recurring measure; and

(ii) is limited to 20 per cent of the cost of adaptation; and

(iii) does not cover the cost of replacing and operating the assisted investment, which must be fully borne by firms; and

(iv) is directly linked to and proportionate to a firm's planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; and

(v) is available to all firms which can adopt the new equipment and/or production processes.

8.3 A subsidy programme for which the provisions of paragraph 2 are invoked shall be notified in advance of its implementation to the Committee in accordance with the provisions of Part VII. Any such notification shall be sufficiently precise to enable other Members to evaluate the consistency of the programme with the conditions and criteria provided for in the relevant provisions of paragraph 2. Members shall also provide the Committee with yearly updates of such notifications, in particular by supplying information on global expenditure for each programme, and on any modification of the

[32] "Neutral and objective criteria" means criteria which do not favour certain regions beyond what is appropriate for the elimination or reduction of regional disparities within the framework of the regional development policy. In this regard, regional subsidy programmes shall include ceilings on the amount of assistance which can be granted to each subsidized project. Such ceilings must be differentiated according to the different levels of development of assisted regions and must be expressed in terms of investment costs or cost of job creation. Within such ceilings, the distribution of assistance shall be sufficiently broad and even to avoid the predominant use of a subsidy by, or the granting of disproportionately large amounts of subsidy to, certain enterprises as provided for in Article 2.

[33] The term "existing facilities" means facilities which have been in operation for at least two years at the time when new environmental requirements are imposed.

programme. Other Members shall have the right to request information about individual cases of subsidization under a notified programme.[34]

8.4 Upon request of a Member, the Secretariat shall review a notification made pursuant to paragraph 3 and, where necessary, may require additional information from the subsidizing Member concerning the notified programme under review. The Secretariat shall report its findings to the Committee. The Committee shall, upon request, promptly review the findings of the Secretariat (or, if a review by the Secretariat has not been requested, the notification itself), with a view to determining whether the conditions and criteria laid down in paragraph 2 have not been met. The procedure provided for in this paragraph shall be completed at the latest at the first regular meeting of the Committee following the notification of a subsidy programme, provided that at least two months have elapsed between such notification and the regular meeting of the Committee. The review procedure described in this paragraph shall also apply, upon request, to substantial modifications of a programme notified in the yearly updates referred to in paragraph 3.

8.5 Upon the request of a Member, the determination by the Committee referred to in paragraph 4, or a failure by the Committee to make such a determination, as well as the violation, in individual cases, of the conditions set out in a notified programme, shall be submitted to binding arbitration. The arbitration body shall present its conclusions to the Members within 120 days from the date when the matter was referred to the arbitration body. Except as otherwise provided in this paragraph, the DSU shall apply to arbitrations conducted under this paragraph.

Article 9

Consultations and Authorized Remedies

9.1 If, in the course of implementation of a programme referred to in paragraph 2 of Article 8, notwithstanding the fact that the programme is consistent with the criteria laid down in that paragraph, a Member has reasons to believe that this programme has resulted in serious adverse effects to the domestic industry of that Member, such as to cause damage which would be difficult to repair, such Member may request consultations with the Member granting or maintaining the subsidy.

9.2 Upon request for consultations under paragraph 1, the Member granting or maintaining the subsidy programme in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually acceptable solution.

9.3 If no mutually acceptable solution has been reached in consultations under paragraph 2 within 60 days of the request for such consultations, the requesting Member may refer the matter to the Committee.

9.4 Where a matter is referred to the Committee, the Committee shall immediately review the facts involved and the evidence of the effects referred to in paragraph 1. If the Committee determines that such effects exist, it may recommend to the subsidizing Member to modify this programme in such a way as to remove these effects. The Committee shall present its conclusions within 120 days from the date when the matter is referred to it under paragraph 3. In the event the recommendation is not followed within six months, the Committee shall authorize the requesting Member to take appropriate countermeasures commensurate with the nature and degree of the effects determined to exist.

[34] It is recognized that nothing in this notification provision requires the provision of confidential information, including confidential business information.

PART V: COUNTERVAILING MEASURES

Article 10

Application of Article VI of GATT 1994[35]

Members shall take all necessary steps to ensure that the imposition of a countervailing duty[36] on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated[37] and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.

Article 11

Initiation and Subsequent Investigation

11.1 Except as provided in paragraph 6, an investigation to determine the existence, degree and effect of any alleged subsidy shall be initiated upon a written application by or on behalf of the domestic industry.

11.2 An application under paragraph 1 shall include sufficient evidence of the existence of *(a)* a subsidy and, if possible, its amount, *(b)* injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement, and *(c)* a causal link between the subsidized imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

(i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;

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[35] The provisions of Part II or III may be invoked in parallel with the provisions of Part V; however, with regard to the effects of a particular subsidy in the domestic market of the importing Member, only one form of relief (either a countervailing duty, if the requirements of Part V are met, or a countermeasure under Articles 4 or 7) shall be available. The provisions of Parts III and V shall not be invoked regarding measures considered non-actionable in accordance with the provisions of Part IV. However, measures referred to in paragraph 1(a) of Article 8 may be investigated in order to determine whether or not they are specific within the meaning of Article 2. In addition, in the case of a subsidy referred to in paragraph 2 of Article 8 conferred pursuant to a programme which has not been notified in accordance with paragraph 3 of Article 8, the provisions of Part III or V may be invoked, but such subsidy shall be treated as non-actionable if it is found to conform to the standards set forth in paragraph 2 of Article 8.

[36] The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994.

[37] The term "initiated" as used hereinafter means procedural action by which a Member formally commences an investigation as provided in Article 11.

(ii) a complete description of the allegedly subsidized product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;

(iii) evidence with regard to the existence, amount and nature of the subsidy in question;

(iv) evidence that alleged injury to a domestic industry is caused by subsidized imports through the effects of the subsidies; this evidence includes information on the evolution of the volume of the allegedly subsidized imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 15.

11.3 The authorities shall review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation.

11.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed[38] by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.[39] The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

11.5 The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation.

11.6 If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of the existence of a subsidy, injury and causal link, as described in paragraph 2, to justify the initiation of an investigation.

11.7 The evidence of both subsidy and injury shall be considered simultaneously *(a)* in the decision whether or not to initiate an investigation and *(b)* thereafter, during the course of the investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied.

11.8 In cases where products are not imported directly from the country of origin but are exported to the importing Member from an intermediate country, the provisions of this Agreement shall be fully applicable and the transaction or transactions shall, for the purposes of this Agreement, be regarded as having taken place between the country of origin and the importing Member.

11.9 An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of

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[38] In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.

[39] Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1.

either subsidization or of injury to justify proceeding with the case. There shall be immediate termination in cases where the amount of a subsidy is *de minimis* , or where the volume of subsidized imports, actual or potential, or the injury, is negligible. For the purpose of this paragraph, the amount of the subsidy shall be considered to be *de minimis* if the subsidy is less than 1 per cent ad valorem.

11.10 An investigation shall not hinder the procedures of customs clearance.

11.11 Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.

Article 12

Evidence

12.1 Interested Members and all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

12.1.1 Exporters, foreign producers or interested Members receiving questionnaires used in a countervailing duty investigation shall be given at least 30 days for reply.[40] Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

12.1.2 Subject to the requirement to protect confidential information, evidence presented in writing by one interested Member or interested party shall be made available promptly to other interested Members or interested parties participating in the investigation.

12.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 11 to the known exporters[41] and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the protection of confidential information, as provided for in paragraph 4.

12.2. Interested Members and interested parties also shall have the right, upon justification, to present information orally. Where such information is provided orally, the interested Members and interested parties subsequently shall be required to reduce such submissions to writing. Any decision of the investigating authorities can only be based on such information and arguments as were on the written record of this authority and which were available to interested Members and interested parties participating in the investigation, due account having been given to the need to protect confidential information.

12.3 The authorities shall whenever practicable provide timely opportunities for all interested Members and interested parties to see all information that is relevant to the presentation of their cases,

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[40] As a general rule, the time-limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representatives of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory.

[41] It being understood that where the number of exporters involved is particularly high, the full text of the application should instead be provided only to the authorities of the exporting Member or to the relevant trade association who then should forward copies to the exporters concerned.

that is not confidential as defined in paragraph 4, and that is used by the authorities in a countervailing duty investigation, and to prepare presentations on the basis of this information.

12.4 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom the supplier acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.[42]

12.4.1 The authorities shall require interested Members or interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such Members or parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

12.4.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.[43]

12.5 Except in circumstances provided for in paragraph 7, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested Members or interested parties upon which their findings are based.

12.6 The investigating authorities may carry out investigations in the territory of other Members as required, provided that they have notified in good time the Member in question and unless that Member objects to the investigation. Further, the investigating authorities may carry out investigations on the premises of a firm and may examine the records of a firm if *(a)* the firm so agrees and *(b)* the Member in question is notified and does not object. The procedures set forth in Annex VI shall apply to investigations on the premises of a firm. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 8, to the firms to which they pertain and may make such results available to the applicants.

12.7 In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

12.8 The authorities shall, before a final determination is made, inform all interested Members and interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

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[42] Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.

[43] Members agree that requests for confidentiality should not be arbitrarily rejected. Members further agree that the investigating authority may request the waiving of confidentiality only regarding information relevant to the proceedings.

12.9 For the purposes of this Agreement, "interested parties" shall include:

(i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product; and

(ii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

12.10 The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding subsidization, injury and causality.

12.11 The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable.

12.12 The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

Article 13

Consultations

13.1 As soon as possible after an application under Article 11 is accepted, and in any event before the initiation of any investigation, Members the products of which may be subject to such investigation shall be invited for consultations with the aim of clarifying the situation as to the matters referred to in paragraph 2 of Article 11 and arriving at a mutually agreed solution.

13.2 Furthermore, throughout the period of investigation, Members the products of which are the subject of the investigation shall be afforded a reasonable opportunity to continue consultations, with a view to clarifying the factual situation and to arriving at a mutually agreed solution.[44]

13.3 Without prejudice to the obligation to afford reasonable opportunity for consultation, these provisions regarding consultations are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating the investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with the provisions of this Agreement.

13.4 The Member which intends to initiate any investigation or is conducting such an investigation shall permit, upon request, the Member or Members the products of which are subject to such

[44] It is particularly important, in accordance with the provisions of this paragraph, that no affirmative determination whether preliminary or final be made without reasonable opportunity for consultations having been given. Such consultations may establish the basis for proceeding under the provisions of Part II, III or X.

investigation access to non-confidential evidence, including the non-confidential summary of confidential data being used for initiating or conducting the investigation.

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:

(a) government provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member;

(b) a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts;

(c) a loan guarantee by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees;

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

Article 15

Determination of Injury[45]

15.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the subsidized imports and

[45] Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

the effect of the subsidized imports on prices in the domestic market for like products[46] and *(b)* the consequent impact of these imports on the domestic producers of such products.

15.2 With regard to the volume of the subsidized imports, the investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the subsidized imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

15.3 Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the amount of subsidization established in relation to the imports from each country is more than *de minimis* as defined in paragraph 9 of Article 11 and the volume of imports from each country is not negligible and *(b)* a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

15.4 The examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

15.5 It must be demonstrated that the subsidized imports are, through the effects[47] of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, *inter alia*, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

15.6 The effect of the subsidized imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the subsidized imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

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[46] Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

[47] As set forth in paragraphs 2 and 4.

15.7 A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the subsidy would cause injury must be clearly foreseen and imminent. In making a determination regarding the existence of a threat of material injury, the investigating authorities should consider, *inter alia*, such factors as:

(i) nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom;

(ii) a significant rate of increase of subsidized imports into the domestic market indicating the likelihood of substantially increased importation;

(iii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased subsidized exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;

(iv) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and

(v) inventories of the product being investigated.

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further subsidized exports are imminent and that, unless protective action is taken, material injury would occur.

15.8 With respect to cases where injury is threatened by subsidized imports, the application of countervailing measures shall be considered and decided with special care.

Article 16

Definition of Domestic Industry

16.1 For the purposes of this Agreement, the term "domestic industry" shall, except as provided in paragraph 2, be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that when producers are related[48] to the exporters or importers or are themselves importers of the allegedly subsidized product or a like product from other countries, the term "domestic industry" may be interpreted as referring to the rest of the producers.

16.2. In exceptional circumstances, the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if *(a)* the producers within such market sell all or almost all of their production of the product in question in that market, and *(b)* the demand in that market is not to any

[48] For the purpose of this paragraph, producers shall be deemed to be related to exporters or importers only if *(a)* one of them directly or indirectly controls the other; or *(b)* both of them are directly or indirectly controlled by a third person; or *(c)* together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of subsidized imports into such an isolated market and provided further that the subsidized imports are causing injury to the producers of all or almost all of the production within such market.

16.3 When the domestic industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in paragraph 2, countervailing duties shall be levied only on the products in question consigned for final consumption to that area. When the constitutional law of the importing Member does not permit the levying of countervailing duties on such a basis, the importing Member may levy the countervailing duties without limitation only if *(a)* the exporters shall have been given an opportunity to cease exporting at subsidized prices to the area concerned or otherwise give assurances pursuant to Article 18, and adequate assurances in this regard have not been promptly given, and *(b)* such duties cannot be levied only on products of specific producers which supply the area in question.

16.4 Where two or more countries have reached under the provisions of paragraph 8(a) of Article XXIV of GATT 1994 such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the domestic industry referred to in paragraphs 1 and 2.

16.5 The provisions of paragraph 6 of Article 15 shall be applicable to this Article.

Article 17

Provisional Measures

17.1 Provisional measures may be applied only if:

(a) an investigation has been initiated in accordance with the provisions of Article 11, a public notice has been given to that effect and interested Members and interested parties have been given adequate opportunities to submit information and make comments;

(b) a preliminary affirmative determination has been made that a subsidy exists and that there is injury to a domestic industry caused by subsidized imports; and

(c) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

17.2 Provisional measures may take the form of provisional countervailing duties guaranteed by cash deposits or bonds equal to the amount of the provisionally calculated amount of subsidization.

17.3 Provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.

17.4 The application of provisional measures shall be limited to as short a period as possible, not exceeding four months.

17.5 The relevant provisions of Article 19 shall be followed in the application of provisional measures.

Article 18

Undertakings

18.1 Proceedings may[49] be suspended or terminated without the imposition of provisional measures or countervailing duties upon receipt of satisfactory voluntary undertakings under which:

(a) the government of the exporting Member agrees to eliminate or limit the subsidy or take other measures concerning its effects; or

(b) the exporter agrees to revise its prices so that the investigating authorities are satisfied that the injurious effect of the subsidy is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the amount of the subsidy. It is desirable that the price increases be less than the amount of the subsidy if such increases would be adequate to remove the injury to the domestic industry.

18.2 Undertakings shall not be sought or accepted unless the authorities of the importing Member have made a preliminary affirmative determination of subsidization and injury caused by such subsidization and, in case of undertakings from exporters, have obtained the consent of the exporting Member.

18.3 Undertakings offered need not be accepted if the authorities of the importing Member consider their acceptance impractical, for example if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. Should the case arise and where practicable, the authorities shall provide to the exporter the reasons which have led them to consider acceptance of an undertaking as inappropriate, and shall, to the extent possible, give the exporter an opportunity to make comments thereon.

18.4 If an undertaking is accepted, the investigation of subsidization and injury shall nevertheless be completed if the exporting Member so desires or the importing Member so decides. In such a case, if a negative determination of subsidization or injury is made, the undertaking shall automatically lapse, except in cases where such a determination is due in large part to the existence of an undertaking. In such cases, the authorities concerned may require that an undertaking be maintained for a reasonable period consistent with the provisions of this Agreement. In the event that an affirmative determination of subsidization and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Agreement.

18.5 Price undertakings may be suggested by the authorities of the importing Member, but no exporter shall be forced to enter into such undertakings. The fact that governments or exporters do not offer such undertakings, or do not accept an invitation to do so, shall in no way prejudice the consideration of the case. However, the authorities are free to determine that a threat of injury is more likely to be realized if the subsidized imports continue.

18.6 Authorities of an importing Member may require any government or exporter from whom an undertaking has been accepted to provide periodically information relevant to the fulfilment of such an undertaking, and to permit verification of pertinent data. In case of violation of an undertaking, the authorities of the importing Member may take, under this Agreement in conformity with its provisions, expeditious actions which may constitute immediate application of provisional measures using the best information available. In such cases, definitive duties may be levied in accordance with this Agreement on products entered for consumption not more than 90 days before the application of

[49] The word "may" shall not be interpreted to allow the simultaneous continuation of proceedings with the implementation of undertakings, except as provided in paragraph 4.

such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.

Article 19

Imposition and Collection of Countervailing Duties

19.1 If, after reasonable efforts have been made to complete consultations, a Member makes a final determination of the existence and amount of the subsidy and that, through the effects of the subsidy, the subsidized imports are causing injury, it may impose a countervailing duty in accordance with the provisions of this Article unless the subsidy or subsidies are withdrawn.

19.2 The decision whether or not to impose a countervailing duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the countervailing duty to be imposed shall be the full amount of the subsidy or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition should be permissive in the territory of all Members, that the duty should be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry, and that procedures should be established which would allow the authorities concerned to take due account of representations made by domestic interested parties[50] whose interests might be adversely affected by the imposition of a countervailing duty.

19.3 When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted. Any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter.

19.4 No countervailing duty shall be levied[51] on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.

Article 20

Retroactivity

20.1 Provisional measures and countervailing duties shall only be applied to products which enter for consumption after the time when the decision under paragraph 1 of Article 17 and paragraph 1 of Article 19, respectively, enters into force, subject to the exceptions set out in this Article.

20.2 Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the subsidized imports would, in the absence of the provisional measures,

[50] For the purpose of this paragraph, the term "domestic interested parties" shall include consumers and industrial users of the imported product subject to investigation.

[51] As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

have led to a determination of injury, countervailing duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

20.3 If the definitive countervailing duty is higher than the amount guaranteed by the cash deposit or bond, the difference shall not be collected. If the definitive duty is less than the amount guaranteed by the cash deposit or bond, the excess amount shall be reimbursed or the bond released in an expeditious manner.

20.4 Except as provided in paragraph 2, where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive countervailing duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

20.5 Where a final determination is negative, any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

20.6 In critical circumstances where for the subsidized product in question the authorities find that injury which is difficult to repair is caused by massive imports in a relatively short period of a product benefiting from subsidies paid or bestowed inconsistently with the provisions of GATT 1994 and of this Agreement and where it is deemed necessary, in order to preclude the recurrence of such injury, to assess countervailing duties retroactively on those imports, the definitive countervailing duties may be assessed on imports which were entered for consumption not more than 90 days prior to the date of application of provisional measures.

Article 21

Duration and Review of Countervailing Duties and Undertakings

21.1 A countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury.

21.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive countervailing duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the countervailing duty is no longer warranted, it shall be terminated immediately.

21.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive countervailing duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both subsidization and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to

continuation or recurrence of subsidization and injury.[52] The duty may remain in force pending the outcome of such a review.

21.4 The provisions of Article 12 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

21.5 The provisions of this Article shall apply *mutatis mutandis* to undertakings accepted under Article 18.

Article 22

Public Notice and Explanation of Determinations

22.1 When the authorities are satisfied that there is sufficient evidence to justify the initiation of an investigation pursuant to Article 11, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

22.2 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report[53], adequate information on the following:

(i) the name of the exporting country or countries and the product involved;

(ii) the date of initiation of the investigation;

(iii) a description of the subsidy practice or practices to be investigated;

(iv) a summary of the factors on which the allegation of injury is based;

(v) the address to which representations by interested Members and interested parties should be directed; and

(vi) the time-limits allowed to interested Members and interested parties for making their views known.

22.3 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 18, of the termination of such an undertaking, and of the termination of a definitive countervailing duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

22.4 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary

[52] When the amount of the countervailing duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

[53] Where authorities provide information and explanations under the provisions of this Article in a separate report, they shall ensure that such report is readily available to the public.

determinations on the existence of a subsidy and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:

(i) the names of the suppliers or, when this is impracticable, the supplying countries involved;

(ii) a description of the product which is sufficient for customs purposes;

(iii) the amount of subsidy established and the basis on which the existence of a subsidy has been determined;

(iv) considerations relevant to the injury determination as set out in Article 15;

(v) the main reasons leading to the determination.

22.5 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of an undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of an undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in paragraph 4, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by interested Members and by the exporters and importers.

22.6 A public notice of the termination or suspension of an investigation following the acceptance of an undertaking pursuant to Article 18 shall include, or otherwise make available through a separate report, the non-confidential part of this undertaking.

22.7 The provisions of this Article shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 21 and to decisions under Article 20 to apply duties retroactively.

Article 23

Judicial Review

Each Member whose national legislation contains provisions on countervailing duty measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 21. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question, and shall provide all interested parties who participated in the administrative proceeding and are directly and individually affected by the administrative actions with access to review.

PART VI: INSTITUTIONS

Article 24

Committee on Subsidies and Countervailing Measures and Subsidiary Bodies

24.1 There is hereby established a Committee on Subsidies and Countervailing Measures composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this Agreement or by the Members and it shall afford Members the opportunity of consulting on any matter relating to the operation of the Agreement or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee.

24.2 The Committee may set up subsidiary bodies as appropriate.

24.3 The Committee shall establish a Permanent Group of Experts composed of five independent persons, highly qualified in the fields of subsidies and trade relations. The experts will be elected by the Committee and one of them will be replaced every year. The PGE may be requested to assist a panel, as provided for in paragraph 5 of Article 4. The Committee may also seek an advisory opinion on the existence and nature of any subsidy.

24.4 The PGE may be consulted by any Member and may give advisory opinions on the nature of any subsidy proposed to be introduced or currently maintained by that Member. Such advisory opinions will be confidential and may not be invoked in proceedings under Article 7.

24.5 In carrying out their functions, the Committee and any subsidiary bodies may consult with and seek information from any source they deem appropriate. However, before the Committee or a subsidiary body seeks such information from a source within the jurisdiction of a Member, it shall inform the Member involved.

PART VII: NOTIFICATION AND SURVEILLANCE

Article 25

Notifications

25.1 Members agree that, without prejudice to the provisions of paragraph 1 of Article XVI of GATT 1994, their notifications of subsidies shall be submitted not later than 30 June of each year and shall conform to the provisions of paragraphs 2 through 6.

25.2 Members shall notify any subsidy as defined in paragraph 1 of Article 1, which is specific within the meaning of Article 2, granted or maintained within their territories.

25.3 The content of notifications should be sufficiently specific to enable other Members to evaluate the trade effects and to understand the operation of notified subsidy programmes. In this connection, and without prejudice to the contents and form of the questionnaire on subsidies[54], Members shall ensure that their notifications contain the following information:

(i) form of a subsidy (i.e. grant, loan, tax concession, etc.);

(ii) subsidy per unit or, in cases where this is not possible, the total amount or the annual amount budgeted for that subsidy (indicating, if possible, the average subsidy per unit in the previous year);

[54] The Committee shall establish a Working Party to review the contents and form of the questionnaire as contained in BISD 9S/193-194.

(iii) policy objective and/or purpose of a subsidy;

(iv) duration of a subsidy and/or any other time-limits attached to it;

(v) statistical data permitting an assessment of the trade effects of a subsidy.

25.4 Where specific points in paragraph 3 have not been addressed in a notification, an explanation shall be provided in the notification itself.

25.5 If subsidies are granted to specific products or sectors, the notifications should be organized by product or sector.

25.6 Members which consider that there are no measures in their territories requiring notification under paragraph 1 of Article XVI of GATT 1994 and this Agreement shall so inform the Secretariat in writing.

25.7 Members recognize that notification of a measure does not prejudge either its legal status under GATT 1994 and this Agreement, the effects under this Agreement, or the nature of the measure itself.

25.8 Any Member may, at any time, make a written request for information on the nature and extent of any subsidy granted or maintained by another Member (including any subsidy referred to in Part IV), or for an explanation of the reasons for which a specific measure has been considered as not subject to the requirement of notification.

25.9 Members so requested shall provide such information as quickly as possible and in a comprehensive manner, and shall be ready, upon request, to provide additional information to the requesting Member. In particular, they shall provide sufficient details to enable the other Member to assess their compliance with the terms of this Agreement. Any Member which considers that such information has not been provided may bring the matter to the attention of the Committee.

25.10 Any Member which considers that any measure of another Member having the effects of a subsidy has not been notified in accordance with the provisions of paragraph 1 of Article XVI of GATT 1994 and this Article may bring the matter to the attention of such other Member. If the alleged subsidy is not thereafter notified promptly, such Member may itself bring the alleged subsidy in question to the notice of the Committee.

25.11 Members shall report without delay to the Committee all preliminary or final actions taken with respect to countervailing duties. Such reports shall be available in the Secretariat for inspection by other Members. Members shall also submit, on a semi-annual basis, reports on any countervailing duty actions taken within the preceding six months. The semi-annual reports shall be submitted on an agreed standard form.

25.12 Each Member shall notify the Committee *(a)* which of its authorities are competent to initiate and conduct investigations referred to in Article 11 and *(b)* its domestic procedures governing the initiation and conduct of such investigations.

Article 26

Surveillance

26.1 The Committee shall examine new and full notifications submitted under paragraph 1 of Article XVI of GATT 1994 and paragraph 1 of Article 25 of this Agreement at special sessions held

every third year. Notifications submitted in the intervening years (updating notifications) shall be examined at each regular meeting of the Committee.

26.2 The Committee shall examine reports submitted under paragraph 11 of Article 25 at each regular meeting of the Committee.

PART VIII: DEVELOPING COUNTRY MEMBERS

Article 27

Special and Differential Treatment of Developing Country Members

27.1 Members recognize that subsidies may play an important role in economic development programmes of developing country Members.

27.2 The prohibition of paragraph 1(a) of Article 3 shall not apply to:

(a) developing country Members referred to in Annex VII.

(b) other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in paragraph 4.

27.3 The prohibition of paragraph 1(b) of Article 3 shall not apply to developing country Members for a period of five years, and shall not apply to least developed country Members for a period of eight years, from the date of entry into force of the WTO Agreement.

27.4 Any developing country Member referred to in paragraph 2(b) shall phase out its export subsidies within the eight-year period, preferably in a progressive manner. However, a developing country Member shall not increase the level of its export subsidies[55], and shall eliminate them within a period shorter than that provided for in this paragraph when the use of such export subsidies is inconsistent with its development needs. If a developing country Member deems it necessary to apply such subsidies beyond the 8-year period, it shall not later than one year before the expiry of this period enter into consultation with the Committee, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial and development needs of the developing country Member in question. If the Committee determines that the extension is justified, the developing country Member concerned shall hold annual consultations with the Committee to determine the necessity of maintaining the subsidies. If no such determination is made by the Committee, the developing country Member shall phase out the remaining export subsidies within two years from the end of the last authorized period.

27.5 A developing country Member which has reached export competitiveness in any given product shall phase out its export subsidies for such product(s) over a period of two years. However, for a developing country Member which is referred to in Annex VII and which has reached export competitiveness in one or more products, export subsidies on such products shall be gradually phased out over a period of eight years.

27.6 Export competitiveness in a product exists if a developing country Member's exports of that product have reached a share of at least 3.25 per cent in world trade of that product for two

[55] For a developing country Member not granting export subsidies as of the date of entry into force of the WTO Agreement, this paragraph shall apply on the basis of the level of export subsidies granted in 1986.

consecutive calendar years. Export competitiveness shall exist either *(a)* on the basis of notification by the developing country Member having reached export competitiveness, or *(b)* on the basis of a computation undertaken by the Secretariat at the request of any Member. For the purpose of this paragraph, a product is defined as a section heading of the Harmonized System Nomenclature. The Committee shall review the operation of this provision five years from the date of the entry into force of the WTO Agreement.

27.7 The provisions of Article 4 shall not apply to a developing country Member in the case of export subsidies which are in conformity with the provisions of paragraphs 2 through 5. The relevant provisions in such a case shall be those of Article 7.

27.8 There shall be no presumption in terms of paragraph 1 of Article 6 that a subsidy granted by a developing country Member results in serious prejudice, as defined in this Agreement. Such serious prejudice, where applicable under the terms of paragraph 9, shall be demonstrated by positive evidence, in accordance with the provisions of paragraphs 3 through 8 of Article 6.

27.9 Regarding actionable subsidies granted or maintained by a developing country Member other than those referred to in paragraph 1 of Article 6, action may not be authorized or taken under Article 7 unless nullification or impairment of tariff concessions or other obligations under GATT 1994 is found to exist as a result of such a subsidy, in such a way as to displace or impede imports of a like product of another Member into the market of the subsidizing developing country Member or unless injury to a domestic industry in the market of an importing Member occurs.

27.10 Any countervailing duty investigation of a product originating in a developing country Member shall be terminated as soon as the authorities concerned determine that:

(a) the overall level of subsidies granted upon the product in question does not exceed 2 per cent of its value calculated on a per unit basis; or

(b) the volume of the subsidized imports represents less than 4 per cent of the total imports of the like product in the importing Member, unless imports from developing country Members whose individual shares of total imports represent less than 4 per cent collectively account for more than 9 per cent of the total imports of the like product in the importing Member.

27.11 For those developing country Members within the scope of paragraph 2(b) which have eliminated export subsidies prior to the expiry of the period of eight years from the date of entry into force of the WTO Agreement, and for those developing country Members referred to in Annex VII, the number in paragraph 10(a) shall be 3 per cent rather than 2 per cent. This provision shall apply from the date that the elimination of export subsidies is notified to the Committee, and for so long as export subsidies are not granted by the notifying developing country Member. This provision shall expire eight years from the date of entry into force of the WTO Agreement.

27.12 The provisions of paragraphs 10 and 11 shall govern any determination of *de minimis* under paragraph 3 of Article 15.

27.13 The provisions of Part III shall not apply to direct forgiveness of debts, subsidies to cover social costs, in whatever form, including relinquishment of government revenue and other transfer of liabilities when such subsidies are granted within and directly linked to a privatization programme of a developing country Member, provided that both such programme and the subsidies involved are granted for a limited period and notified to the Committee and that the programme results in eventual privatization of the enterprise concerned.

27.14 The Committee shall, upon request by an interested Member, undertake a review of a specific export subsidy practice of a developing country Member to examine whether the practice is in conformity with its development needs.

27.15 The Committee shall, upon request by an interested developing country Member, undertake a review of a specific countervailing measure to examine whether it is consistent with the provisions of paragraphs 10 and 11 as applicable to the developing country Member in question.

PART IX: TRANSITIONAL ARRANGEMENTS

Article 28

Existing Programmes

28.1 Subsidy programmes which have been established within the territory of any Member before the date on which such a Member signed the WTO Agreement and which are inconsistent with the provisions of this Agreement shall be:

(a) notified to the Committee not later than 90 days after the date of entry into force of the WTO Agreement for such Member; and

(b) brought into conformity with the provisions of this Agreement within three years of the date of entry into force of the WTO Agreement for such Member and until then shall not be subject to Part II.

28.2 No Member shall extend the scope of any such programme, nor shall such a programme be renewed upon its expiry.

Article 29

Transformation into a Market Economy

29.1 Members in the process of transformation from a centrally-planned into a market, free-enterprise economy may apply programmes and measures necessary for such a transformation.

29.2 For such Members, subsidy programmes falling within the scope of Article 3, and notified according to paragraph 3, shall be phased out or brought into conformity with Article 3 within a period of seven years from the date of entry into force of the WTO Agreement. In such a case, Article 4 shall not apply. In addition during the same period:

(a) Subsidy programmes falling within the scope of paragraph 1(d) of Article 6 shall not be actionable under Article 7;

(b) With respect to other actionable subsidies, the provisions of paragraph 9 of Article 27 shall apply.

29.3 Subsidy programmes falling within the scope of Article 3 shall be notified to the Committee by the earliest practicable date after the date of entry into force of the WTO Agreement. Further notifications of such subsidies may be made up to two years after the date of entry into force of the WTO Agreement.

29.4 In exceptional circumstances Members referred to in paragraph 1 may be given departures from their notified programmes and measures and their time-frame by the Committee if such departures are deemed necessary for the process of transformation.

PART X: DISPUTE SETTLEMENT

Article 30

The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided herein.

PART XI: FINAL PROVISIONS

Article 31

Provisional Application

The provisions of paragraph 1 of Article 6 and the provisions of Article 8 and Article 9 shall apply for a period of five years, beginning with the date of entry into force of the WTO Agreement. Not later than 180 days before the end of this period, the Committee shall review the operation of those provisions, with a view to determining whether to extend their application, either as presently drafted or in a modified form, for a further period.

Article 32

Other Final Provisions

32.1 No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.[56]

32.2 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

32.3 Subject to paragraph 4, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.

32.4 For the purposes of paragraph 3 of Article 21, existing countervailing measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force at that date already included a clause of the type provided for in that paragraph.

32.5 Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws,

[56] This paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate.

regulations and administrative procedures with the provisions of this Agreement as they may apply to the Member in question.

32.6 Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

32.7 The Committee shall review annually the implementation and operation of this Agreement, taking into account the objectives thereof. The Committee shall inform annually the Council for Trade in Goods of developments during the period covered by such reviews.

32.8 The Annexes to this Agreement constitute an integral part thereof.

ANNEX I

ILLUSTRATIVE LIST OF EXPORT SUBSIDIES

(a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.

(b) Currency retention schemes or any similar practices which involve a bonus on exports.

(c) Internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.

(d) The provision by governments or their agencies either directly or indirectly through government-mandated schemes, of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for provision of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available[57] on world markets to their exporters.

(e) The full or partial exemption remission, or deferral specifically related to exports, of direct taxes[58] or social welfare charges paid or payable by industrial or commercial enterprises.[59]

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[57] The term "commercially available" means that the choice between domestic and imported products is unrestricted and depends only on commercial considerations.

[58] For the purpose of this Agreement:

The term "direct taxes" shall mean taxes on wages, profits, interests, rents, royalties, and all other forms of income, and taxes on the ownership of real property;

The term "import charges" shall mean tariffs, duties, and other fiscal charges not elsewhere enumerated in this note that are levied on imports;

The term "indirect taxes" shall mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges;

"Prior-stage" indirect taxes are those levied on goods or services used directly or indirectly in making the product;

"Cumulative" indirect taxes are multi-staged taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production;

"Remission" of taxes includes the refund or rebate of taxes;

"Remission or drawback" includes the full or partial exemption or deferral of import charges.

[59] The Members recognize that deferral need not amount to an export subsidy where, for example, appropriate interest charges are collected. The Members reaffirm the principle that prices for goods in transactions between exporting enterprises and foreign buyers under their or under the same control should for tax purposes be the prices which would be charged between independent enterprises acting at arm's length. Any Member may draw the attention of another Member to administrative or other practices which may contravene

(f) The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged.

(g) The exemption or remission, in respect of the production and distribution of exported products, of indirect taxes58 in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.

(h) The exemption, remission or deferral of prior-stage cumulative indirect taxes58 on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior-stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior-stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior-stage cumulative indirect taxes are levied on inputs that are consumed in the production of the exported product (making normal allowance for waste).[60] This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II.

(i) The remission or drawback of import charges58 in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste); provided, however, that in particular cases a firm may use a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported inputs as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, not to exceed two years. This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II and the guidelines in the determination of substitution drawback systems as export subsidies contained in Annex III.

(j) The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.

(k) The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and other credit terms and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.

Provided, however, that if a Member is a party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original

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this principle and which result in a significant saving of direct taxes in export transactions. In such circumstances the Members shall normally attempt to resolve their differences using the facilities of existing bilateral tax treaties or other specific international mechanisms, without prejudice to the rights and obligations of Members under GATT 1994, including the right of consultation created in the preceding sentence.

Paragraph (e) is not intended to limit a Member from taking measures to avoid the double taxation of foreign-source income earned by its enterprises or the enterprises of another Member.

[60] Paragraph (h) does not apply to value-added tax systems and border-tax adjustment in lieu thereof; the problem of the excessive remission of value-added taxes is exclusively covered by paragraph (g).

Members), or if in practice a Member applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.

(l) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of GATT 1994.

ANNEX II

GUIDELINES ON CONSUMPTION OF INPUTS IN THE PRODUCTION PROCESS[61]

I

1. Indirect tax rebate schemes can allow for exemption, remission or deferral of prior-stage cumulative indirect taxes levied on inputs that are consumed in the production of the exported product (making normal allowance for waste). Similarly, drawback schemes can allow for the remission or drawback of import charges levied on inputs that are consumed in the production of the exported product (making normal allowance for waste).

2. The Illustrative List of Export Subsidies in Annex I of this Agreement makes reference to the term "inputs that are consumed in the production of the exported product" in paragraphs (h) and (i). Pursuant to paragraph (h), indirect tax rebate schemes can constitute an export subsidy to the extent that they result in exemption, remission or deferral of prior-stage cumulative indirect taxes in excess of the amount of such taxes actually levied on inputs that are consumed in the production of the exported product. Pursuant to paragraph (i), drawback schemes can constitute an export subsidy to the extent that they result in a remission or drawback of import charges in excess of those actually levied on inputs that are consumed in the production of the exported product. Both paragraphs stipulate that normal allowance for waste must be made in findings regarding consumption of inputs in the production of the exported product. Paragraph (i) also provides for substitution, where appropriate.

II

In examining whether inputs are consumed in the production of the exported product, as part of a countervailing duty investigation pursuant to this Agreement, investigating authorities should proceed on the following basis:

1. Where it is alleged that an indirect tax rebate scheme, or a drawback scheme, conveys a subsidy by reason of over-rebate or excess drawback of indirect taxes or import charges on inputs consumed in the production of the exported product, the investigating authorities should first determine whether the government of the exporting Member has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts. Where such a system or procedure is determined to be applied, the investigating authorities should then examine the system or procedure to see whether it is reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. The investigating authorities may deem it necessary to carry out, in accordance with paragraph 6 of Article 12, certain practical tests in order to verify information or to satisfy themselves that the system or procedure is being effectively applied.

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[61] Inputs consumed in the production process are inputs physically incorporated, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product.

2. Where there is no such system or procedure, where it is not reasonable, or where it is instituted and considered reasonable but is found not to be applied or not to be applied effectively, a further examination by the exporting Member based on the actual inputs involved would need to be carried out in the context of determining whether an excess payment occurred. If the investigating authorities deemed it necessary, a further examination would be carried out in accordance with paragraph 1.

3. Investigating authorities should treat inputs as physically incorporated if such inputs are used in the production process and are physically present in the product exported. The Members note that an input need not be present in the final product in the same form in which it entered the production process.

4. In determining the amount of a particular input that is consumed in the production of the exported product, a "normal allowance for waste" should be taken into account, and such waste should be treated as consumed in the production of the exported product. The term "waste" refers to that portion of a given input which does not serve an independent function in the production process, is not consumed in the production of the exported product (for reasons such as inefficiencies) and is not recovered, used or sold by the same manufacturer.

5. The investigating authority's determination of whether the claimed allowance for waste is "normal" should take into account the production process, the average experience of the industry in the country of export, and other technical factors, as appropriate. The investigating authority should bear in mind that an important question is whether the authorities in the exporting Member have reasonably calculated the amount of waste, when such an amount is intended to be included in the tax or duty rebate or remission.

ANNEX III

GUIDELINES IN THE DETERMINATION OF SUBSTITUTION DRAWBACK SYSTEMS AS EXPORT SUBSIDIES

I

Drawback systems can allow for the refund or drawback of import charges on inputs which are consumed in the production process of another product and where the export of this latter product contains domestic inputs having the same quality and characteristics as those substituted for the imported inputs. Pursuant to paragraph (i) of the Illustrative List of Export Subsidies in Annex I, substitution drawback systems can constitute an export subsidy to the extent that they result in an excess drawback of the import charges levied initially on the imported inputs for which drawback is being claimed.

II

In examining any substitution drawback system as part of a countervailing duty investigation pursuant to this Agreement, investigating authorities should proceed on the following basis:

1. Paragraph (i) of the Illustrative List stipulates that home market inputs may be substituted for imported inputs in the production of a product for export provided such inputs are equal in quantity to, and have the same quality and characteristics as, the imported inputs being substituted. The existence of a verification system or procedure is important because it enables the government of the exporting Member to ensure and demonstrate that the quantity of inputs for which drawback is claimed does not

exceed the quantity of similar products exported, in whatever form, and that there is not drawback of import charges in excess of those originally levied on the imported inputs in question.

2. Where it is alleged that a substitution drawback system conveys a subsidy, the investigating authorities should first proceed to determine whether the government of the exporting Member has in place and applies a verification system or procedure. Where such a system or procedure is determined to be applied, the investigating authorities should then examine the verification procedures to see whether they are reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. To the extent that the procedures are determined to meet this test and are effectively applied, no subsidy should be presumed to exist. It may be deemed necessary by the investigating authorities to carry out, in accordance with paragraph 6 of Article 12, certain practical tests in order to verify information or to satisfy themselves that the verification procedures are being effectively applied.

3. Where there are no verification procedures, where they are not reasonable, or where such procedures are instituted and considered reasonable but are found not to be actually applied or not applied effectively, there may be a subsidy. In such cases a further examination by the exporting Member based on the actual transactions involved would need to be carried out to determine whether an excess payment occurred. If the investigating authorities deemed it necessary, a further examination would be carried out in accordance with paragraph 2.

4. The existence of a substitution drawback provision under which exporters are allowed to select particular import shipments on which drawback is claimed should not of itself be considered to convey a subsidy.

5. An excess drawback of import charges in the sense of paragraph (i) would be deemed to exist where governments paid interest on any monies refunded under their drawback schemes, to the extent of the interest actually paid or payable.

ANNEX IV

CALCULATION OF THE TOTAL AD VALOREM SUBSIDIZATION (PARAGRAPH 1(A) OF ARTICLE 6)[62]

1. Any calculation of the amount of a subsidy for the purpose of paragraph 1(a) of Article 6 shall be done in terms of the cost to the granting government.

2. Except as provided in paragraphs 3 through 5, in determining whether the overall rate of subsidization exceeds 5 per cent of the value of the product, the value of the product shall be calculated as the total value of the recipient firm's[63] sales in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted.[64]

3. Where the subsidy is tied to the production or sale of a given product, the value of the product shall be calculated as the total value of the recipient firm's sales of that product in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted.

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[62] An understanding among Members should be developed, as necessary, on matters which are not specified in this Annex or which need further clarification for the purposes of paragraph 1(a) of Article 6.

[63] The recipient firm is a firm in the territory of the subsidizing Member.

[64] In the case of tax-related subsidies the value of the product shall be calculated as the total value of the recipient firm's sales in the fiscal year in which the tax-related measure was earned.

4. Where the recipient firm is in a start-up situation, serious prejudice shall be deemed to exist if the overall rate of subsidization exceeds 15 per cent of the total funds invested. For purposes of this paragraph, a start-up period will not extend beyond the first year of production.[65]

5. Where the recipient firm is located in an inflationary economy country, the value of the product shall be calculated as the recipient firm's total sales (or sales of the relevant product, if the subsidy is tied) in the preceding calendar year indexed by the rate of inflation experienced in the 12 months preceding the month in which the subsidy is to be given.

6. In determining the overall rate of subsidization in a given year, subsidies given under different programmes and by different authorities in the territory of a Member shall be aggregated.

7. Subsidies granted prior to the date of entry into force of the WTO Agreement, the benefits of which are allocated to future production, shall be included in the overall rate of subsidization.

8. Subsidies which are non-actionable under relevant provisions of this Agreement shall not be included in the calculation of the amount of a subsidy for the purpose of paragraph 1(a) of Article 6.

ANNEX V

PROCEDURES FOR DEVELOPING INFORMATION CONCERNING SERIOUS PREJUDICE

1. Every Member shall cooperate in the development of evidence to be examined by a panel in procedures under paragraphs 4 through 6 of Article 7. The parties to the dispute and any third-country Member concerned shall notify to the DSB, as soon as the provisions of paragraph 4 of Article 7 have been invoked, the organization responsible for administration of this provision within its territory and the procedures to be used to comply with requests for information.

2. In cases where matters are referred to the DSB under paragraph 4 of Article 7, the DSB shall, upon request, initiate the procedure to obtain such information from the government of the subsidizing Member as necessary to establish the existence and amount of subsidization, the value of total sales of the subsidized firms, as well as information necessary to analyze the adverse effects caused by the subsidized product.[66] This process may include, where appropriate, presentation of questions to the government of the subsidizing Member and of the complaining Member to collect information, as well as to clarify and obtain elaboration of information available to the parties to a dispute through the notification procedures set forth in Part VII.[67]

3. In the case of effects in third-country markets, a party to a dispute may collect information, including through the use of questions to the government of the third-country Member, necessary to analyse adverse effects, which is not otherwise reasonably available from the complaining Member or the subsidizing Member. This requirement should be administered in such a way as not to impose an unreasonable burden on the third-country Member. In particular, such a Member is not expected to make a market or price analysis specially for that purpose. The information to be supplied is that which is already available or can be readily obtained by this Member (e.g. most recent statistics which

[65] Start-up situations include instances where financial commitments for product development or construction of facilities to manufacture products benefiting from the subsidy have been made, even though production has not begun.

[66] In cases where the existence of serious prejudice has to be demonstrated.

[67] The information-gathering process by the DSB shall take into account the need to protect information which is by nature confidential or which is provided on a confidential basis by any Member involved in this process.

have already been gathered by relevant statistical services but which have not yet been published, customs data concerning imports and declared values of the products concerned, etc.). However, if a party to a dispute undertakes a detailed market analysis at its own expense, the task of the person or firm conducting such an analysis shall be facilitated by the authorities of the third-country Member and such a person or firm shall be given access to all information which is not normally maintained confidential by the government.

4. The DSB shall designate a representative to serve the function of facilitating the information-gathering process. The sole purpose of the representative shall be to ensure the timely development of the information necessary to facilitate expeditious subsequent multilateral review of the dispute. In particular, the representative may suggest ways to most efficiently solicit necessary information as well as encourage the cooperation of the parties.

5. The information-gathering process outlined in paragraphs 2 through 4 shall be completed within 60 days of the date on which the matter has been referred to the DSB under paragraph 4 of Article 7. The information obtained during this process shall be submitted to the panel established by the DSB in accordance with the provisions of Part X. This information should include, *inter alia*, data concerning the amount of the subsidy in question (and, where appropriate, the value of total sales of the subsidized firms), prices of the subsidized product, prices of the non-subsidized product, prices of other suppliers to the market, changes in the supply of the subsidized product to the market in question and changes in market shares. It should also include rebuttal evidence, as well as such supplemental information as the panel deems relevant in the course of reaching its conclusions.

6. If the subsidizing and/or third-country Member fail to cooperate in the information-gathering process, the complaining Member will present its case of serious prejudice, based on evidence available to it, together with facts and circumstances of the non-cooperation of the subsidizing and/or third-country Member. Where information is unavailable due to non-cooperation by the subsidizing and/or third-country Member, the panel may complete the record as necessary relying on best information otherwise available.

7. In making its determination, the panel should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process.

8. In making a determination to use either best information available or adverse inferences, the panel shall consider the advice of the DSB representative nominated under paragraph 4 as to the reasonableness of any requests for information and the efforts made by parties to comply with these requests in a cooperative and timely manner.

9. Nothing in the information-gathering process shall limit the ability of the panel to seek such additional information it deems essential to a proper resolution to the dispute, and which was not adequately sought or developed during that process. However, ordinarily the panel should not request additional information to complete the record where the information would support a particular party's position and the absence of that information in the record is the result of unreasonable non-cooperation by that party in the information-gathering process.

ANNEX VI

PROCEDURES FOR ON-THE-SPOT INVESTIGATIONS PURSUANT TO PARAGRAPH 6 OF ARTICLE 12

1. Upon initiation of an investigation, the authorities of the exporting Member and the firms known to be concerned should be informed of the intention to carry out on-the-spot investigations.

2. If in exceptional circumstances it is intended to include non-governmental experts in the investigating team, the firms and the authorities of the exporting Member should be so informed. Such non-governmental experts should be subject to effective sanctions for breach of confidentiality requirements.

3. It should be standard practice to obtain explicit agreement of the firms concerned in the exporting Member before the visit is finally scheduled.

4. As soon as the agreement of the firms concerned has been obtained, the investigating authorities should notify the authorities of the exporting Member of the names and addresses of the firms to be visited and the dates agreed.

5. Sufficient advance notice should be given to the firms in question before the visit is made.

6. Visits to explain the questionnaire should only be made at the request of an exporting firm. In case of such a request the investigating authorities may place themselves at the disposal of the firm; such a visit may only be made if *(a)* the authorities of the importing Member notify the representatives of the government of the Member in question and *(b)* the latter do not object to the visit.

7. As the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details, it should be carried out after the response to the questionnaire has been received unless the firm agrees to the contrary and the government of the exporting Member is informed by the investigating authorities of the anticipated visit and does not object to it; further, it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained.

8. Enquiries or questions put by the authorities or firms of the exporting Members and essential to a successful on-the-spot investigation should, whenever possible, be answered before the visit is made.

ANNEX VII

DEVELOPING COUNTRY MEMBERS REFERRED TO IN PARAGRAPH 2(A) OF ARTICLE 27

The developing country Members not subject to the provisions of paragraph 1(a) of Article 3 under the terms of paragraph 2(a) of Article 27 are:

(a) Least-developed countries designated as such by the United Nations which are Members of the WTO.

(b) Each of the following developing countries which are Members of the WTO shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27 when GNP per capita has reached $1,000 per annum[68]: Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe.

[68] The inclusion of developing country Members in the list in paragraph (b) is based on the most recent data from the World Bank on GNP per capita.