

A DENOUEMENT WITH SUSPENSE: THE EPILOGUE OF *CANADA – RENEWABLE ENERGY*

D R . L I J U A N X I N G *

Synopsis

The paper reviews a recent case that Canada went through, which revolves around the feed-in tariff program (FIT Program) in Ontario, before the Dispute Settlement Body (DSB) of the World Trade Organization from a fresh perspective – that is, to crystallize potential challenges on the measures concerned by scrutinizing and furthering pertinent intermediate findings of the Panel and the Appellate Body in that case. Analysis in the paper reveals that, despite the fact that Canada has fully implemented the DSB recommendations and rulings, further subsidization claims against the FIT Program may have been facilitated by pertinent reasoning and findings of the Panel and, in particular, the Appellate Body. Having put those reasoning and findings in the spotlight, the paper explores several issues that formulate the line of arguments of the stakeholders in preparation for potential trade disputes.

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Introduction

Japan and the European Union (EU) challenged Canada’s measures relating to domestic content requirements in the feed-in tariff program (hereinafter “FIT Program”) in Ontario in cases of DS412 (*Canada – Renewable Energy*) and DS426 (*Canada – Feed-In Tariff Program*) before the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) between 2010 and 2011. Given that the Panel and the Appellate Body merged the rulings of the two cases into one panel report and one Appellate Body report, respectively, “*Canada – Renewable Energy*” is used to represent the two cases involved for the purpose of this paper. In the case, the challenged “Minimum Required Domestic Content Levels” prescribed under the FIT Program and related FIT and microFIT Contracts were found by the Panel and the Appellate Body inconsistent with Article 2.1 of the Agreement on Trade-Related Investment Measures (hereinafter “TRIMs Agreement”) and Article III:4 of the General Agreement on Tariffs and Trade of 1994 (hereinafter “GATT 1994”). Canada was requested, accordingly, by the DSB to bring the measures challenged into conformity with its obligations under

those Agreements. In June 2014, Canada informed the DSB that the Government of Ontario had complied with the DSB recommendations and rulings.

It seems that Canada's implementation should have placed an end to the pertinent disputes; however, the subsidization claims accompanying the challenges on domestic content requirements, as raised by Japan and the EU, may expose Canada to further trade disputes, despite the fact that the analysis of those claims was not completed by the Appellate Body in its report. In particular, pertinent intermediate findings of the Appellate Body may even facilitate prospective claims on the Canadian measures at issue by formulating the line of arguments that lay the foundation for successful launch of the pertinent claims.

The overarching aim of this paper is to crystallize the implications of the intermediate findings of the Appellate Body as to the subsidization claims on the FIT Program. The analysis in this paper is unfolded in three parts. In Part I, the case of *Canada – Renewable Energy* is briefly reviewed in order to depict the backdrop against which the subsidization claims were raised. The significance and implications of the intermediate findings of the Appellate Body pertaining to the subsidization claims are spotlighted in Part II. In Part III, further analysis along the direction pointed out by the pertinent intermediate findings is provided to help the stakeholders be prepared for potential legal disputes over the FIT Program.

I. The Case of Canada – Renewable Energy: a Denouement with Suspense

The FIT Program as challenged before the DSB, the main claims of Japan and the EU, the final findings of the Panel and the Appellate Body, and Canada's implementation of the DSB recommendations are briefly reviewed in this part.

A. Consultations regarding the FIT Program

The FIT Program is open to facilities located in Ontario, Canada that generate electricity exclusively from one or more of the following sources of renewable energy: wind, solar photovoltaic ("PV"), renewable biomass, biogas, landfill gas or waterpower. The Program is divided into two streams: (i) the FIT stream – for projects with a capacity to produce electricity that exceeds 10

kW, but is no more than 10 MW for solar PV projects or 50 MW in the case of waterpower projects; “and (ii) the microFIT stream – for projects having a capacity to produce up to 10 kW of electricity (typically small household, farm or business generation projects)”.¹ The FIT Program is administered by the Ontario Power Authority (OPA) and is implemented through the application of a standard set of rules, standard contracts and, for each class of generation technology, standard pricing.²

Only projects “that satisfy all of the specific eligibility requirements set out in the FIT and microFIT Rules, and that can be connected to the Ontario electricity system, will be offered a Contract, and thereby permitted to participate in the Program”.³ “[T]he most important requirement that a wind or solar PV FIT generator must satisfy is the domestic content requirement. Pursuant to Section 6.4(d) of the FIT Rules, FIT generators that do not satisfy the domestic content requirement are in default under the FIT contracts, while for micorFIT generators, an offer of a microFIT Contract is strictly conditional on compliance with the microFIT domestic content requirement.”⁴

The Domestic Content Level of a FIT or microFIT project is determined by reference to a “Domestic Content Grid” provided in Exhibit D to the FIT Contract and Appendix C to the microFIT Contract, which lists the goods and services that may be utilized to satisfy the Minimum Required Domestic Content Level for a particular generation facility, and specifies the qualifying percentage that each good or service may contribute toward the Domestic Content Level of a particular project. In order for solar PV (FIT and microFIT) or wind (FIT) generators to receive the guaranteed, long- term rates under the FIT Program, they must utilize a sufficient amount of the Ontario-origin goods and services listed in the applicable Domestic Content Grid to satisfy the applicable Minimum Required Domestic Content Level.⁵

The “Minimum Required Domestic Content Level” for wind FIT contracts between 2009 and 2011 was 25%, and 50% from 2012 onward; the level for Solar PV FIT contracts between 2009 and 2010 was 50%, and 60%

¹ *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* (2012), WT/DS412/R (the same as *Canada – Measures Relating to the Feed-In Tariff Program* (2012), WT/DS426/R) at para 7.66 (citation omitted) (*Canada – Renewable Energy*, Panel Report).

² *Ibid* at para 7.67 (citation omitted).

³ *Ibid* at para 7.68 (citation omitted).

⁴ *Ibid*, Annex A-1, *Integrated Executive Summary of Japan* WT/DS412/R/Add.1 at para 34 (*Canada – Renewable Energy*, Panel Report).

⁵ *Ibid* at para 35.

from 2011 onward; the level for Solar PV microFIT contracts between 2009 and 2010 was 40%, and 60% from 2011 onward.⁶ All FIT projects other than waterpower projects have a set term of 20 years. Pursuant to the FIT or microFIT Contract, a generator is guaranteed payment of the contract rate for all the electricity it produces (or could have produced but was instructed by the Independent Electricity System Operator (IESO) not to) up to its project's contract capacity throughout the term of the contract.⁷

Japan and the EU claimed that the domestic content requirements provided for and implemented under the challenged measures place Canada in violation of (i) the national treatment obligation under Article III:4 of GATT 1994; (ii) the prohibition that is set out in Article 2.1 of the TRIMs Agreement on the application of any trade-related investment measures that are inconsistent with Article III of GATT 1994; and (iii) the prohibition on import substitution subsidies prescribed in Articles 3.1(b) and 3.2 of the Agreement on Subsidies and Countervailing Measures (hereinafter "SCM Agreement").⁸

Specifically, Japan and the EU argued that the measures are inconsistent with Canada's obligations under Articles III:4 and III:5 of GATT 1994 because they appear to be laws, regulations or requirements affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of equipment for renewable energy generation facilities that accord less favorable treatment to imported equipment than that accorded to like products originating in Ontario; that the measures could be internal quantitative regulations relating to the mixture, processing or use of a specified amount or proportion of equipment for renewable energy generation facilities which require that equipment for renewable energy generation facilities be supplied from Ontario sources; and that the measures appear to require the mixture, processing or use of equipment for renewable energy generation facilities supplied from Ontario in specified amounts or proportions, being applied so as to afford protection to Ontario production of such equipment, contrary to the principles established by Article III:1 of GATT 1994.⁹

Japan and the EU also claimed that the measures appear to be inconsistent with Article 2.1 of the TRIMs Agreement because they appear to

⁶ Statistics summarized according to *ibid* (Minimum Required Domestic Content Levels for Wind and Solar PV FIT Contracts).

⁷ *Ibid* at para 36.

⁸ *Canada – Measures Relating to the Feed-in Tariff Program* (Dispute Settlement: Dispute DS426) online: WTO <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds426_e.htm> (Case Summary).

⁹ *Ibid*.

be trade-related investment measures that are inconsistent with the provisions of Article III of GATT 1994.¹⁰ Finally, they alleged that it appears that a subsidy is granted under the measures because there would be a financial contribution or a form of income or price support, and a benefit is thereby conferred.¹¹ It is also claimed that the subsidy would be a prohibited subsidy under Articles 3.1(b) and 3.2 of the SCM Agreement because it appears to be provided “contingent ... upon the use of domestic over imported goods”, namely, contingent upon the use of equipment for renewable energy generation facilities produced in Ontario over such equipment imported from countries such as Japan and the EU.¹²

B. Final findings of the Panel

The Panel was established as requested by the EU and Japan in January 2011 and June 2011 respectively. It found that Canada had not established that it was entitled to rely upon Article III:8(a) of GATT 1994 because the Government of Ontario’s procurement of electricity under the FIT Program was undertaken “with a view to commercial resale”.¹³ The Panel furthermore found that the challenged measures fell within the scope of paragraph 1(a) of the Illustrative List under the TRIMs Agreement. It thereby concluded that Japan and the EU had demonstrated that the challenged measures were inconsistent with Canada’s obligations under Article 2.1 of the TRIMs Agreement and Article III:4 of GATT 1994. As regards the prohibited-subsidy claims of Japan and the EU under Articles 3.1(b) and 3.2 of the SCM Agreement, the Panel majority dismissed the allegations on the grounds that the complainants had failed to establish the existence of a subsidy.¹⁴

C. Final findings of the Appellate Body

Both the complainants and the respondent notified the DSB in February 2013 of their decisions to appeal to the Appellate Body certain issues of law covered in the panel report and certain legal interpretations

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

developed by the Panel.¹⁵ In its report, the Appellate Body found that the challenged measures were not covered by Article III:8 of GATT 1994 and that, consequently, the Panel's finding that the Minimum Required Domestic Content Levels prescribed under the FIT Program and related FIT and microFIT Contracts were inconsistent with Article 2.1 of the TRIMs Agreement and Article III:4 of GATT 1994, stood.¹⁶

With regard to the appeal relating to Article 1.1(a) of the SCM Agreement, the Appellate Body upheld the Panel's finding that the FIT Program and related FIT and microFIT Contracts were government "purchases [of] goods" within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement. It rejected the complainants' appeal that the challenged measures may also be characterized as "direct transfer[s] of funds" or "potential direct transfers of funds" under Article 1.1(a)(1)(i) of the SCM Agreement, but declined to make such a finding itself.¹⁷

As regards the complainants' appeal relating to Article 1.1(b) of the SCM Agreement, the Appellate Body reversed the Panel's finding that Japan and the EU failed to establish that the FIT Program and related FIT and microFIT Contracts confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement, because the *Panel* erred in defining the relevant market and in its benefit analysis.¹⁸ Nonetheless, the Appellate Body found itself unable to complete the analysis in that regard and in the regard as to whether Canada acts inconsistently with Articles 3.1(b) and 3.2 of the SCM Agreement.¹⁹ In conclusion, the Appellate Body recommended that the DSB request Canada to bring its measures challenged into conformity with its obligations under those Agreements.²⁰

D. Implementation of Canada

Canada informed the DSB on June 5, 2014, that the Government of Ontario had complied with the DSB recommendations and rulings by (i) no longer subjecting large renewable electricity procurements to domestic requirements; and (ii) significantly lowering the domestic content requirements for small and microFIT procurement of wind and solar

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Supra* note 1 at 7.168(a)(i).

¹⁸ Case Summary, *supra* note 8.

¹⁹ *Ibid.*

²⁰ *Ibid.*

electricity under the FIT Program.²¹ The Minister of Energy, Government of Ontario directed the OPA on July 25, 2014 to not include any domestic content requirements in any FIT Contracts signed by the OPA after July 25, 2014.²² The OPA accordingly posted on its website version 3.0.1 of the FIT Contract, which does not include any domestic content requirements, and declared that all successful Applicants that were included on the July 30, 2014 Contract Offer List will receive version 3.0.1 of the FIT Contract.²³

It looks as if a perfect period has been drawn under *Canada – Renewable Energy* at this point; but an examination of the analysis and intermediate findings of the Appellate Body thereunder, especially those as to the subsidization claims, may lead to an observation to the contrary, because the pertinent analysis and findings of the Appellate Body – even though uncompleted – could provide more incentives for the stakeholders to bring further complaints about the FIT Program at issue.

II. The Subsidization Claims: Unsupported but Far-reaching

Both the Panel and the Appellate Body declined the subsidization claims raised by Japan and the EU, but on quite different grounds. In particular, the lingering reasoning and findings of the Appellate Body as to the issue, which are scrutinized in this part, indicate, not only that no all-clear signal is in place for the FIT Program even after Canada’s full implementation of the DSB recommendations and rulings, but also that the chances to successfully launch further complaints about the FIT program may have noticeably increased.

A. The Characterization of the Measures at Issue

Japan and the EU argued that the guaranteed payment of the FIT and microFIT Contract rates amounts to a “financial contribution” in the form of a “direct transfer of funds” or a “potential direct transfer of funds” under Article 1.1(a)(1)(i) of the SCM Agreement, or alternatively, a form of “income or price support” within the meaning of Article 1.1(a)(2) of the SCM

²¹ *Ibid.*

²² Ontario Power Authority, *New FIT Contract Version 3.0.1 Posted* (August 14, 2014), online: Ontario Power Authority <<http://fit.powerauthority.on.ca/program-updates/newsroom/newsroom-2014/august-14-2014-new-fit-contract-version-3-0-1>>.

²³ *Ibid.*

Agreement.²⁴ Canada alleged that the FIT Program and its related contracts can only be properly legally characterized as financial contributions in the form of “government purchases [of] goods” within the meaning of Article 1.1(a)(iii) of the SCM Agreement.²⁵ Having concluded that the appropriate legal characterization to be given to the FIT Program, and the FIT and microFIT Contracts, is “government purchases [of] goods” under Article 1.1(a)(1)(iii) of the SCM Agreement, the Panel did not agree with the complaints that the measures can *also* be legally characterized as “direct transfer[s] of funds” or “potential direct transfers of funds” under Article 1.1(a)(1)(i) of the SCM Agreement. On the grounds of judicial economy, the Panel made no findings in respect of the complainants’ allegations that the challenged measures may be legally characterized as “income or price support” under Article 1.1(a)(2) of the SCM Agreement.²⁶

Despite the fact that the Appellate Body (i) upheld the Panel’s finding that the FIT Program and related FIT and microFIT Contracts can be characterized as government “purchases [of] goods” and (ii) rejected the complainants’ appeal that the challenged measures may also be characterized as “direct transfer[s] of funds” or “potential direct transfers of funds”, it declared moot and of no legal effect the Panel’s finding that “government ‘purchases [of] goods’ could [not] also be legally characterized as ‘direct transfer[s] of funds’ without infringing [the] principle [of effective treaty interpretation]”, inasmuch as it negates the possibility that a transaction may fall under more than one type of financial contribution under Article 1.1(a)(1) of the SCM Agreement.²⁷ In other words, the Appellate Body affirmed the possibility to characterize the measures at issue with having a multifaceted nature under Article 1.1(a)(1) of the SCM Agreement. Since the characterization of the measures bears significance for the establishment of a benefit under Article 1.1(b) of the SCM Agreement, as discussed in subsection IIB, *infra*, the Appellate Body’s opinion in this regard actually expands the scope of approaches available for the complainants to establish the existence of a benefit.

Japan and the EU also claimed that the measures at issue may constitute “income or price support” under Article 1.1(a)(2) of the SCM

²⁴ *Canada – Renewable Energy*, Panel Report, *supra* note 1 at paras 7.169, 7.176.

²⁵ *Ibid* at para 7.181.

²⁶ *Ibid* at paras. 7.243-7.249.

²⁷ Case Summary, *supra* note 8.

Agreement.²⁸ The Panel exercised judicial economy by declining to adjudicate on this claim, on the ground that, “the arguments the complainants have advanced to support their allegations about the extent to which the challenged measures confer a ‘benefit’, when they are characterized as ‘income or price support’ . . . , are essentially the same as those examined and rejected by the Panel”, and therefore “it is [not] necessary, for the purpose of satisfactorily resolving the complainants’ subsidy, to also decide [the issue].”²⁹

The Appellate Body rejected, afterwards, Japan’s appeal that the Panel exercised false judicial economy in that regard, on the grounds that Japan did not distinguish between situations where the measures would be characterized as a “financial contribution” and as “income or price support”.³⁰ It found that Japan “focused on requesting the Panel to make a recommendation that Canada ‘withdraw its prohibited subsidies without delay’.”³¹ “Thus, the thrust of Japan’s claim concerned the existence of prohibited subsidies and the specific remedy associated with such finding, rather than the specific characterization of the challenged measures as financial contribution and/or income or price support.”³²

The Appellate Body furthered the Panel’s analysis by indicating that, even though the characterization of a transition under Article 1.1(a)(1) or 1.1(a)(2) of the SCM Agreement may have implications for the manner in which the determination of a benefit under Article 1.1(b) of the SCM Agreement is conducted, in order to justify the claims of characterizing the measures at issue as “income or price support” under Article 1.1(a)(2) of the SCM Agreement,³³ Japan should elaborate “whether and in which way the benefit analysis would have been different, or would have led to a different outcome, if the Panel had characterized the FIT [Program] and Contracts as ‘income or price support’ instead of as a ‘financial contribution[.]’” rather than founding its benefit argument on “the same benchmarks in both situations”.³⁴ To sum up the Appellate Body’s reasoning, the measures at issue could be characterized with having a multifaceted nature under

²⁸ *Canada – Renewable Energy*, Panel Report, *supra* note 1 at para 7.249

²⁹ *Ibid.*

³⁰ *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* (2013), WT/DS412/AB/R (the same as *Canada – Measures Relating to the Feed-In Tariff Program* (2013), WT/DS426/AB/R) at para 5.136 (*Canada – Renewable Energy*, Appellate Body Report).

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.* at para 5.137.

³⁴ *Ibid.*

subparagraphs (i) through (iv) of Article 1.1(a)(1) of the SCM Agreement; they could even be characterized simultaneously with Article 1.1(a)(1) as “financial contributions” and Article 1.1(a)(2) as “income or price support”, so long as the significance of such differentiation is justified by the complainants. As indicated in the paragraphs that follow, one aspect of the significance of such differentiation may lie in the approach of determining the existence of a benefit under Article 1.1(b) of the SCM Agreement.³⁵

B. The Existence of a Benefit

The Panel concluded that Japan and the EU had failed to establish that the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement.³⁶ It began its analysis by setting out the legal standard for determining the existence of a benefit under that article – namely, acknowledging that Article 14(d) of the SCM Agreement provides useful context for such a determination.³⁷ The Panel found that the “Ontario prices on the basis of which the complainants had made their case of benefit – namely, the Hourly Ontario Electricity Price (HOEP) and all of the HOEP-derivatives advanced by the complainants” could not serve as appropriate benchmarks for the purpose of the benefit analysis.³⁸ The Panel also rejected four benchmarks from out-of-province electricity markets such as “Alberta, in Canada, and New York State, New England, and the Mid-Atlantic region, in the United States – submitted by the complainants as proxies for the wholesale electricity market price in Ontario.”³⁹ After reviewing the evidence on the record, the Panel found that the information available was “insufficient to determine the average cost of capital in Canada for projects with a risk profile comparable to the challenged FIT and microFIT Contracts during the relevant period”.⁴⁰

The Appellate Body reversed the Panel’s finding that Japan and the EU failed to establish that the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement, on the ground that the Panel erred in defining the relevant market and in its benefit analysis.⁴¹

³⁵ *Ibid* at paras 5.140-5.144.

³⁶ *Canada – Renewable Energy*, Panel Report, *supra* note 1 at para 7.328.

³⁷ *Canada – Renewable Energy*, Appellate Body Report, *supra* note 30 at para 5.148.

³⁸ *Ibid* at para 5.151.

³⁹ *Ibid* at para 5.152.

⁴⁰ *Ibid* at para 5.157.

⁴¹ *Ibid* at para 5.219.

Meanwhile, the Appellate Body did not consider that there were sufficient factual findings by the Panel and uncontested evidence on the Panel record that would allow itself to complete the legal analysis and conduct a benefit benchmark comparison between the prices of wind-generated electricity under the FIT Program and the prices for wind-generated electricity under the Renewable Energy Supply (RES) initiative.⁴² The Appellate Body declared consequently that it could not determine whether the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement and whether they constitute prohibited subsidies inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement.⁴³

In spite of the uncompleted analysis, the Appellate Body pointed out two main problems with the Panel's analysis of the relevant market for the purpose of the benefit comparison. First, "the Panel should have started, rather than concluding, its benefit analysis with the definition of the *relevant market* which is central to, and a prerequisite for, a benefit analysis under Article 1.1(b) of the SCM Agreement", because the existence of a benefit can properly be established only by comparing the prices of goods and services in the relevant market where they compete.⁴⁴ Second, the Appellate Body observed:

...[O]n the one hand, the fact that electricity is physically identical, regardless of how it is generated, suggests that there is high demand-side substitutability between electricity generated through different technologies. On the other hand, however, there are additional factors that may be used to differentiate on the demand-side, which the Panel did not consider in its analysis of the relevant market. Factors such as the type of contract, the size of the customer, and the type of electricity generated (base-load *versus* peak-load) may differentiate the market. In addition, the Appellate Body noted that the Panel did not analyze supply-side factors in the definition of the relevant market.⁴⁵

Having pointed out the two problems of the analysis of the Panel, the Appellate Body developed, along the observations above, detailed instructions on how to define the relevant market in the present dispute (as discussed in subsection IIIC, *infra*), the compliance with which may somehow enhance the

⁴² *Ibid* at para 5.246.

⁴³ *Ibid* at para 6.1(e)(i)-(iii).

⁴⁴ *Ibid* at para 5.169.

⁴⁵ *Ibid* at paras 5.169-5.171.

chances of successfully launching further complaints about the guaranteed payment under the FIT Program.

C. The Relevance of the Removal of Domestic Content Requirements

Given that the subsidization claims were raised against the backdrop in which the FIT Program embraced domestic content requirements, it is necessary to explore the impact of the removal of domestic content requirements from the FIT Program on prospective subsidization claims before I turn to the substantive analysis of those claims.

The complainants argued that the challenged measures were inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement based on two premises: (i) the guaranteed payment under the FIT and microFIT Contracts constitutes a subsidy, and (ii) the provision of the subsidy was contingent upon the use of domestic over imported goods, which is prohibited by Article 3 of the SCM Agreement.⁴⁶ Since only the second premise involves “domestic content requirements”, the removal of such a requirement can just dismiss this premise – in other words, there would still exist concerns about whether the guaranteed payment under the FIT Program constitutes a subsidy even if the program does not require a minimum domestic content level.

D. Following-up Questions

If subsidization claims are raised against the current FIT Program which eliminates the domestic content requirements, some questions need to be further reflected by the stakeholders in the changing context, including (i) the implications of the characterization of the measures at issue as having multifaceted nature; (ii) the application of Article 14 of the SCM Agreement, which constitutes the relevant context of Article 1.1(b) of the SCM Agreement, in determining the existence of a benefit conferred by the measures at issue; (iii) the furthering of the intermediate findings of the Appellate Body as to the determination of the existence of a benefit under Article 1.1(b) of the SCM Agreement; (iv) the categorization of a subsidy provided through the guaranteed payment under the FIT Program, if

⁴⁶ *Ibid* at para 1.6.

established; and (v) the possibility to justify the provision of that subsidy, if established, by Article XX of GATT 1994.

III. Foresight for the FIT Program: Still Uncompleted but Further

In this part, analysis along the intermediate findings of the Appellate Body as to the subsidization claims against the FIT Program is conducted, for the purpose of assuring that the stakeholders be awakened to, and be fully prepared for, the potential legal disputes.

A. The Characterization of the Measures at Issue

According to the Appellate Body, it is possible for the FIT Program to be characterized as “government purchase [of] goods” under Article 1.1(a)(1)(iii) of the SCM Agreement and “direct transfer[s] of funds” (or “potential direct transfers of funds”) under Article 1.1(a)(1)(i) of the SCM Agreement simultaneously, given that it reversed the Panel’s finding that subparagraphs (i) and (iii) of Article 1.1(a)(1) of the SCM Agreement are “mutually exclusive” on the following grounds.⁴⁷ In *US – Large Civil Aircraft (2nd Complaint)*, the Appellate Body found that Article 1.1(a)(1) of the SCM Agreement, which prescribes subsidies in the form of “financial contributions”, “does not explicitly spell out the intended relationship between the constituent subparagraphs”⁴⁸ and that the structure of this provision “does not expressly preclude that a transaction could be covered by more than one subparagraph”.⁴⁹ Considering that “transaction may be complex and multifaceted. This may mean that different aspects of the same transaction may fall under different types of financial contribution.”⁵⁰

The possibility to characterize the measures at issue with having a multifaceted nature under Article 1.1(a) of the SCM Agreement is significant because the approaches of determining the existence of a benefit conferred by those measures vary in relation to the different aspects of their nature. In *Canada – Renewable Energy*, the claim that the measures at issue constitute a

⁴⁷ *Ibid* at para 5.116 .

⁴⁸ *United States – Measures Affecting Trade in Large Civil Aircraft – Second Complaint* (2012), WT/DS353/AB/R at para 613 (*US – Large Civil Aircraft* (2nd complaint), Appellate Body Report).

⁴⁹ *Ibid*, note 1287 to para 613.

⁵⁰ *Canada – Renewable Energy*, Appellate Body Report, *supra* note 30 at para 5.120.

subsidy was rebutted by the Appellate Body because the existence of a benefit was not successfully proved through neither the approach adopted by the complainants nor that adopted by the Panel – that is, both the complainants and the Panel failed to apply Article 14(d) of the SCM Agreement in the right way. Upon the assumption that the complainants have successfully argued that the measures at issue can also be characterized as “direct transfer[s] of funds” or “potential transfers of funds” under Article 1.1(a)(1)(i) of the SCM Agreement, they can then resort to other approaches of determining the existence of a benefit conferred by measures characterized as “direct transfer[s] of funds” or “potential transfers of funds”, as prescribed by Article 14 of the SCM Agreement – the specific application of which is discussed in subsection IIIC, *infra*.

In effect, the Appellate Body in *Canada – Renewable Energy* did not preclude, either, the possibility to simultaneously characterize the measures at issue as “financial contributions” under Article 1.1(a)(1) of the SCM Agreement and “income or price support” under Article 1.1(a)(2) of the SCM Agreement. As discussed in subsection IIA, *supra*, the ground on which the Appellate Body rejected Japan’s claim that the Panel erred in exercising judicial economy by declining to adjudicate the issue as to whether the measures at issue constitute “income or price support” is that Japan failed to establish that the characterization of the measures at issue as “income or price support” would lead to different legal consequences from those of the characterization as “financial contributions”. In other words, the need to characterize the measures at issue as both “financial contribution” and “income or price support” should be justified by perceived differences in the legal approaches or consequences in the two situations, before substantive analysis is undertaken by the Panel or the Appellate Body as to whether the measures at issue can also be characterized as “income or price support”.

B. The Relevance of Article 14 of the SCM Agreement

As both the Panel and the Appellate Body agreed in *Canada – Renewable Energy* that Article 14(d) of the SCM Agreement “suggests one way to demonstrate that the challenged measures [that are characterized as ‘government purchase [of] goods’ confer a benefit”,⁵¹ it is necessary to solidify the relevance of Article 14 of the SCM Agreement to the determination of

⁵¹ *Ibid* at para 5.162.

the existence of a benefit conferred by measures otherwise characterized – say, as “direct transfer[s] of funds” or “potential direct transfers of funds”.

In general, Article 14 of the SCM Agreement “is used in countervailing duties cases to calculate the amount of the subsidy in terms of the benefit to the recipient . . . [and] as relevant context to determine whether a subsidy exists.”⁵² The first aspect of the significance of Article 14 of the SCM Agreement is that it affirms the indispensable role of *comparison* in determining the existence of a benefit, as elaborated by the Appellate Body in the following excerpt:

A financial contribution will confer a benefit upon a recipient within the meaning of Article 1.1(b) of the SCM Agreement when it provides an advantage to its recipient. It is well established that the existence of any such advantage is to be determined by comparing the position of the recipient with and without the financial contribution, and that “the marketplace provides an appropriate basis for [making this] comparison”.⁵³

To further strengthen the approach of comparison under Article 14 of the SCM Agreement, the Appellate Body recalled its findings in *Canada - Aircraft* that “advantage” under paragraph 1 of the Illustrative List of the TRIMs Agreement and “benefit” under Article 1.1(b) of the SCM Agreement is different, because “[i]n any event, a finding of an ‘advantage’ under the TRIMs Agreement does not require a comparison with a benefit benchmark in the relevant market, as required for a benefit analysis under the SCM Agreement.”⁵⁴

The second aspect of the significance of Article 14 of the SCM Agreement lies in that, if the FIT Program is also characterized as “direct transfer[s] of funds” or “potential direct transfers of funds”, Article 14(a) of the SCM Agreement – which relates to “government provision of equity capital”, one form of “direct transfer[s] of funds” or “potential direct transfers of funds” under Article 1.1(a)(1)(i) of the SCM Agreement – may be relevant. The benchmark adopted by Article 14(a) is “investment decision”, which apparently pertains to the FIT Program because the program has been recognized as constituting “investment” by the Panel in *Canada – Renewable Energy* on the ground that “one of the aims of the FIT program, and the FIT

⁵² *Ibid* at para. 5.163.

⁵³ *Canada – Renewable Energy*, Panel Report, *supra* note 1 at para. 7.271.

⁵⁴ *Canada – Renewable Energy*, Appellate Body Report, *supra* note 30 at para. 5.208.

and microFIT Contracts, is to encourage investment in the local production of equipment associated with the renewable energy generation in the Province of Ontario”.⁵⁵

C. The Determination of the Existence of a Benefit

In *Canada – Renewable Energy*, the Appellate Body clarified the allocation of tasks between the Panel and the complainants as to making a *prima facie* case of the existence of a benefit and employing the evidence and arguments to conduct analysis. For measures characterized as “government purchase [of] goods”, a determination of the existence of a benefit under Article 1.1(b), read in the context of Article 14(d) of the SCM Agreement, requires a comparison between actual remuneration and a market-based benchmark or proxy.⁵⁶ “In making a *prima facie* case of benefit under Article 1.1(b) of the SCM Agreement, the burden was on the complainants to identify a suitable benchmark and to make adjustments, where necessary.”⁵⁷ Nevertheless, “[p]rovided the complainants had presented relevant evidence and arguments to make a *prima facie* case, it was for the Panel to analyze the appropriate benchmark or proxy.”⁵⁸ Accordingly, the Appellate Body reversed the Panel’s finding that the complainants failed to establish that the measures challenged confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement, on the grounds that the complainants had presented arguments and evidence which could have allowed the Panel to conduct its benefit analysis on the basis of the appropriate benefit benchmark that it evoked in its reports.⁵⁹

The Appellate Body further underscored that, even though the complainants had focused their main arguments on inappropriate benchmarks or benefit approaches, the Panel should *not* “have limited its analysis to the proposed benefit approach, and/or to the benchmarks that were part of the complainants’ principal argument, in a situation where the evidence and the arguments presented by the complainants, and the arguments in response by [the respondent], may have allowed it to develop its own reasoning and to make findings based on a benchmark”.⁶⁰

⁵⁵ *Canada – Renewable Energy*, Panel Report, *supra* note 1 at para 7.109.

⁵⁶ *Canada – Renewable Energy*, Appellate Body Report, *supra* note 30 at paras 5.162, 5.136, 5.165.

⁵⁷ *Ibid* at para 5.216.

⁵⁸ *Ibid* at para 5.215.

⁵⁹ *Ibid* at para 5.218.

⁶⁰ *Ibid* at para 5.215.

Having affirmed that the evidence and arguments presented by the complainants may prove to be sufficient if the Panel had conducted its analysis along the right direction, the Appellate Body subsequently demonstrated how to conduct an analysis of “the relevant market”, which is essential to the determination of the adequacy of remuneration in relation to the “prevailing market conditions” under Article 14(d) of the SCM Agreement. The approach suggested by the Appellate Body to define the relevant market can be addressed in several respects. First, supply-side factors should be taken into account in defining the relevant market.⁶¹ According to the Appellate Body, had the Panel undertaken an analysis of supply-side factors, “the significance of government intervention in the electricity market to the definition of the relevant market would have become evident.”⁶² Such an analysis would have let the Panel reach different conclusions, particularly whether “it was of the view that the competitive wholesale electricity market was not the appropriate focus of the benefit analysis in these disputes.”⁶³

The Appellate Body continued that the importance attached to supply-side factors could highlight the role of the definition of the energy supply-mix in defining the relevant market, as explained in the following excerpt:

[S]upply-side factors suggest that important differences in cost structures and operating costs and characteristics among generating technologies prevent the very existence of windpower and solar PV generation, absent government definition of the energy supply-mix of electricity generation technologies. This, in turn, would have lead the Panel to conclude that the benefit comparison under Article 1.1(b) should not be conducted within the competitive wholesale electricity market as a whole, but within *competitive markets for wind- and solar PV-generated electricity*, which are created by the government definition of the energy supply-mix.⁶⁴

Noting that the Panel did not “explore the possibility of an electricity supply-mix benchmark based on the evidence submitted by the complainants regarding previous renewable energy programs in Ontario [(Renewable Energy Supply (RES))] and out-of-province (Quebec)”,⁶⁵ the Appellate Body

⁶¹ *Ibid* at para 5.171.

⁶² *Ibid* at para 5.172.

⁶³ *Ibid*.

⁶⁴ *Ibid* at para 5.178 (emphasis added).

⁶⁵ *Ibid* at para 5.218.

emphasized that the government's management of the energy supply-mix plays a key role in the situation that the regulation of electricity markets by governments is guided by "long-term considerations aimed at ensuring that consumers have stable access to electricity in the coming years and increasingly from renewable sources."⁶⁶

According to the Appellate Body, the second aspect of the analysis that should be conducted by the Panel as to the relevant market is the role of government intervention in creating a market for renewable energy generation. Having supported the Panel's rejection of the complainants' "but for" test by reiterating that "the definition of a certain supply-mix by the government cannot *in and of itself* be considered as conferring a benefit within the meaning of Article 1.1(b) of the SCM agreement",⁶⁷ the Appellate Body held that "a market-based approach to benefit benchmarks [does not] exclude . . . taking into account situations where governments intervene to create markets that would otherwise not exist."⁶⁸ Therefore, "a government's choice to include windpower and solar PV generation in the energy supply-mix should not be considered as preventing the identification or adaptation of competitive benefit benchmarks for purposes of an analysis under Article 1.1(b) of the SCM Agreement."⁶⁹

The third aspect of the analysis that should have been conducted by the Panel as to the definition of the relevant market, as indicated by the Appellate Body, is the affirmation of the observation that, at the wholesale level, where the government's purchase decisions are shaped by its definition of the energy supply-mix, electricity from different generation technologies – whether conventional or renewable – is not substitutable.⁷⁰

In Ontario, "Electricity supply mix" means, "for an electricity product, the combination of power sources used to generate the product."⁷¹ According to the Supply Mix Directive of Feb 17, 2011, "[b]ased on forecast assessments of what the system can accommodate, the OPA shall plan for 10,700 MW of renewable energy capacity, excluding hydroelectric, by 2018."⁷² This target was adjusted by the end of 2013. The Ministry of Energy,

⁶⁶ *Ibid* at para 5.187 (emphasis added).

⁶⁷ *Ibid* at paras. 5.172, 5.174, 5.175.

⁶⁸ *Ibid* at para 5.185.

⁶⁹ *Ibid* at para 5.186.

⁷⁰ *Ibid* at para 5.176.

⁷¹ Ontario Energy Board Act, Electricity Retailing - Disclosure to Consumers, O Reg 416/99 (1998), art. 1.

⁷² Ministry of Energy, Government of Ontario, 2011 Supply Mix Directive at 3, online: Ontario Power Authority <http://www.powerauthority.on.ca/sites/default/files/new_files/IPSP%20directive%2020110217.pdf>.

Government of Ontario released Ontario's Long-Term Energy Plan by the Numbers on December 2, 2013, which slowed down somehow the paces of expanding the renewable energy generation. According to the plan, 10,700 megawatts of wind, solar and bioenergy will be online by 2021.⁷³ "The 2025 forecast for Ontario's energy mix is 42 per cent nuclear, 46 per cent renewable and 12 per cent natural gas. None of Ontario's electricity will come from coal."⁷⁴ In contrast, the statistics released by the Ministry of Energy show that, in 2013, solar and wind sources account for 0.8% and 3.9%, respectively, of the electricity provided⁷⁵, which indicates a giant gap between the current market and the market defined by the energy mix.

Taking that electricity from different generation technologies is not substitutable at the wholesale level in Ontario, the Appellate Body finally formulated, as the fourth aspect of the analysis that has been expected from the Panel, that, where the government has defined an energy supply-mix that includes windpower and solar PV electricity generation technologies, "a benchmark comparison for purposes of a benefit analysis for windpower and solar PV electricity generation should be with the terms and conditions that would be available under market-based conditions for each of these technologies, taking the supply-mix as a given."⁷⁶ Therefore, to establish the existence of a benefit upon the characterization of the measures at issue as "government purchase [of] goods", the complainants only need to follow the four steps sorted out above by collecting and presenting persuasive evidence and applying the formulation designed by the Appellate Body.

If the measures are characterized also as "direct transfer[s] of funds" or "potential direct transfers of funds", the complainants may then resort to Article 14(a) of the SCM Agreement, which provides an approach different from that under Article 14(d) of the SCM Agreement as to determining the existence of a benefit. Article 14(a) of the SCM Agreement does not provide a precise method for calculating benefit. It simply states that a benefit is conferred "if the investment decision can be regarded as inconsistent with the usual investment practice . . . of private investors in the territory of that

⁷³ Ministry of Energy, Government of Ontario, *Ontario's Long-Term Energy Plan by the Numbers*, online: Ontario <<http://news.ontario.ca/mei/en/2013/12/ontarios-long-term-energy-plan-by-the-numbers.html>>.

⁷⁴ Ministry of Energy, Government of Ontario, *Ontario's Supply Mix*, online: Ontario <<http://news.ontario.ca/mei/en/2013/12/ontarios-supply-mix.html>>.

⁷⁵ Ministry of Energy, Government of Ontario, *Ontario's System-Wide Electricity Supply Mix: 2013 Data*, online: Ontario Energy Board <http://www.ontarioenergyboard.ca/oeb/_Documents/Regulatory/2013_Supply_Mix_Data.pdf>.

⁷⁶ *Canada – Renewable Energy*, Appellate Body Report, *supra* note 30 at para 5.190.

Member.”⁷⁷ The focus in Article 14(a) on the “investment decision” is crucial “because it identifies what is to be compared to a market benchmark, and when that comparison is to be situated.”⁷⁸ As for the possible existence of both inside and outside investors, the Appellate Body in *Japan – DARMs* did “not consider that there are different standards applicable to inside and to outside investors. There is but one standard – the market standard – according to which rational investors act.”⁷⁹ Under Article 14(a), the benchmark is “the usual investment practice of private investors”,⁸⁰ which means “common or customary conduct of private investors”.⁸¹

It is worth noting that Article 14 only constitutes relevant context for Article 1.1(b) of the SCM Agreement if the recipient has received a “financial contribution” – which is prescribed in Article 1.1 (a)(1) of the SCM Agreement – on terms more favorable than those available to the recipient in the market.⁸² Nonetheless, in spite of the absence of WTO jurisprudence on how to demonstrate the existence of a benefit conferred by measures characterized as “income or price support” under Article 1.1(a)(2) of the SCM Agreement, the Appellate Body highlighted in *Canada – Aircraft* that if a recipient becomes “better off” by receiving a financial contribution, or *income or price support*, directly or indirectly provided by a government on terms *more favorable* than the terms available in the market place, the government is deemed to confer a benefit and thus a subsidy.⁸³

D. The Categorization of the Alleged Subsidy

As revealed in subsection IIC, *supra*, the removal of domestic content requirements from the FIT Program may largely dismiss the claims made based on Articles 3.1(b) and 3.2 of the SCM Agreement, but does not affect significantly the possible challenges on the FIT Program as providing “actionable subsidies”. Under the SCM Agreement, the subsidies that cause

⁷⁷ *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea* (2005), WT/DS299/R at para 7.211 (EC – *Countervailing Measures on DRAM Chips*, Panel Report).

⁷⁸ *European Communities – Measures Affecting Trade in Large Civil Aircraft* (2011), WT/DS316/AB/R at para 999 (EC and certain member States – *Large Civil Aircraft*, Appellate Body Report).

⁷⁹ *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea* (2007), WT/DS336/AB/R at para 172 (*Japan – DRAMs (Korea)*, Appellate Body Report).

⁸⁰ *Ibid.*

⁸¹ EC and certain member States – *Large Civil Aircraft*, Appellate Body Report, *supra* note 78.

⁸² *Japan – DRAMs (Korea)*, Appellate Body Report, *supra* note 79 at para 173.

⁸³ *Canada – Measures Affecting the Export of Civilian Aircraft* (2000), WT/DS70/AB/R at paras 152-161 (*Canada – Aircraft*, Appellate Body Report).

adverse effect to the interests of other Members are actionable.⁸⁴ The so-called “adverse effect” within the meaning of Article 5 of the SCM Agreement includes (i) injury to the domestic industry of another Member; (ii) 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; and (iii) serious prejudice to the interests of another Member. In the present case, the complainants may focus their arguments on whether the alleged subsidy causes serious prejudice to the interests of another country, since the guaranteed payment under the FIT Program apparently has little relevance to (a) the exportation that may cause injury to domestic industry of another country or (b) the benefits of concessions bound under Article II of GATT 1994. On the presumption that the guaranteed payment under the FIT Program is challenged as actionable subsidy that causes serious injury to the interests of another country, the following two issues should be addressed by the stakeholder.

First, the stakeholders should cast light on the issue as to whether the electricity generated by different technologies constitutes “like products in the same market”. In *Canada – Renewable Energy*, despite the fact that the Appellate Body held that electricity generated by different technologies is not substitutable at the wholesale level where the government’s decisions of purchase of electricity are shaped by the energy supply-mix, it did not deny that final consumers at the retail level may not distinguish between electricity on the basis of generation technology because all electricity fed into the grid is blended regardless of the energy generation technology used⁸⁵ – that is, electricity generated by different technologies can be regarded as substitutable at the retail level. In addition, the Appellate Body acknowledged that, in a market *without* government intervention, conventional generators may have larger economies of scale and exercise price constraints on windpower and solar PV generators; but it would be very unlikely, if not impossible, that the former may exercise any form of price constraint on the latter.⁸⁶ Nonetheless, the Appellate Body did not further its analysis as to whether conventional generators and windpower and solar PV generators can mutually exercise price constraints – that is, to compete with each other – in a market *with* government intervention, the analysis of which is left accordingly for the complainants to complete.

⁸⁴ WTO, *Agreement on Subsidies and Countervailing Measures*, art. 5.

⁸⁵ *Canada – Renewable Energy*, Appellate Body Report, *supra* note 30 at para 5.176.

⁸⁶ *Ibid* at para 5.174.

One fact that the complainants could rely on when completing the analysis in that regard is that, the electricity prices under the FIT Program are constituents of prices received by Independent Power Producers (IPPs) who generate around 40% of Ontario's electricity supply - i.e., prices that are negotiated or set under different types of OPA initiatives and contracts including the Clean Energy Supply ("CES") contracts for natural gas; the RES Request; the Hydroelectric Contract Initiative ("HCI") for grid-connected non-OPG-owned hydro facilities; the Combined Head and Power ("CHP") Requests; the Renewable Energy Standard Offer Program ("RESOP"); and the FIT Program.⁸⁷

As for "the same market" issue, the burden of proof would be fulfilled by the complainants without much difficulty, given that electricity generated by different technologies is blended in the same grid for retail. As found by the Panel, Ontario's electricity system has been described as a partially liberalized "hybrid" system where both public and private entities participate in core generation, transmission, distribution and retail activities.⁸⁸ As of year-end 2010, generation capacity in Ontario can be roughly separated into three groups of generators: (i) the government-owned assets of Ontario Power Generation (OPG), which are the former generation assets of Ontario Hydro; (ii) Non-Utility Generators (NUGs), which are private generators that entered into supply contracts with Ontario Hydro in the 1980s and 1990s; and (iii) IPPs, which comprise all the other generators in Ontario that have started to operate since the wholesale market was restructured.⁸⁹ Apparently, these groups of generators share the electricity retail market in Ontario.

The second issue that the stakeholders need to prove in challenging the FIT Program as providing actionable subsidy is that it causes "serious prejudice" to the interests of another country. Article 6.2 of the SCM Agreement provides that 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 Article 6.3 of the SCM Agreement - namely, displacement or impedance, price undercutting, price suppression/depression, and lost sales. The complainants will need to establish causation required under Article 6.3 of the SCM Agreement in any

⁸⁷ *Canada - Renewable Energy*, Panel Report, *supra* note 1 at paras 7.25, 7.26, 7.28.

⁸⁸ *Ibid* at para 7.25.

⁸⁹ *Ibid* at para 7.26.

given case⁹⁰ – namely, to prove that there is a “genuine and substantial relationship of cause and effect” between the alleged subsidy and the enumerated market phenomenon.⁹¹

If the complainants argue that serious prejudice takes the form of “displacement” or “impedance” within the meaning of Articles 6.3(a) and 6.3(b) of the SCM Agreement, they “need not demonstrate a decline in sales in order to demonstrate displacement or impedance”.⁹² As inherent in the ordinary meaning of those terms, “displacement relates to a situation where sales volume has declined, while impedance relates to a situation where sales which otherwise would have occurred were impeded.”⁹³

If the complainants argue that serious prejudice takes the form of “price undercutting”, “price suppression”, “price depression”, or “lost sales”, under Article 6.3(d) of the SCM Agreement, “[a] precise, definitive quantification of the subsidy is not required.”⁹⁴ According to the Appellate Body in *US – Upland Cotton*, the text of Article 6.3(c) and the relevant context of the SCM Agreement do not impose an obligation on a panel to quantify the amount of the challenged subsidy,⁹⁵ which may further reduce the burden of proof to be assumed by the complainants.

E. Environment-Related Policy

Japan and the EU had underscored throughout the proceedings in *Canada – Renewable Energy* that they did not question the legitimacy of the objectives pursued by the Government of Ontario through the FIT Program of “reducing carbon emissions and promoting the generation of electricity from renewable energy sources.”⁹⁶ In particular, Japan acknowledged that “the government’s intervention as such is to internalize the positive

⁹⁰ *Korea – Measures Affecting Trade in Commercial Vessels* (2005), WT/DS273/R at para 7.560 (*Korea – Commercial Vessels*, Panel Report).

⁹¹ *EC and certain member States – Large Civil Aircraft*, Appellate Body Report, *supra* note 78 at para 1232.

⁹² *Indonesia – Certain Measures Affecting the Automobile Industry* (1998), WT/DS64/R at para 14.218 (*Indonesia – Autos*, Panel Report).

⁹³ *Ibid.*

⁹⁴ *United States – Subsidies on Upland Cotton* (2005), WT/DS267/AB/R at para 467 (*US – Upland Cotton*, Appellate Body Report).

⁹⁵ *Ibid.* at para 465. “The provisions of the SCM Agreement regarding quantification of subsidies reveal that the methodological approaches to quantification may be quite different, depending on the context and purpose of quantification. The absence of any indication in Article 6.3(c) as to whether one of these methods, or any other method, should be used suggests . . . that no such precise quantification was envisaged as a necessary prerequisite for . . . analysis under Article 6.3(c).” *Ibid.*

⁹⁶ *Canada – Renewable Energy*, Panel Report, *supra* note 1 at para 7.7.

externalities of renewable energy generation technologies”.⁹⁷ Given this context, Canada may consider the possibility to justify the measures under the FIT Program – even if they are held inconsistent with its pertinent WTO obligations – by applying Article XX “General Exceptions” of GATT 1994, especially Article XX(g) which provides for measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption”.

The application of Article XX has to meet a two-tier test – that is, the measure at issue must not only come under one or another of the particular exceptions (i.e., paragraphs (a) to (j)) listed under Article XX, but also satisfy the requirements imposed by the opening clauses of Article XX.⁹⁸ Accordingly, in order to employ Article XX of GATT 1994, Canada should, at the outset, prove that the measures at issue fall within the meaning of Article XX(g). Given that “mineral” natural resources are indisputably “exhaustible”, the measures at issue under the FIT Program which secures the sustainability of electricity markets in the long term by reducing reliance on fossil fuels could be recognized as relating to “exhaustible natural resources” without any dispute. As for “relating to”, the Appellate Body clarified in *US – Gasoline* that the term does not embrace the concept of “necessary”, and pointed out that the term was equivalent to “primarily aimed at”,⁹⁹ – which also could have reduced the burden of proof to be assumed by the complainants.

The policy background of the FIT Program can easily reveal the fact that the FIT Program “primarily aimed at” the conservation of exhaustible natural resources. As reaffirmed by the Panel in *Canada – Renewable Energy*, the FIT Program was formally launched by the OPA on 1 October 2009 as the third in a series of initiatives adopted by the Government of Ontario since 2004 to increase the supply of electricity produced from renewable sources of energy into the Ontario electricity system in order to diversify its supply-mix and help replace coal-fired facilities.¹⁰⁰ Four objectives of the FIT Program as described by the *Ontario Minister of Energy and Infrastructure* are to (i) “increase capacity of renewable energy supply to ensure adequate

⁹⁷ *Ibid.*

⁹⁸ *United States – Standards for Reformulated and Conventional Gasoline* (1996), WT/DS2/AB/R, at 22 (US – Gasoline, Appellate Body Report).

⁹⁹ *Ibid.* at 16, 18.

¹⁰⁰ *Canada – Renewable Energy*, Panel Report, *supra* note 1 at para 7.65.

generation and reduce emissions”; (ii) “introduce a simpler method to procure and develop generating capacity from renewable sources of energy”; (iii) “enable new green industries through new investment and job creation”; and (iv) “provide incentives for investment in renewable energy technologies”.¹⁰¹

In order to invoke Article XX(g) of GATT 1994, Canada also needs to argue that the measures at issue are “made effective in conjunction with” restrictions on domestic production or consumption. The Appellate Body found in *US – Gasoline* that “the phrase ‘in conjunction with’ may be read quite plainly as ‘together with’ or ‘jointly with’. . . . [which means] a requirement of even-handedness in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources.”¹⁰²

Called on by the two-tier test, Canada, once having characterized the measures at issue under Article XX(g), should then appraise the measures under the chapeau of Article XX which addresses the manner in which the measures at issue are applied.¹⁰³ In general, Canada has to prove that the measures at issue “are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade”.¹⁰⁴

Concluding Remarks

Canada has fully implemented the DSB recommendations and rulings in *Canada – Renewable Energy* by removing domestic content requirements from the FIT Program, which were challenged by Japan and the EU and found inconsistent with Article III of GATT 1994 and Article 2 of the TRIMs Agreement by the Panel and the Appellate Body. The removal of domestic content requirements, however, could not put an end to the present disputes because (i) it could not substantively dismiss the subsidization claims raised simultaneously in the case, and (ii) the intermediate findings of the

¹⁰¹ *Ibid.*

¹⁰² *US – Gasoline*, Appellate Body report, *supra* note 98 at 20.

¹⁰³ *Ibid.* at 22.

¹⁰⁴ For elaboration on the interpretation of the terms “arbitrary or unjustifiable discrimination” and “disguised restriction on international trade”, see, e.g., *ibid.* at 23, 25; *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (1998), WT/DS58/AB/R, paras. 119-120, 150; *Brazil – Measures Affecting Imports of Retreaded Tyres* (2007), WT/DS332/AB/R, paras. 226-230, 239, 251, 316.

Appellate Body as to those claims may even facilitate further challenges on the measures at issue. In order to make itself be awakened to, and be fully prepared for, the potential legal disputes, the government of Canada needs to reflect beforehand on the issues including (a) the implication of the characterization of the measures at issue which have a multifaceted nature; (b) the application of Article 14 of the SCM Agreement - which is held by the Panel and the Appellate Body to constitute the relevant context of Article 1.1(b) of the SCM Agreement - in determining the existence of a benefit conferred by the measures at issue; (c) the determination of the existence of a benefit by furthering the pertinent intermediate findings of the Appellate Body; (d) the categorization of the alleged subsidy, if established; and (e) the possibility to justify the provision of subsidies, if established, by Article XX of GATT 1994.

