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**Feed-in Tariffs for Renewable Energy and the WTO  
Agreement on Subsidies and Countervailing Measures  
- Are Feed-in Tariffs Specific Subsidies?**

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## **Abbreviations**

AB – Appellate Body

DSU – Understanding on Rules and Procedures Governing the Settlement of Disputes

FIT – Feed-in Tariff

GATT – General Agreement on Tariffs and Trade

ICJ Statute – Statute of the International Court of Justice

LDCs – Least Developed Countries

OPA – Ontario Power Authority

SCM Agreement – Agreement on Subsidies and Countervailing Measures

SOE – State-owned Enterprise

WTO Agreement – Marrakesh Agreement Establishing the World Trade Organization

WTO – World Trade Organization

# 1. Introduction

## 1.1 Background

Environmental problems have emerged as among the gravest and most urgent challenges for the international community today. Not least is this true regarding climate change; the acclaimed Stern Review finds that the effects of climate change risk to negatively impact many of the basic needs of human beings around the globe, such as access to water and food production. The review emphasises the magnitude of consequences, some irreversible, should business as usual be continued and urges the global community to take action.<sup>1</sup> The need to act on this matter has also been recognised by states through United Nations Framework Convention on Climate Change and the linked Kyoto Protocol, where states have committed to reduce greenhouse gas emissions.<sup>2</sup> Indeed, to combat climate change decreased emissions of greenhouse gases play an important role. In this respect, reports show that the single largest contributor to climate change through production of greenhouse gases is electricity and heat generation.<sup>3</sup>

In attempts to address climate change many states have introduced programmes to increase the production and use of renewable energy through subsidisation of that particular industry.<sup>4</sup> Notably, the use of green energy subsidies has increased at a high rate in recent years. According to World Energy Outlook 2013, subsidies for renewable energy amounted to 101 billion USD in 2012, an increase by 11 % from 2011.<sup>5</sup> The biggest users of green energy subsidies are the EU and the US, but also another 65

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<sup>1</sup> Nicholas Stern, *The Economics of Climate Change: The Stern Review* (Cambridge University Press 2006) xv.

<sup>2</sup> United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC) and Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162 (Kyoto Protocol).

<sup>3</sup> Nicholas Stern, 'What is the Economics of Climate Change?' (2006) 7 *World Economics* 1, 1.

<sup>4</sup> Mark Wu and James Salzman, 'The Next Generation of Trade and Environment Conflicts: The Rise of Green Industrial Policy' (2013-2014) 108 *Northwestern University Law Review* 401, 419-420.

<sup>5</sup> International Energy Agency, 'World Energy Outlook 2013: Renewable Energy Outlook' (OECD/IEA 2013) 226  
<[http://www.worldenergyoutlook.org/media/weowebbsite/2013/WE02013\\_Ch06\\_Renewables.pdf](http://www.worldenergyoutlook.org/media/weowebbsite/2013/WE02013_Ch06_Renewables.pdf)>  
accessed 4 May 2015.

countries including Canada, Japan, South Korea, Israel, India and China use such subsidies.<sup>6</sup>

Not only are such subsidies prevalent, but have also been proven successful. For instance, the Intergovernmental Panel on Climate Change has deemed subsidies in the form of price support one of the most effective incentives in order to reduce the emission of green house gases.<sup>7</sup> Moreover, while the Kyoto Protocol does not specify which measure states should introduce to achieve the emission reduction goals set out in the treaty, the protocol nevertheless provides a list of policies that states can use to reduce emissions, many of which can be achieved through subsidies.<sup>8</sup> For example, the protocol in article 2(1)(a)(iv) mentions promotion of new and renewable energy.<sup>9</sup>

However, with the increase in the use of subsidisation programmes there has also been a significant rise in disputes in the WTO concerning environmental measures.<sup>10</sup> This can be showcased by a number of cases brought in 2012 alone, including a case brought by Japan and the EU against Canada challenging a feed-in tariff (FIT) programme introduced by Ontario, another case brought by China challenging rebates for renewable energy installations introduced by states in the US, an EU investigation into alleged unfair practices by China's solar panel manufacturers as well as a case against European feed-in tariff programmes by China.<sup>11</sup>

It is not the first time in history the interests of free and fair trade and environmental protection have been set against each other in WTO dispute settlement. Indeed, in their efforts to address different environmental problems states have introduced various measures throughout history, ranging from rules on fishing methods to protect endangered species to introduction of border measures such as carbon taxes to combat climate change, all risking to conflict with international trading rules as they may have

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<sup>6</sup> Wu and Salzman (n 4) 419-420.

<sup>7</sup> Robert Howse, 'Climate Mitigation Subsidies and the WTO Legal Framework: A Policy Analysis' (International Institute for Sustainable Development, May 2010) 12 <[www.iisd.org/pdf/2009/bali\\_2\\_copenhagen\\_subsidies\\_legal.pdf](http://www.iisd.org/pdf/2009/bali_2_copenhagen_subsidies_legal.pdf)> accessed 21 April 2015.

<sup>8</sup> Howse (n 7) 1-2.

<sup>9</sup> Kyoto Protocol article 2(1)(a)(iv).

<sup>10</sup> Wu and Salzman (n 4) 403.

<sup>11</sup> Wu and Salzman (n 4) 403-404.

an impact on trade.<sup>12</sup> While cases concerning measures aimed at protecting the environment were common in the mid 1990s, the disputes then largely concerned the GATT agreement, such as when a group of developing countries challenged environmental conditions imposed by the US on imports of tuna and shrimp.<sup>13</sup> However, in recent years the focus has changed and increasingly the disputes now concern what has been labelled green industrial policy, i.e. policy that includes both environmental benefits as well as protectionist aspects, such as subsidies for renewable energy. In fact, Wu and Salzman note that since 2009, the vast majority of trade and environment disputes are such 'next generation' disputes.<sup>14</sup> Thus, the green industrial policy has given rise to clashes between trade and environmental issues.<sup>15</sup> Wu and Salzman note that, as opposed to the disputes in the 1990s that were largely seen as developed countries trying to improve environmental behaviour by developing states, the disputes with regards to green industrial policy do not exhibit the same divide between developed and developing countries.<sup>16</sup> Instead, the issue of WTO consistency of subsidies for renewable energy is an issue that extends over both developed and developing countries – Brazil, China and India are for instance leaders in different clean energy sectors respectively.<sup>17</sup>

The above-mentioned subsidies for renewable energy can take various forms, such as blending mandates, quotas, portfolio obligations, tax credits and FITs.<sup>18</sup> Operational in more than 65 countries, one of the most common type of subsidies for renewable energy are the so-called FITs, which essentially aim to provide long-term financial incentives for investment in renewable energy through for instance a guaranteed price for production of renewable energy.<sup>19</sup> FITs are particularly common in the EU, with many of the member states operating FIT programmes. Moreover, the German FIT programme has

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<sup>12</sup> See for example *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998) WT/DS58/AB/R <<http://docsonline.wto.org>> (*US - Shrimp*) and Lorand Bartels, 'The WTO Legality of the Application of the EU's Emission Trading System to the EU Emissions Trading System to Aviation' (2012) 23 *The European Journal of International Law* 429.

<sup>13</sup> Wu and Salzman (n 4) 404.

<sup>14</sup> Wu and Salzman (n 4) 442.

<sup>15</sup> Aaron Cosbey, 'Green Industrial Policy and the World Trading System' (Entwined Issue Brief 17, International Institute for Sustainable Development 2013) 3-4 <[www.iisd.org/sites/default/files/pdf/2013/entwined\\_brief\\_green\\_industrial.pdf](http://www.iisd.org/sites/default/files/pdf/2013/entwined_brief_green_industrial.pdf)> accessed 7 April 2015.

<sup>16</sup> Wu and Salzman (n 4) 405.

<sup>17</sup> Sadiq Z. Bigdeli, 'Resurrecting the Dead? The Expired Non-Actionable Subsidies and the Lingering Question of "Green Space"' (2011) 8 *Manchester Journal of International Economic Law* 2, 3.

<sup>18</sup> International Energy Agency (n 5) 225.

<sup>19</sup> Wu and Salzman (n 4) 419.

often been pointed out as a particularly successful example as it has played an important part in creating one of the world's strongest renewable energy industries and has been beneficial for the environment.<sup>20</sup>

In many of these 'next generation' cases the claimants have challenge measures taken by states on the basis that they breach the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) and therefore should be withdrawn. These developments have lead scholars to award attention to the issue and there is an increasing amount of literature considering the issue and even calling for reform of the SCM Agreement to accommodate subsidy programmes for renewable energy.<sup>21</sup> The above-mentioned developments have lead to uncertainty regarding whether it is possible for states to maintain subsidies for renewable energy such as FITs and, moreover, concern that if such measures are found to be incompatible with WTO law this could have a harmful effect on the environment and stall the attempts by countries to address environmental problems. Given the prevalence and success of subsidies for renewable energy, particularly FITs, and the growing number of cases, there is a significant need for clarification of the law in this area.

## 1.2 Purpose and research questions

The aim of this dissertation is to clarify the WTO law on subsidies, the SCM Agreement, with respect to subsidies for renewable energy and member states' possibilities to maintain such measures in place. Due to the limited scope of the dissertation, the topic cannot however be covered in its entirety.

First, while there are several different types of measures states can utilise to increase the use of renewable energy, the scope of the dissertation does not allow all to be considered. Therefore, the focus of the dissertation will be on one of these types of measures, namely FITs, as such measures are common, particularly in Europe, and have been regarded as successful. While states may design FIT programmes slightly

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<sup>20</sup> Michael E Streich, 'Green Energy and Green Economy Act, 2009: A "FIT"-ing Policy for North America?' (2010-2011) 33 *Houston Journal of International Law* 419, 432.

<sup>21</sup> See for example Bigdeli (n 17) and Aaron Cosbey and Petros Mavroidis, 'A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO' (2014) 17 *Journal of International Economic Law* 11.

differently, in this dissertation no particular scheme of any one country will be considered. Instead, the general characteristics of FIT schemes will be considered, in order to provide a more generally applicable conclusion.

Moreover, the limited scope of the dissertation does not allow for an evaluation of FITs against all provisions of the SCM Agreement. In order to provide an in-depth analysis, the scope of the dissertation will be limited to whether FIT programmes constitute specific subsidies as defined by the SCM Agreement. Whether FIT programmes can be considered specific subsidies or not is crucial to the question of whether member states can maintain FIT programmes in force as the fulfilment of the definition of subsidy and the requirement of specificity are prerequisites for the provisions of the SCM Agreement to be applicable. Thus, if FIT programmes do not amount to specific subsidies, such measures will fall outside the scope of the SCM Agreement and consequently are not subject to the WTO disciplines on subsidies and cannot be challenged on this basis. This evaluation will require an analysis of the requirements laid down in article 1 of the SCM Agreement defining a subsidy as well as in article 2, which outlines the requirements for a subsidy to be specific.

In order to fulfil the above-mentioned aim the dissertation will provide an answer to the following research questions:

- What are the main characteristics of FIT programmes?
- Do FIT programmes, as defined in the dissertation, constitute specific subsidies according to the WTO SCM Agreement?

### **1.3 Methodology and materials**

To fulfil the aim of the dissertation a two-pronged approach will be taken, first concluding what the main features of FIT programmes are and then using the conclusions as a model to evaluate whether FIT programmes constitute specific subsidies according to the SCM Agreement. The two separate research questions in this dissertation will each need to be answered with a different methodology.



The methodology for the first research question, aiming to construct a type of 'model FIT' in order to make it possible to assess the WTO compatibility of FITs, will consist of mapping and comparing the design of existing FIT programmes. The comparison will identify the main features of FIT programmes and identify the lowest common denominator – thus the features that are common to most FIT programmes today regardless in what state the programme exists. In order to do this, the dissertation will draw upon the design of the most well-known and successful FIT programmes and the existent research done in this area. The results from this methodological approach will be used as basis for the discussion regarding the second research question.

The FIT programmes used in this dissertation in order to construct the model FIT are foremost programmes in operation in Germany, France, Spain, the UK and in Ontario, Canada. These particular programmes have been chosen for different reasons. The German FIT programme is particularly important to the mapping of FIT programmes as it is one of the earliest FIT programmes introduced and as it is generally considered one of the most successful FIT programmes. These factors have led to that it has been used as a blueprint for the design of many other FIT programmes around the world and thus has influenced the design of many other FITs.<sup>22</sup> This makes it relevant to include in the comparison as the features of this programme likely will exist also in many other FITs. In addition to the German programme, also other programmes applied in the EU have been included in the study as the design of such programmes and their WTO compatibility is particularly relevant from a European perspective. Lastly, the Ontario programme has been chosen because it is a programme that has been involved in the, so far only, adjudicated dispute in this area by the WTO adjudicating bodies, *Canada - Renewable Energy*,<sup>23</sup> and it therefore is interesting to discuss the features of this particular programme and to discern to what extent these features are similar to those in other FIT programmes.

The second research question regarding whether FIT programmes constitute specific subsidies will be answered using the traditional legal method. This method will be used

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<sup>22</sup> Streich (n 20) 431.

<sup>23</sup> Single document issued by the AB constituting the two AB reports *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* (6 May 2013) WT/DS412/AB/R and *Canada – Measures Relating to the Feed-In Tariff Program* (6 May 2013) WT/DS426/AB/R <<http://docsonline.wto.org>> (*Canada – Renewable Energy*).

to apply the law to the model FIT developed as explained above. The aims of the traditional legal method include identifying and interpreting the law in a particular area.<sup>24</sup> As this dissertation aims to identify and clarify the law with regards to the SCM Agreement and subsidies for renewable energy as well as apply this law to a factual situation, the traditional legal method provides an appropriate methodology to achieve the aims. The traditional legal method is based on particular sources of law and a hierarchical relationship between these sources.<sup>25</sup> The sources of law and the weight accorded to the different sources will vary depending on the area of law<sup>26</sup> and it is therefore necessary to more closely outline the appropriate sources with regards to WTO law.

Despite being a largely self-contained area of law,<sup>27</sup> WTO law is part of the international legal system. With regards to sources of international law, article 38(1) of the Statute of the International Court of Justice is of paramount importance. This provision mentions four sources of international law, namely international conventions, international custom, general principles of law, and judicial decisions and teachings of the most highly qualified publicists.<sup>28</sup> Although none of the WTO Agreements makes an explicit mention of article 38(1) of the ICJ Statute,<sup>29</sup> the relation between the WTO law and international law has been highlighted in agreements as well as in case law. For instance, article 3.2 of the DSU stipulates that the aim of the WTO dispute settlement system is to clarify the provisions of the WTO agreements in accordance with customary rules of interpretation of international law. In addition to this, the AB in the case *US – Gasoline* clarified with regards to the GATT that it is not to be read in clinical isolation from public international law.<sup>30</sup>

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<sup>24</sup> Aleksander Pecznik, *Juridikens teori och metod* (Norstedts juridik 1995) 33.

<sup>25</sup> Claes Sandgren, *Vad är rättsvetenskap?* (Jure förlag 2009) 118.

<sup>26</sup> Jan Kleineman, 'Rättsdogmatisk metod' in Fredric Korling and Mauro Zamboni (eds) *Juridisk metodlära* (Studentlitteratur 2013) 22.

<sup>27</sup> David Palmeter and Petros C. Mavroidis, 'The WTO Legal System: Sources of Law' (1998) 92 *American Journal of International Law* 398, 413.

<sup>28</sup> Statute of the International Court of Justice (26 June 1946) 59 Stat. 1055 (ICJ Statute) article 38 and Martin Dixon, *International Law* (Oxford University Press 2007) 23.

<sup>29</sup> Palmeter and Mavroidis (n 27) 399.

<sup>30</sup> *United States – Standards for Reformulated and Conventional Gasoline* (26 April 1996) WT/DS2/AB/R <<http://docsonline.wto.org>> (*US - Gasoline*) 17.

The WTO Agreement and the annexed agreements are treaties pursuant to international law and create legal rights and obligations for the member states. Thus, it follows that the legal text is the principal source of WTO law and therefore, as was stated by the AB in *Japan - Alcoholic Beverages*, all legal analysis should begin with a textual interpretation of the legal texts.<sup>31</sup> The importance of the legal texts can further be seen in article 3.2 of the DSU, which emphasises that 'recommendations and rulings from the DSB cannot add to or diminish the rights and obligations provided in the covered agreements'.<sup>32</sup>

When interpreting the legal agreements of the WTO, international customary law will be important, as article 3.2 of the DSU refers to customary rules of interpretation of public international law.<sup>33</sup> The wording of the provision has been taken as a reference to article 31 and 32 of the Vienna Convention on the Law of Treaties, as these provisions are regarded as reflecting customary international law on treaty interpretation.<sup>34</sup> Reference to these provisions can for example be seen in the case *US - Gasoline*.<sup>35</sup> Hence, the interpretation of the agreements should be done in accordance with article 31 and 32 of the Vienna Convention.

Although the legal texts are undoubtedly the most important source of law, there are in addition other sources of WTO law, which nevertheless informs the interpretation of the law. Earlier practice under both the GATT era as well as after the establishment of the WTO is an important source for clarification of WTO law. Much like the system of the ICJ, the adjudicating bodies of the WTO effectively will not depart from earlier case law, even though they are not technically bound by it.<sup>36</sup> Even though adopted reports are only binding on the parties to the dispute, the AB has in several cases held that adopted AB reports as well as adopted panel reports can be taken into account, as in *US - Shrimp (Article 21.5 - Malaysia)*, and moreover even that panels are in fact expected to take such

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<sup>31</sup> *Japan - Taxes on Alcoholic Beverages* (4 October 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R <<http://docsonline.wto.org>> (*Japan - Alcoholic Beverages*) 14 and Palmetier and Mavroidis (n 27) 398.

<sup>32</sup> DSU article 3.2(2).

<sup>33</sup> DSU Article 3.2.

<sup>34</sup> Palmetier and Mavroidis (n 27) 406.

<sup>35</sup> *US - Gasoline* 16-17.

<sup>36</sup> Palmetier and Mavroidis (n 27) 400.

reports into account, as in *US – Oil Country Tubular Goods Sunset Reviews*.<sup>37</sup> The AB also found in *Japan – Alcoholic Beverages* that this applies also to panel reports adopted under the GATT era.<sup>38</sup> The AB in *US – Stainless Steel* clarified that while AB reports are not technically binding on anyone outside of the parties to the dispute, the fact that WTO members attach importance to these reports and that the dispute settlement system shall ensure security and predictability, makes the legal reasoning in such cases part of the *acquis* of the dispute settlement system.<sup>39</sup> Thus, while according to article 3.2 of the DSU not able to add or take away rights and obligations of members of the WTO, the rulings of previous panels and the AB will still be of importance when interpreting the provisions of the SCM Agreement.

In addition to the legal texts and previous reports, teachings from highly qualified publicists, as stated in the ICJ statute, are moreover part of the material considered by panels and the AB when adjudicating on issues of WTO law.<sup>40</sup> Furthermore, also general principles of law, as mention by the ICJ statute, have been used by WTO adjudicating bodies, for example the principle that interpretations of a treaty that would render whole clauses or paragraphs of a text redundant shall be avoided.<sup>41</sup>

Thus, when applying the traditional legal method in this dissertation, it is necessary to be aware of the particular nature of the WTO legal system in order to appropriately apply the hierarchical system of sources of law.

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<sup>37</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia* (22 October 2001) WT/DS58/AB/RW <<http://docsonline.wto.org>> (*US – Shrimp (Article 21.5 - Malaysia)*) para 109 and *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* (29 November 2004) WT/DS268/AB/R <<http://docsonline.wto.org>> (*US – Oil Country Tubular Goods Sunset Reviews*) para 188 and Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (Cambridge University Press 2013) 51-52.

<sup>38</sup> Van den Bossche and Zdouc (n 37) 51 and Palmeter and Mavroidis (n 27) 401.

<sup>39</sup> *United States – Final Antidumping Measures on Stainless Steel from Mexico* (30 April 2008) WT/DS344/AB/R <<http://docsonline.wto.org>> (*US – Stainless Steel*) paras 158 and 160 and Van den Bossche and Zdouc (n 37) 52.

<sup>40</sup> See for example *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* (25 November 1997) WT/DS56/R <<http://docsonline.wto.org>> (*Argentina – Textiles and Apparel*), *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* (19 December 1997) WT/DS50/AB/R <<http://docsonline.wto.org>> (*India – Patents*) and Palmeter and Mavroidis (n 27) 408.

<sup>41</sup> Palmeter and Mavroidis (n 27) 408.

#### **1.4 Disposition**

The first chapter has provided a background and highlighted the conflicts arising in the area and elaborated on why these are problematic and has also set out the purpose of the dissertation and specified the research questions. In chapter two, the structure of different FIT programmes will be outlined while in chapter three the dissertation will move on to consider the relevant WTO rules and whether FIT programmes constitute specific subsidies in accordance with the SCM Agreement. Chapter four will provide for conclusions on the findings of the dissertation.

## 2. Outline of FIT programmes

### 2.1. Renewable energy programmes and the extent to which FITs are used

States use a wide variety of measures to promote the use of renewable energy. Among these direct loans, grants, and a regulatory framework to encourage the production of renewable energy can be named. The use of such programmes to promote the use of renewable energy has increased in recent years: for instance, between 2005 and 2011 the number of countries with a programme for production of renewable energy increased from approximately 55 to 118.<sup>42</sup> Most often governments use a mix of different policies in order to promote production and use of renewable energy. The design of such programmes may also be changed during time in order to better suit the aim.<sup>43</sup> However, it can be noted that the most common schemes to promote the use of renewable energy are FITs, quotas or renewable portfolio standards. With regards to FIT programmes, the year 2010 at least 45 states had introduced FIT programmes at a national level, and an additional four countries used them at regional level,<sup>44</sup> thus making FIT programmes a salient feature in the attempt to increase the use of renewable energy. With the use of FIT programmes the demand for renewable energy has risen and the cost for installation of renewable energy has decreased.<sup>45</sup>

### 2.2 Structure of FIT programmes

FIT programmes aim to establish long-term financial incentives for production of renewable energy.<sup>46</sup> The rationale for FITs is based on the notion that the initial capital costs necessary for developing renewable energy projects are so high that they will discourage investors from investing in renewable energy, and thus investors need to be guaranteed a certain level of return over time if development of renewable energy is to take place.<sup>47</sup> In essence, FIT programmes are price support mechanisms aimed at

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<sup>42</sup> M. S. Srikar, 'Renewable Energy Programmes in the European Union, Japan and the United States – Compatibility with WTO Law' (2012) Indian Institute for Foreign Trade, Centre for WTO Studies Working Paper 200/4, 16 <<http://ssrn.com/abstract=2179621>> accessed 27 February 2015.

<sup>43</sup> Srikar (n 42) 17.

<sup>44</sup> Srikar (n 42) 18.

<sup>45</sup> Streich (n 20) 431.

<sup>46</sup> Wu and Salzman (n 4) 419.

<sup>47</sup> Streich (n 20) 426.

promoting the establishment of sources for renewable energy through payment of a guaranteed price for energy to producers.<sup>48</sup> In that way, FITs enhance the incentives for investing in renewable energy sources by reducing the investment risk.<sup>49</sup>

Essentially, a FIT policy is an economic policy in which a government imposes on electric utility companies an obligation to purchase energy from renewable sources for a number of years at a rate that has been decided by the government. Within the structure is included an obligation for the utility companies to purchase all the electricity produced by the renewable source and guarantee the producer of renewable energy full access to the electricity grid.<sup>50</sup>

While FIT programmes can be designed in slightly different ways, three common features to FIT programmes can be discerned, namely a purchase obligation, a predefined tariff level and a long duration of tariff payment.<sup>51</sup> The sections below will elaborate slightly on the meaning of each of these features, as well as discuss certain other features that may be included in FIT programmes and the financing of the programmes.

### **2.2.1 Purchase obligation**

One important feature of FIT schemes consists of an obligation for electric utility companies or other electric grid operators to buy all the electricity that is produced from renewable energy producers that are part of the FIT programme. This obligation exists regardless of electricity demand.<sup>52</sup> This means that when a producer of renewable energy joins the FIT programme the producer is guaranteed that all the energy produced from the renewable energy installation will be bought by the operator of the electric grid, and thus does not have to be concerned that electricity produced will not be bought due to unfavourable prices.

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<sup>48</sup> Srikar (n 42) 21.

<sup>49</sup> Streich (n 20) 420-421.

<sup>50</sup> Streich (n 20) 425.

<sup>51</sup> David Jacobs, *Renewable Energy Policy Convergence in the EU: The Evolution of Feed-in Tariffs in Germany, Spain and France* (Ashgate Publishing Company 2012) 27 and Srikar (42) 22.

<sup>52</sup> Jacobs (n 51) 27.

The purchase obligation part of the FIT programme is a necessary feature as it increases investment security by ensuring that the tariff payment will take place and thus the investor will receive payment for the electricity. Indeed, the purchase obligation is so essential that it exists in all FIT programmes, in fact, a policy will not be considered a FIT programme if it does not contain a purchase obligation.<sup>53</sup>

### 2.2.2 Predefined tariff level

Another essential feature of a basic FIT scheme is that producers of renewable energy are guaranteed a certain amount of money per unit of electricity that the electric utility companies buy in accordance with the purchase obligation.<sup>54</sup> As mentioned above, the price for the electricity set by the government as part of a FIT program is usually set higher than the electricity price for electricity from non-renewable sources. This is the case for mainly two reasons. The first is the one discussed briefly in relation to the rationale of FIT programmes, namely because the price should compensate for the high initial costs associated with the development of renewable energy projects and guarantee a reasonable rate of return to the investor. The other reason is that the price should reflect the value of other benefits that renewable energy provides, such as social and environmental benefits.<sup>55</sup>

Moreover, the level of the tariff rates paid to producers of renewable energy often vary depending on the type of technology used for production of renewable energy, thus making it possible to adjust the tariff rate to match the cost of developing a particular technology for production of renewable energy. This in turn enables the production of renewable energy from a wide variety of sources and a possibility for all producers to get a reasonable return on their investments.<sup>56</sup> The tariff rate can also vary depending on the size of the power plant as well as its location.<sup>57</sup>

It is important that the tariff is set at the right price. Otherwise, a too low tariff risks not attracting investors and thus not to fulfil the purpose of the FIT programme and a too

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<sup>53</sup> Jacobs (n 51) 43.

<sup>54</sup> Jacobs (n 51) 43.

<sup>55</sup> Streich (n 20) 425.

<sup>56</sup> Srikar (n 42) 21-22.

<sup>57</sup> Jacobs (n 51) 43.



high tariff risks not becoming cost-effective, giving investors unnecessarily high returns on the investment. To determine the right level for the tariff, two different methods have been created, namely the value-based methodology and the cost-based methodology. When determining the tariff in accordance with the first approach the tariff is calculated based on the value of the generation of electricity. This value can be assessed both from the perspective of the electric utility company and from the perspective of society. In the former scenario the value is derived from the avoided costs for the utility and in the latter the external costs for production of electricity from other sources is internalised.<sup>58</sup> When using the value-based approach, the price for electricity is essentially determined on basis of the avoided cost for generation of power, which can be calculated either through looking at the value for the utility or the value for society. With the value to utility approach, the value of a kWh of electricity produced from a renewable source is seen as equal to a kWh of electricity produced from conventional energy sources. This means that the tariff is set on the basis of what the utility would have paid for conventionally produced electricity. When using the value to society approach, on the other hand, a sum is added to the price for a kWh of conventionally produced energy, in an attempt to also in the price account for the external costs, such as climate change and damage to public health due to for instance pollution, avoided for the society through the use of energy from renewable sources.<sup>59</sup> The factors in the value-based approach, such as the external costs, can be difficult to estimate, which makes this method difficult to apply.<sup>60</sup>

Due to these difficulties, many of the FIT schemes, not least in for example Europe, use another method instead, called the cost-based method. When the cost-based method is used the costs for a renewable energy project are first estimated and then a reasonable return is added. <sup>61</sup> This approach takes into account production costs for different technologies. The added return on investment is usually determined at between five and ten percent. With the cost-based approach, there is no link to the price of energy from conventional sources.<sup>62</sup> Although Germany's first FIT programme operated on the basis of a value-based approach in terms of determination of tariffs, a change in the law in

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<sup>58</sup> Streich (n 20) 427.

<sup>59</sup> Jacobs (n 51) 65.

<sup>60</sup> Streich (n 20) 428.

<sup>61</sup> Streich (n 20) 428.

<sup>62</sup> Jacobs (n 51) 65-66.

2000 instead introduced tariff rates based on the costs of generation of electricity.<sup>63</sup> The German FIT programme now uses a cost-based approach where the tariff constitute of a base price, which vary depending on the project, but also a profit margin that is determined in advance. This system in the German FIT has become a role model for FIT programmes worldwide. Among the advantages with this model is that it provides an opportunity for policymakers to support projects using a certain type of technology and it also aims to increase innovation by decreasing the tariffs over time.<sup>64</sup> To provide another example, the tariff level in the Spanish FIT programme is since 2004 based on the cost-based approach, taking into account the specific cost relating to different production technologies and also guarantees that investors will get a reasonable rate of return.<sup>65</sup>

### 2.2.3 Long duration of tariff payment

The third part of the structure of FIT programmes is that the payment of tariffs is guaranteed over a long period of time, usually between 15 to 20 years, but it can also extend up to the lifetime of the renewable energy installation.<sup>66</sup> To provide examples, the German FIT programme extends to a period of 20 years,<sup>67</sup> whereas the FIT programme operated in Ontario, Canada, extends up to 40 years.<sup>68</sup> The FIT programme in Spain, on the other hand, extends 25 years for certain technologies such as solar energy, whereas for other types of technologies, such as wind power, it extends for the entire lifetime of the technology but with a slightly higher tariff level the first 15-20 years.<sup>69</sup>

The long duration of FIT contracts serve several purposes and brings with it several advantages for investors in renewable energy. First, it serves the purpose of guaranteeing compensation for the high initial costs related to investment in renewable energy production. In this respect, the long duration of FIT contracts guarantees the investor a longer time to recover the initial costs related to the investment. In this

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<sup>63</sup> Jacobs (n 51) 67.

<sup>64</sup> Streich (n 20) 430-431.

<sup>65</sup> Jacobs (n 51) 54.

<sup>66</sup> Jacobs (n 51) 80.

<sup>67</sup> Jacobs (n 51) 78.

<sup>68</sup> *Canada – Renewable Energy* para 1.3.

<sup>69</sup> Jacobs (n 51) 79.

respect it can be noted that the length of the FIT contract often is related to the level of the tariff, meaning that the shorter the FIT contract the higher the tariff rate. This has to do with ensuring an opportunity for the investor to cover the cost for investing in renewable energy equipment. Hence, if the FIT contract extends for a shorter period of time, the investor will need a higher tariff rate during this time to recover the costs. Moreover, the long duration of FIT contracts also has the benefit for the investor that it provides security for the investment, which in turn brings an opportunity for the investor to obtain beneficial financing conditions through for example low interest rates.<sup>70</sup>

The usual length of the FIT contract often corresponds to the lifetime of the renewable energy installations, which often is around 20 years. Although it would be possible to have a FIT contract without any predetermined time limit, the inclusion of a time limit for the FIT contract serves the purpose of encouraging investment in new technology when the lifetime of the technology has been reached.<sup>71</sup>

#### **2.2.4 Other features - local content requirements**

FIT programmes can also be combined with features other than the above-mentioned three characteristics. One example of such an additional feature is a so-called local content requirement. Such policies may involve an obligation on producers of renewable energy to use a certain proportion of locally produced technology for the renewable energy installation in order to be eligible for the FIT programme, or may instead of an obligation provide a financial incentive to use local technology by providing a higher tariff if local technology is used.<sup>72</sup> The FIT programme of Ontario made use of a local content requirement meaning that only renewable energy installations using a certain proportion of equipment produced locally were eligible to participate in the program.<sup>73</sup> However, while this feature is sometimes included in FIT programmes, such as the one in Ontario, this is not something that is necessary to include in order for a policy to be considered a FIT and it therefore cannot be said to be a characteristic feature of FIT programmes.

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<sup>70</sup> Jacobs (n 51) 77.

<sup>71</sup> Jacobs, (n 51) 77.

<sup>72</sup> Wu and Salzman (n 4) 425.

<sup>73</sup> *Canada – Renewable Energy* para 1.4.

### 2.2.5 Financing of FIT programmes

A separate, in that it does not change the basic features of the FIT, question regarding the design of the FIT programmes, which nevertheless may have be of significance regarding whether a FIT programme is considered a subsidy as will be seen later, is how the programme is financed. There are different ways in which a FIT programme can be financed, the main ones being through financing of FIT programmes using government revenues from taxation or spreading of the cost over all electricity consumers.<sup>74</sup> More specifically, the former option would consist of a public body using public funds, such as income from taxation, to carry out the FIT programme.<sup>75</sup> The second option is however the most common way to finance FIT programmes. This option is a more decentralised one, involving the government to a lesser extent. In such a situation, the government could instead direct a private body to both execute the programme as well as generate the funding for the programme on its own.<sup>76</sup> FIT programmes following this type of funding often charge electric utility companies with the task of administering the payment for the FIT contracts. The payment most often comes from an additional charge applied to the electricity. This charge will normally be spread over electricity customers nation-wide or region-wide, depending on the scope of the FIT programme, thus spreading the cost to ensure a minimal cost for each individual.<sup>77</sup> This method means that the additional cost for production of renewable energy is transferred from the producer of renewable energy to the consumers. One of the advantages with using this methodology is that no government revenue is required, which according to Jacobs provides stability to the system.<sup>78</sup> Such a system leaves the government involvement to a minimum – extending only to regulate the activities of private actors, thus determining the tariff, the duration of the tariff payment and obliging the utility operators to purchase all electricity generated from renewable sources.<sup>79</sup> By way of example, it can

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<sup>74</sup> Jacobs (n 51) 82.

<sup>75</sup> Maria Wilke, 'Feed-in Tariffs for Renewable Energy and WTO Subsidy Rules: An Initial Legal Review' (2011) International Centre for Trade and Sustainable Development, Trade and Sustainable Energy Series Issue Paper No 4, 11 <[www.ictsd.org/downloads/2011/11/feed-in-tariffs-for-renewable-energy-and-wto-subsidy-rules.pdf](http://www.ictsd.org/downloads/2011/11/feed-in-tariffs-for-renewable-energy-and-wto-subsidy-rules.pdf)> accessed 30 March 2015.

<sup>76</sup> Wilke (n 75) 11.

<sup>77</sup> Srikar (n 42) 21 and Streich (n 20) 426.

<sup>78</sup> Jacobs (n 51) 82.

<sup>79</sup> Jacobs (n 51) 82.

be noted that the FIT programme in Germany is financed through equally distributing the additional cost among final consumers, thus using the second option mentioned.<sup>80</sup>

### **2.3 Conclusions**

It can be concluded that a model FIT – taking into account the various design options for FITs as described above – would include a purchase obligation, a predefined tariff level most likely based on the cost-based method thus providing for a recovery of the costs as well as an added reasonable rate of return, and a long duration of the tariff payment. With regards to financing, it can be noted that although these common features of FIT programmes can be found, it is still possible for states to finance similar programmes in different ways.

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<sup>80</sup> Jacobs (n 51) 83.

### 3. FIT programmes and the WTO SCM Agreement's rules on specific subsidies

#### 3.1 Background and overview of the regulation of subsidies in the WTO

The question of subsidisation is contentious, largely because of the political sensitivity of the issue. Subsidisation involves a decision of redistribution of wealth to certain beneficiaries, which moreover may have an effect on other countries through distortion of trade.<sup>81</sup> The economic rationale behind subsidies and the regulation thereof has attracted much debate, as it is far from straightforward to establish exactly what a subsidy is, which subsidies should be allowed and how the distinction between good and bad subsidies should be made.<sup>82</sup> Indeed, subsidies are considered very sensitive in international trade as they can both be used to promote legitimate objectives, related to economic, social, and environmental policy for example, but also have the potential to distort competition and create adverse effects for other trading partners. Because of this, the question of subsidies has given rise to much debate in the WTO.<sup>83</sup> Nevertheless, rules on subsidies have been agreed on by members of the WTO and are included in the WTO law.<sup>84</sup>

While the rationale for a regime on subsidies is to some extent disputed, to provide an understanding of the rationale for a subsidy regime it can be noted that subsidisation may distort international trade through impairing market access as well as through distorting competition. For instance, subsidisation can be used to eliminate the value of tariff concessions that states agree to within the ambit of WTO negotiations, as states through subsidising its domestic industry effectively can eliminate the effect of tariff concessions. In this way subsidies can be seen to be a way for states to protect their domestic industry at the expense of trading partners.<sup>85</sup> Moreover, subsidisation may also have a distorting effect on trade due to that third countries, which do not subsidise

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<sup>81</sup> Andreas F Lowenfeld, *International Economic Law* (2<sup>nd</sup> ed Oxford University Press 2008) 216.

<sup>82</sup> Michael Trebilcock and Michael Fishbein, 'International Trade: Barriers to Trade' in Andrew T Guzman and Alan O Sykes (eds), *Research Handbook in International Economic Law* (Edward Elgar 2007) 19.

<sup>83</sup> Van den Bossche and Zdouc (n 37) 745-746.

<sup>84</sup> Trebilcock and Fishbein (n 82) 20-21.

<sup>85</sup> Michael J Trebilcock, *Understanding Trade Law* (Edward Elgar Publishing 2011) 86.

their industries, find it more difficult to export, due to the advantage conferred on the domestic industry in the subsidising state.<sup>86</sup>

Another aim of subsidy regulation can be said to be to examine certain government practices deemed capable in theory of distorting international trade. The aim is to include many such potential measures under the definition of subsidy and then to weed out the damaging ones later on in the process. The regulation of subsidies thus serves the aim of transparency, in that it makes it easier for members of the international trading community to scrutinise practices by other members and determine which are harmful. This can be seen through rules that oblige members to notify specific subsidies.<sup>87</sup>

Although rules on subsidies were included already in the GATT 1947, subsidies were then sparsely regulated and the provisions in the GATT only obliged states to notify subsidies with an effect on trade and seek to avoid export subsidies for primary products. However, during subsequent rounds the rules on subsidies were extended and clarified, eventually resulting in the SCM Agreement.<sup>88</sup> Nowadays, WTO law deals with subsidies in two ways. First, a subsidy may be deemed illegal by breaching the SCM Agreement. Moreover, the GATT permits member states to under certain circumstances introduce countervailing measures against imported goods that has benefitted from subsidies.<sup>89</sup> While the regulation of subsidies in the GATT is not very detailed, a more comprehensive regulation exists in the SCM Agreement, which provides a definition of a subsidy, establishes which subsidies are prohibited and actionable as well as outlines the remedies that can be taken in case of subsidisation.

As mentioned above, one of the advantages with the SCM Agreement, as opposed to the GATT regulation of subsidies, was the inclusion of a definition of subsidy. For a measure to constitute a subsidy it is first required that it fulfils the definition of a subsidy in

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<sup>86</sup> Trebilcock (n 85) 86-87.

<sup>87</sup> Luca Rubini, 'What does the recent WTO litigation on renewable energy subsidies tell us about methodology in legal analysis? The good, the bad, and the ugly' (2014) EUI Working Papers 2014/05, 18 <<http://ssrn.com/abstract=2383799>> accessed 6 April 2015.

<sup>88</sup> Van den Bossche and Zdouc (n 37) 746-747.

<sup>89</sup> Alan O Sykes, 'International Trade: Trade Remedies', in Andrew T Guzman and Alan O Sykes (eds), *Research Handbook in International Economic Law* (Edward Elgar 2007) 101-102.

article 1 of the SCM Agreement, meaning that it must consist of a financial contribution, this contribution must be made by a government or any public body and a benefit must be conferred. Moreover, article 1.2 establishes that for the SCM Agreement to be applicable, the subsidy must also be specific in accordance with article 2 of the SCM Agreement.

However, not all subsidies will constitute a breach of the SCM Agreement. The SCM Agreement adopts a 'traffic light' approach to subsidies and introduces different rules for different categories of subsidies. Originally, the SCM Agreement distinguished between three types of subsidies; prohibited subsidies, actionable subsidies, and non-actionable subsidies. However, following the expiration of the provision on non-actionable subsidies in January 2000,<sup>90</sup> only two categories of subsidies remain, namely prohibited and actionable subsidies.<sup>91</sup>

After having briefly introduced the WTO regime on subsidies the next section will turn to an assessment of whether a FIT programme amounts to a specific subsidy according to the WTO SCM Agreement through a more in-depth analysis of the rules and requirements of the SCM Agreement and a discussion of the relevant aspects of FIT programs in relation to these findings. Section 3.2 will examine whether FIT programmes fulfil the definition of a subsidy and section 3.3 will consider the issue of specificity. While not all subsidies are inconsistent with WTO law, the fulfilment of the definition of subsidy and the requirement of specificity are prerequisites for the SCM Agreement to be applicable in the first place. Thus, this means that should any of the requirements in the definition of a subsidy or regarding specificity not be fulfilled, the measure will be exempted from the regime on subsidies.

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<sup>90</sup> See SCM Agreement article 31.

<sup>91</sup> Van den Bossche and Zdouc (n 37) 770.



### 3.2 Definition of subsidy

While the provisions on subsidies in the GATT lacked a definition of what constitutes a subsidy, in the SCM Agreement a definition of the term subsidy was for the first time included in article 1.1.<sup>92</sup> The article states that

*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 [...], 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 forgone and not collected (e.g. fiscal incentives such as tax credits);*

*(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;*

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<sup>92</sup> Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (Oxford University Press 2009) 108.

and

*(b) a benefit is thereby conferred.*<sup>93</sup>

In short, a subsidy pursuant to the SCM Agreement is defined as a financial contribution by a government or any income or price support that confer a benefit.<sup>94</sup> Thus, the definition provides that there must be a financial contribution, it must be made by the government, and said financial contribution by a government must confer a benefit for a subsidy to exist. Notably, the AB has in its jurisprudence emphasised that these are different criteria that need to be examined separately.<sup>95</sup> In the following sections the meaning of these criteria will therefore be examined more closely and each criteria will be related to FIT programmes.

The first requirement stated in article 1.1 for a measure by a state to be considered a subsidy is the existence of a financial contribution by a government. It can be noted that this part of article 1.1 contains both a requirement that there is a financial contribution as well as a requirement that the financial contribution has been made by the government. Thus, as the AB in *US – Countervailing Duty Investigation on DRAMS*<sup>96</sup> clarified - for a subsidy to exist there must be a financial contribution and acts by exclusively private entities will not be considered financial contributions under article 1.1. of the SCM Agreement.<sup>97</sup>

### **3.2.1 Financial contribution – purchase of goods**

Regarding the existence of a financial contribution, subparagraphs (i) to (iv) in article 1.1 provide an exhaustive list of ways in which a government can provide a financial contribution. It can be done through (i) direct transfer of funds, such as grants and loans,

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<sup>93</sup> SCM Agreement article 1.1.

<sup>94</sup> Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (n 92) 108.

<sup>95</sup> *Brazil – Export Financing Programme for Aircraft* (2 August 1999) WT/DS46/AB/R <<http://docsonline.wto.org>> (*Brazil – Aircraft*) para 157, *Canada – Measures Affecting the Export of Civilian Aircraft* (2 August 1999) WT/DS70/AB/R <<http://docsonline.wto.org>> (*Canada – Aircraft*) para 156 and Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (n 92) 108.

<sup>96</sup> *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea* (27 June 2005) WT/DS296/AB/R <<http://docsonline.wto.org>> (*US – Countervailing Duty Investigation on DRAMS*)

<sup>97</sup> *US – Countervailing Duty Investigation on DRAMS* para 107.

or potential direct transfer of funds or liabilities such as loan guarantees; (ii) government revenue that is due is forgone or not collected, such as fiscal incentives, (iii) provision of goods or services other than general infrastructure or purchasing of goods, or lastly through (iv) providing payments to a funding mechanism or through a private body.<sup>98</sup> Even though the list in article 1 of the SCM Agreement is exhaustive, the term financial contribution still encompasses a wide range of transactions, as was evidenced in *US – Softwood Lumber IV*.<sup>99</sup>

As, according to the SCM Agreement, only certain conduct by a government or a public body will fall under the definition of a subsidy, the first question requiring an answer in order to determine whether a FIT programme is a subsidy is whether it can be considered to fall within the scope of subparagraphs (i)-(iv).

In *US – Softwood Lumber IV* the AB pronounced on the general interpretation of article 1.1(a)1(iii) of the SCM Agreement. While the case primarily concerned the question of whether a measure by the Canadian government was a financial contribution through the provision of goods included in article 1.1(a)(iii) - the case concerned a stumpage agreement, i.e. an agreement to harvest timber, where Canada argued that standing timber was not a tradable good as it is attached to the ground while the US argued that the term goods in the article under dispute included as goods standing timber<sup>100</sup> - the AB nevertheless also pronounced on the general interpretation of article 1 of the SCM Agreement and the term purchase of goods by a government.<sup>101</sup> The AB emphasised that subparagraph (iii) complements (i)-(ii) by adding to the monetary contributions qualifying as subsidies also contributions in kind.<sup>102</sup> The AB elaborated on the reasoning as to why government purchase of goods is treated as a subsidy and in that context noted that the purchase of goods from a company by the government has the potential to artificially increasing the revenues of that company.<sup>103</sup>

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<sup>98</sup> SCM Agreement article 1.

<sup>99</sup> *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* (19 January 2004) WT/DS257/AB/R <<http://docsonline.wto.org>> (*US – Softwood Lumber IV*) para 52 and Van den Bossche and Zdouc (n 37) 751.

<sup>100</sup> *US – Softwood Lumber IV* para 48-49.

<sup>101</sup> *US – Softwood Lumber IV* para 53.

<sup>102</sup> *US – Softwood Lumber IV* para 52.

<sup>103</sup> Van den Bossche and Zdouc (n 37) 754.

With regards to FIT programmes, it has been argued that whether a FIT programme can be considered a subsidy in fact has been controversial due to the fact that a FIT programme does not immediately correspond to what would be considered classical examples of a subsidy, such as a direct transfer of funds or loans by a government on more beneficial terms than generally available on the market.<sup>104</sup> As FIT programmes, as pointed out above, essentially are purchasing guarantees, the closest option that comes to mind is purchase of goods by a government, as mentioned in subparagraph (iii).

However, doubt appears already due to the particular properties of electricity, as it at a first glance does not appear self-evident that electricity in fact is a good. Nonetheless, this aspect should not be considered too problematic, as electricity is defined as a good in the Harmonized System Nomenclature, developed by the World Customs Organization – a definition that is also used in the WTO.<sup>105</sup> Thus, the physical properties of electricity do not disqualify FIT programmes from the ambit of subparagraph (iii).

As FIT programmes, as outlined in chapter 2, impose on electric utility companies an obligation to purchase electricity, it can be concluded that the programmes fulfil the requirements of subparagraph (iii) in that it amounts to a purchase of good.

While it can be argued that the assessment of part of the requirement for the existence of a financial contribution as per the subparagraphs in article 1.1(a)(1), namely a purchase of goods in accordance with subparagraph (iii), is fairly straightforward, the question of whether such action can be attributed to a government in the broad sense however lends much more of a problem.

### **3.2.2 Financial contribution – by a government**

As evidenced above, each of the subparagraphs of article 1.1(a)(1) also contains a requirement that the financial contribution must be made by a government or a public body for the transaction to be considered a subsidy. While subparagraph (i), (ii) and (iii)

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<sup>104</sup> Wilke (n 75) 11.

<sup>105</sup> Thomas Cottier, Garba Malumfashi, Sofya Matteotti-Berkutova, Olga Nartova, Joëlle de Sépibus, and Sadeq Z. Bigdeli, 'Energy in WTO Law and Policy' (2009) NCCR Trade Working Paper No. 2009/25, 5 <<http://phase1.nccr-trade.org/images/stories/projects/ip6/IP6%20Working%20paper.pdf>> accessed 7 April 2015.

list situations where a government or a public body directly makes a financial contribution, subparagraph (iv) also covers the situation when a government indirectly makes a financial contribution through a funding mechanism or a private body.<sup>106</sup> Thus, article 1.1(a)(1)(iv) explicitly states that a financial contribution will be considered to have been made by a government also when the government has not directly transferred the financial contribution but has instead acted through making payments to a funding mechanism, or by directing a private body to transfer the contribution in its place. In order for actions by private bodies to be attributed to the government the actions have to normally be vested in the government and not differ from normal practices of a government.<sup>107</sup> In other words, it can be said that article 1.1 of the SCM Agreement is applicable to both subsidies made by public bodies and by private bodies, however with the important limit on the applicability that it only applies to private bodies when they exercise functions that would normally be vested in the government and do not differ from practices normally followed by governments.<sup>108</sup>

The disparate ways in which FIT programmes are organised in different countries, particularly the way in which some FIT programmes are administered and financed directly by the government whereas others are administered and financed by private entities and the government only appears as a regulator, makes the distinction between public and private with regards to a financial contribution in the SCM Agreement relevant to the determination of whether FITs fulfil the definition of subsidy. As outlined in chapter 2, FIT programmes can either be designed in a way so that a public body uses public funds, such as income from taxation, and independently carries out the FIT programme, or they can be designed so that a government directs a private body to both execute the programme as well as generate the funding for the programme, thus involving the government to a lesser extent.<sup>109</sup> The different ways a FIT programme can be designed will lead to different provisions in article 1.1(a)(1) being applicable.

The approach to direct and indirect governmental action with regards to the requirement of a financial contribution makes the difference in design of utmost

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<sup>106</sup> SCM Agreement article 1.1(a)(1) and *US – Countervailing Duty Investigation on DRAMS* para 108.

<sup>107</sup> SCM Agreement article 1.1(a)(1).

<sup>108</sup> Wilke (n 75) 12-13.

<sup>109</sup> Wilke (n 75) 11.

importance for the question of whether FIT programmes fulfil the requirement of a subsidy. Wilke is in fact suggesting that the question of what is considered a public body and a private body respectively is one of the most pressing questions with regards to the SCM Agreement.<sup>110</sup> In the following sections the dissertation will therefore examine the different designs of FIT programmes in terms of financing brought up in chapter 2 and determine their significance for the fulfilment of the requirements for a subsidy.

### **3.2.2.1 FITs financed by the government or a public body**

It can be concluded that in the case where a government itself executes and finances a FIT programme, the existence of a financial contribution made by a government should be fairly unproblematic to establish. In such a case, a government has through a FIT programme purchased goods, i.e. electricity, and thus made a financial contribution. However, often it is not the government itself that purchases electricity but rather some other body subordinate to the government. This makes it important to establish what is included within the term 'government or a public body' in article 1.1 of the SCM Agreement.

The term government or public body is broader than to encompass only the government in a narrow sense and also includes regional and local authorities as well as state-owned enterprises (SOEs).<sup>111</sup> However, there is still scope for interpretation of which bodies will qualify as public bodies and case law provides some clarification of this issue. Initially, case law focused to a large extent on government control and a public body was primarily interpreted to be an entity controlled by the government.<sup>112</sup> For instance, in *Korea – Commercial Vessels*, the panel in its finding that KEXIM, the Export-Import Bank of Korea, was a public body, primarily focused on that KEXIM was owned 100 % by the government of Korea. Additionally, the panel considered the fact that several of the staff in management positions were appointed by the president and members of the Government of Korea.<sup>113</sup>

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<sup>110</sup> Wilke (n 75) 13.

<sup>111</sup> Van den Bossche and Zdouc (n 37) 758.

<sup>112</sup> *Korea – Measures Affecting Trade in Commercial Vessels* (7 March 2005) WT/DS273/P/R <<http://docsonline.wto.org>> (*Korea – Commercial Vessels*) para 7.50 and Wilke (n 75) 13.

<sup>113</sup> *Korea – Commercial Vessels* para 7.50.

However, the approach taken by the panel in *Korea – Commercial Vessels* appears to have been abandoned in more recent rulings. The term public body was interpreted by the AB in a fairly recent and important, in that it deviates from earlier case law, case, namely *US – Antidumping and Countervailing Duties*.<sup>114</sup> In this case the AB concluded that the key to whether an entity is a public body is that the entity in question possesses, exercises or is vested with governmental authority and not predominantly its formal links with the government. The AB acknowledged that the precise characteristics of an entity that is vested with governmental authority would differ from case to case and moreover the AB emphasised that the importance in the determination of whether a body is vested with governmental authority is not that such delegation is spelled out by statute, but rather whether an entity de facto enjoys such powers. While acknowledging that an entity can be vested with authority in many ways, the AB went on to state a few examples, including existence of evidence that an authority de facto is exercising governmental functions or that a government exercises meaningful authority over an entity.<sup>115</sup> Distancing itself from the panel’s interpretation that a public body is ‘any body controlled by the government’ in conformity with earlier case law,<sup>116</sup> the AB instead emphasised that the fact that there are formal links between a government and an entity, such as for example that the government is the majority shareholder, does not necessarily mean that the government exercises any meaningful control over the entity or that it is vested with governmental authority.<sup>117</sup> In sum, in *US – Antidumping and Countervailing Duties* the AB essentially found that the common characteristics between a government and a public body were the performance of governmental functions or that they are vested with and exercise the authority to perform such functions.<sup>118</sup>

Thus, with the ruling in *US – Antidumping and Countervailing Duties* the AB seems to have deviated from previous case law and put less emphasis on formalistic requirements and more on a de facto examination of the authority a body enjoys. Wilke notes that the dividing line between a public body and a private body after this case is

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<sup>114</sup> *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (11 March 2011) WT/DS379/AB/R <<http://docsonline.wto.org>> (*US – Antidumping and Countervailing Duties*).

<sup>115</sup> *US – Antidumping and Countervailing Duties* paras 317-318.

<sup>116</sup> *US – Antidumping and Countervailing Duties* para 320.

<sup>117</sup> *US – Antidumping and Countervailing Duties* paras 317-318.

<sup>118</sup> Van den Bossche and Zdouc (n 37) 758.

not formal control but rather whether the entity in question possesses the authority and responsibility to effectively govern and control private bodies.<sup>119</sup>

Turning to FIT programmes, the outcome in a case would naturally have to depend on the case-specific circumstances but it can be concluded that the importance is whether the entity buying electricity is de facto vested with governmental authority and *US – Antidumping and Countervailing Duties* effectively prevents a determination to be made on the basis of solely formal relations to the government. The assessment of whether an entity enjoys such authority will be done on a case-by-case basis, as explained by the AB, taking into account factors such as whether an entity exercises governmental functions or whether the government exercise meaningful control over it.

The case *US – Antidumping and Countervailing Duties* arguably has opened up for situations in which entities that previously would have been considered public under the law of the WTO, for instance state-owned enterprises, may not be considered public bodies due to the requirement set by the AB in *US – Antidumping and Countervailing Duties*. As explained by Wilke, the nature of the bodies responsible for executing the FIT programmes in combination with the requirements established by the AB in *US – Antidumping and Countervailing Duties* makes it a difficult assessment. Particularly, the electricity markets and its bodies often constitute a fragmented system with various bodies such as network operators and transmission companies, which could be considered to be playing a part of the financial contribution. As Wilke points out, the determination of what is a public body has thus been made harder with the AB's new approach in *US – Antidumping and Countervailing Duties*.<sup>120</sup>

However, while authors such as Wilke predicted that the classification of entities as public bodies would prove problematic in the assessment of whether FIT programmes qualify as financial contributions,<sup>121</sup> this does not appear to have been the case in practice. In fact, in the recent case *Canada – Renewable Energy* the panel, in a finding that was not appealed, adjudicated on the issue of whether Hydro One Inc, an entity

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<sup>119</sup> Wilke (n 75) 13.

<sup>120</sup> Wilke (n 75) 14.

<sup>121</sup> Wilke (n 75) 13.



operating generation facilities and distribution systems, was to be considered a public body.

In the Ontario FIT programme, the Ontario Power Authority (OPA), acting under the direction of the Ministry of Energy and Infrastructure, was responsible for establishing a FIT programme and entering into FIT contracts,<sup>122</sup> while the SOE Hydro One Inc was responsible for operating generation facilities and distribution systems.<sup>123</sup> While the parties to the dispute all agreed that the OPA was a public body, disagreement prevailed regarding Hydro One. In its assessment, the panel found Hydro One to be a public body due to several reasons. First and foremost, the panel noted that Hydro One was an agent to the Government of Ontario and particularly emphasised that, according to the definition of an agent by the Government of Ontario itself, an agent among other things was an entity which had been assigned or delegated authority or responsibility, or which otherwise had statutory authority and responsibility to perform a public function or service. The panel considered this to strongly indicate that Hydro One was a public body in accordance with the requirements outlined in *US – Antidumping and Countervailing Duties*.<sup>124</sup>

Moreover, the panel found it established that the Government of Ontario exercised meaningful control over Hydro One due to that it had imposed a duty on Hydro One to operate generation facilities and distribution systems and distribute electricity in communities as directed by the government and that the government had extensive powers to define the conditions of such activities.<sup>125</sup> Due particularly to that the Government of Ontario through the public bodies OPA and Hydro One both entered into FIT contracts and transmitted and distributed electricity to consumers, the panel found that a financial contribution through purchase of goods by a government under article 1.1(a)(1)(iii) of the SCM Agreement had been established.<sup>126</sup>

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<sup>122</sup> *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* (19 December 2012) WT/DS412/R and *Canada – Measures Relating to the Feed-In Tariff Program* (World Trade Organization, 19 December 2012, WT/DS426/R) (Single document) <<http://docsonline.wto.org>> (*Canada – Renewable Energy (Panel Report)*) paras 7.195-7.196.

<sup>123</sup> *Canada – Renewable Energy (Panel Report)* para 7.235.

<sup>124</sup> *Canada – Renewable Energy (Panel Report)* paras 7.234-7.235.

<sup>125</sup> *Canada – Renewable Energy (Panel Report)* paras 7.234-7.235.

<sup>126</sup> *Canada – Renewable Energy (Panel Report)* para 7.239.

Thus, despite the stricter requirements established in *US – Antidumping and Countervailing Duties* for an entity to be considered a public body, the discussion and outcome in *Canada – Renewable Energy* shows that many FIT programmes will likely qualify as financial contributions by a government under article 1.1 of the SCM Agreement.

#### **3.2.2.2 FITs financed by private bodies**

With regards to cases where a government only administers FIT programmes through laws and regulations and delegates to private entities to finance and execute the FIT programmes, such programmes may less easily be accommodated under the requirements of what constitutes a government or a public body according to the case law discussed above. Thus, in such cases it is instead necessary to turn to the provision in subparagraph (iv), including within the ambit of article 1.1 also conduct by a government through private entities. When a government delegates to a private body to execute the FIT programme or only introduces legislation establishing a FIT programme private parties must participate in, particularly article 1.1(a)(1)(iv) is of importance.

Subparagraph (iv) is paramount with regards to FIT programmes financed and executed by private actors due to that it extends the applicability of the SCM Agreement to actions by private bodies. While it is true that subparagraph (iv) does make the SCM Agreement applicable to actions by private bodies, the applicability of the SCM Agreement is still limited by the requirement in subparagraph (iv) to instances where a government has ‘entrusted or directed’ a private body and functions that ‘would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments’.<sup>127</sup> Wilke points out that this has potential to limit the scope of financial contribution substantially.<sup>128</sup> Thus, in order to conclude whether also FIT programmes financed by private entities may be considered to provide a financial contribution, it is necessary to closer examine the meaning of the requirements in subparagraph (iv) and relate those to the requirements in FIT programmes, and this will be done in the following sections.

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<sup>127</sup> SCM Agreement article 1.1(a)(1)(iv).

<sup>128</sup> Wilke (n 75) 13.

### 3.2.2.2.1 Entrust or direct

Subparagraph (iv) was thoroughly examined by the panel in the case *US – Exports Restraints*,<sup>129</sup> where the issue the panel had to adjudicate on essentially was whether exports restraints could be considered financial contributions in accordance with article 1.1(a)(1) of the SCM Agreement.<sup>130</sup> Of particular importance to the case was the interpretation of subparagraphs (iii) and (iv), as the US argued that exports restraints could be considered provision of goods that a government had entrusted or directed a private body to make.<sup>131</sup> Starting with the requirement in subparagraph (iv) of a government to entrust or direct a private body, the panel in *US – Exports Restraints* held that the terms encompassed the notion that a government is executing a policy through the use of a private body.<sup>132</sup> Analysing the meaning of entrust and direct, the panel came to the conclusion that for a measure taken by a government to amount to entrustment or direction it must contain an element of delegation or command respectively. The panel outlined three requirements, which, according to the panel, had to be fulfilled, namely that it must be an explicit and affirmative action, it has to be addressed to a particular party and it must encompass an action for the party to undertake.<sup>133</sup>

Notably, the panel distinguished such explicit and affirmative action from situations where an intervention in a market by a government may lead to a certain result due simply to prevailing circumstances at a particular time and free choices made by the actors in the market. Elaborating on this notion, the panel noted that governments can, and often do, intervene in markets with different policy objectives in mind and that such interventions can have different results and that an action by a government does not fulfil the requirements of entrustment and direction simply because a certain effect occurs.<sup>134</sup>

In relation to this, the panel discarded what it named an ‘effects approach’ forwarded by the US, essentially meaning that in a situation where a government measure leads to the

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<sup>129</sup> *United States – Measures Treating Exports Restraints as Subsidies* (29 June 2001) WT/DS194/R <<http://docsonline.wto.org>> (*US – Exports Restraints*).

<sup>130</sup> *US – Exports Restraints* para 8.19.

<sup>131</sup> *US – Exports Restraints* para 8.19.

<sup>132</sup> *US – Exports Restraints* para 8.28.

<sup>133</sup> *US – Exports Restraints* para 8.29.

<sup>134</sup> *US – Exports Restraints* para 8.31.

result that domestic producers sell their products to domestic purchasers it is to be considered equivalent to a government requesting that domestic producers provide goods to domestic purchasers.<sup>135</sup> In response, the panel emphasised that the existence of a financial contribution was to be judged on the basis of the nature of the measure taken by the government and not exclusively on the basis of the effects that it will give rise to. The panel noted in this respect that an effects approach would have far reaching consequences as it would mean that any action taken by a government that might give rise to favourable conditions in a market would qualify as a financial contribution.<sup>136</sup> In further support for its argument, the panel held that the approach argued by the US would in essence make redundant the requirement of a financial contribution, as the effects approach would prevent the requirement to be used to limit the number of government actions falling within the scope of the SCM Agreement. The panel regarded this to be contrary to the conclusion in *Brazil – Aircraft* where it was emphasised that financial contribution and benefit are two separate requirements.<sup>137</sup>

In sum, the panel concluded that when determining the existence of entrustment or direction the focus should be on the measures taken by the government rather than the possible effects caused by the measure.<sup>138</sup> This meant that the panel came to the important conclusion that the SCM Agreement only extends to cover certain forms of action by governments and notably that the function of the financial contribution requirement is to ensure that not all government measures conferring benefits are considered subsidies.<sup>139</sup> In *US – Exports Restraints*, the panel emphasised that while all forms of financial contributions must involve a contribution of economic resources, not all transfers of economic resources constitute financial contributions according to the SCM Agreement.<sup>140</sup>

Essentially, it can be argued that subparagraph (iv), while not diverging from the requirement of a financial contribution, is aimed at preventing states from circumventing the regime on subsidies by acting through private bodies instead of

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<sup>135</sup> *US – Exports Restraints* paras 8.33-8.35.

<sup>136</sup> *US – Exports Restraints* paras 8.33-8.35.

<sup>137</sup> *US – Exports Restraints* paras 8.40.

<sup>138</sup> *US – Exports Restraints* para 8.42.

<sup>139</sup> Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (n 92) 110.

<sup>140</sup> Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (n 92) 111.

directly. The panel noted in *US – Exports Restraints* that subparagraph (iv) does not introduce any other measures taken by governments than those mentioned in subparagraphs (i)-(iii), but only extends the scope of article 1.1(a)(1) to cover additional actors, i.e. private bodies.<sup>141</sup> The role of subparagraph (iv) as an anti-circumvention provision has been expressed in several cases dealing with the interpretation of the subparagraph, including *US – Exports Restraints*, where the panel noted that the purpose of subparagraph (iv) was to prevent governments from avoiding the provisions in subparagraphs (i) to (iii) by acting through a private body<sup>142</sup> as well as in *US – Countervailing Duty Investigation on DRAMS*, where the AB argued that the subparagraph provides for a measure to be qualified as a subsidy where a government has used a private body as an agent in order to provide a financial contribution and thus essentially is an anti-circumvention provision.<sup>143</sup> Pronouncing on the intention with the provision, the AB characterised subparagraph (iv) as an anti-circumvention provision, aimed at ensuring that governments do not circumvent its obligations under the SCM Agreement by using a private entity as a proxy.<sup>144</sup>

In this respect, Rubini points out that there is a tension inherent in the interpretation that subparagraph (iv) is to be interpreted restrictively so as not to extend the scope of the SCM Agreement to include more government measures as financial contributions, but at the same time requiring an extensive interpretation to fulfil its objective as an anti-circumvention provision. In interpreting the provision, Rubini underlines the necessity of balancing these two interests.<sup>145</sup> Regarding the balance struck between these two interests, a development in case law can be noted. While in *US – Exports Restraints*, the panel gave a restrictive interpretation to the terms entrust and direct, in that it, as seen above, required for there to be an explicit and affirmative action of delegation or command, in the following judgments in *US – Countervailing Investigation on DRAMS*, *Korea – Commercial Vessels* and *EC – DRAMS* the AB deviated from this interpretation.<sup>146</sup>

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<sup>141</sup> *US – Exports Restraints* para 8.53.

<sup>142</sup> *US – Exports Restraints* para 8.53.

<sup>143</sup> Van den Bossche and Zdouc (n 37) 756.

<sup>144</sup> *US – Countervailing Duty Investigation on DRAMS* para 113.

<sup>145</sup> Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (n 92) 111.

<sup>146</sup> Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (n 92) 112.

Elaborating on the meaning of the words entrusts and directs in subparagraph (iv), the AB in *US – Countervailing Duty Investigation on DRAMS* significantly deviated from earlier interpretations.<sup>147</sup> Prior to the AB's ruling, the panel had, with reference to *US – Exports Restraints*, found that the ordinary meaning of the words entrust and direct gave that the actions by the government must to some extent be a delegation or a command.<sup>148</sup> Disagreeing with the panel, the AB now held that the panel's interpretation of entrusts and directs as delegation or command was too narrow. While the AB recognised that a delegation or a command were examples of ways in which a government could entrust or direct, there were nevertheless also other ways in which it could be done. The AB recognised with regards to the term entrust that there were other informal as well as formal ways in which a government can entrust a private body than through an act of delegation. Turning to the term direct, the AB recognised that the term contains a notion of authority over the subject of the direction but that there nevertheless are other subtler ways than a command in which a government can direct a private body.<sup>149</sup>

Thus, the AB in *US – Countervailing Duty Investigation on DRAMS* rejected that the terms direct and entrust were limited to the concepts of delegation and command. Instead, the AB talked in terms of entrustment being an action of giving responsibility and direction being the exercise of governmental authority over someone.<sup>150</sup> Rubini criticises this interpretation and argues that it is too broad and thus risks distorting the balance between interests in the provisions.<sup>151</sup> He argues that it could lead to that some regulatory measures by governments could fall within the scope of the term direct as interpreted by the AB, even though the AB ruled this out.<sup>152</sup>

Arguably, it is of particular importance whether government regulation is excluded from subparagraph (iv) with regards to FITs as that would effectively mean that FIT programmes would not be considered an entrustment or direction.

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<sup>147</sup> Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (n 92) 112.

<sup>148</sup> *US – Countervailing Duty Investigation on DRAMS* para 103.

<sup>149</sup> *US – Countervailing Duty Investigation on DRAMS* paras 110-111.

<sup>150</sup> Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (n 92) 112.

<sup>151</sup> Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (n 92) 114.

<sup>152</sup> Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (n 92) 115.

While the case law brings up certain situations of government regulation and holds that this cannot be equated with a financial contribution, it can be argued that the reasoning in *US – Countervailing Duty Investigation on DRAMS* does not support a conclusion that all government regulation would be excluded from constituting a financial contribution. In this case, the AB agreed with the reasoning in *US – Exports Restraints*, that government intervention in a market cannot be considered entrustment or direction only due to that it has a particular result due to circumstances and choices made by actors in the market.<sup>153</sup> This notion was also articulated in *US – Softwood Lumber IV*, where the AB stated that not all actions by a government which confer a benefit can be considered subsidies as such an interpretation would render the list of actions in subparagraph (i) to (iv) ineffective.<sup>154</sup>

Such an interpretation could still be considered to be in line with the object and purpose of the SCM Agreement. The issue was discussed in *US – Countervailing Duty Investigation on DRAMS* and the AB held that the object and purpose of the SCM Agreement reflected a balance between members who wanted to discipline the use of subsidies and those who rather wanted to discipline the use of countervailing duties.<sup>155</sup> In *US – Softwood Lumber IV* the AB articulated on the object and purpose of the SCM Agreement that it was to strengthen and improve the disciplines on subsidies and countervailing measures in GATT but also to recognise that members have a right to impose such measures under particular circumstances.<sup>156</sup> The AB in *US – Countervailing Duty Investigation on DRAMS* emphasised the importance of keeping the balance between recognising that a financial contribution may be made by a government through a private body, as is evidenced in article (iv), but also recognising that the scope of subparagraph (iv) cannot be so broad as to cover instances when a government is only using its general regulatory powers.<sup>157</sup>

The interpretation of subparagraph (iv) by AB in the case *US – Countervailing Duty Investigation on DRAMS* resulted in the conclusion that entrustment entails that a government gives responsibility to a private entity and direction is when a government exercises its authority over a private body. Common for both the situations is the result

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<sup>153</sup> *US – Countervailing Duty Investigation on DRAMS* para 114.

<sup>154</sup> *US – Softwood Lumber IV* para 52, footnote 35.

<sup>155</sup> *US – Countervailing Duty Investigation on DRAMS* para 115.

<sup>156</sup> *US – Softwood Lumber IV* para 64.

<sup>157</sup> *US – Countervailing Duty Investigation on DRAMS* para 115.

that the government has used a private entity in order to carry out one of the specific financial contributions listed in article 1.1. However, the AB also cautioned that it would nevertheless be difficult to identify which specific measures by a government would amount to either entrustment or direction and thus held that the conclusion will depend on the facts of each case. Nevertheless, the AB stated that entrustment and direction would in most cases include either a threat or an inducement in order to make the private entities carry out the actions and that such could serve as evidence.<sup>158</sup>

Due to that FIT programmes indeed appear to fulfil the requirements outlined by the AB in case law of constituting of a case where a government exercises its authority over a private body in order to induce it to purchase goods, it will be of importance whether government regulation is excluded from constituting a financial contribution according to subparagraph (iv), as such a conclusion would mean that FITs financed by private parties would not be considered a financial contribution by a government. As can be seen from the discussion above, certain statements in case law appears to indicate that governmental regulation should be excluded. However, a development in case law can be seen where more recent cases, such as *US – Countervailing Duty Investigation on DRAMS* has adopted a broader interpretation of the terms entrust and direct and thus nevertheless suggest that some governmental measure could be included and thus that also FIT regulations could be considered an entrustment or direction of private actors by a government. Moreover, it is submitted that such an interpretation do not contradict the statements regarding government regulation being excluded in *US – Exports Restraints*, as this statement does not necessarily exclude all government regulation but refers to regulation that only due to particular circumstances and free choice of actors would have a particular result, and, as explained in *US – Countervailing Duty Investigation on DRAMS*, would result in an unintended effect by a government. Indeed, regulation introducing a FIT programme would be a more direct and conscious way of directing private actors, not leaving much choice for them. Thus, FIT regulation cannot be equated with the situation referred to in *US – Exports Restraints* as a FIT regulation does not introduce a regulation and then leave it to actors in the market to decide what to do but rather obligates actors to act in a certain way. In accordance with these

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<sup>158</sup> *US – Countervailing Duty Investigation on DRAMS* para 115.



findings, FIT programmes must be considered to fulfil the first requirement of entrustment or direction in subparagraph (iv).

#### 3.2.2.2 Normally vested in the government

In addition to the requirement that a private entity must have been entrusted or directed by a government for subparagraph (iv) to be applicable, the actions must moreover also normally be vested in the government and the practice not differ from practices normally followed by governments.<sup>159</sup> Rubini argues that it is in fact this requirement that in the end most often will be decisive of whether a regulatory measure will be considered a subsidy or not.<sup>160</sup> With regards to FIT programmes, the question thus is whether purchasing of electricity can be considered a governmental function. In order to determine this it is necessary to more closely consider what the meaning of the term normal government practices in the SCM Agreement is.

Rubini suggests that this requirement has been introduced so as not to broaden the scope of the financial contribution more than what the parties to the agreement intended. The term normal government practices has been interpreted under GATT, the Uruguay negotiations as well as under the WTO in *US – Exports Restraints* to be referring to government practices such as taxes and expenditure and not to include broad notions of intervention in markets by governments.<sup>161</sup> The same conclusion was also reached in *Korea – Commercial Vessels*.<sup>162</sup> Such a limitation of the scope of subparagraph (iv) would seem to exclude from the SCM Agreement the exercise of regulatory power by a government.<sup>163</sup> As discussed in the previous section, it is of paramount importance with regards to FIT programmes if regulation by a government is through this requirement excluded, as this would mean that FITs fail to fulfil one of the requirements in the definition of subsidy.

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<sup>159</sup> SCM Agreement article 1.1(a)(1)(iv).

<sup>160</sup> Luca Rubini, 'Ain't Wastin' Time No More: Subsidies for Renewable Energy, the SCM Agreement, Policy Space, and Law Reform' (2012) 15 *Journal of International Economic Law* 525, 541-542.

<sup>161</sup> Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (n 92) 119.

<sup>162</sup> *Korea – Commercial Vessels* para 7.30 and Wilke (n 75) 16.

<sup>163</sup> Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (n 92) 120.

Howse argues that FIT programmes would not fulfil the requirement precisely because FITs should be considered a regulation of the electricity market rather than a delegation of a governmental function. Howse bases this argument on the interpretation that the requirement in subparagraph (iv) ensures that not all regulation that a government undertakes, which necessarily will impact on the distribution of wealth between different private actors to some extent, will be considered a subsidy.<sup>164</sup>

Indeed, the argument by Howse finds some support in the reasoning in *US – Exports Restraints*, where the panel underscored that the SCM Agreement does not necessarily qualify all measures, which according to economic theory would be considered subsidies, as subsidies under the SCM Agreement. The inclusion of a requirement of a financial contribution thus effectively limits the applicability of the provisions of the SCM Agreement to subsidies as they are defined in the SCM Agreement.<sup>165</sup> Moreover, the panel in *US – Exports Restraints*, also found support for this interpretation in the negotiation history of the financial contribution requirement in article 1 in the SCM Agreement, which it used as supplementary means of interpretation. The negotiating history of the SCM Agreement shows that the parties did not mean for all regulatory measures introduced by governments to be considered subsidies, which is why the requirement of there to be a financial contribution was introduced in the text.<sup>166</sup> The parties to the SCM Agreement wanted to avoid a definition of a subsidy so broad as to include all government measures conferring a benefit through introducing an exhaustive list of measures by governments that will be considered a subsidy.<sup>167</sup> Notably, Hufbauer et al argue that the negotiating history shows that the definition of subsidy in the SCM Agreement drafted narrowly in order to exempt government regulation from being considered a subsidy.<sup>168</sup>

Rubini elaborates on this aspect, and compares the definition of subsidy according to economic theory with the definition in WTO law, concluding that whereas from an economic perspective a subsidy is a regulatory measure which produces effects linked

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<sup>164</sup> Howse (n 7) 13.

<sup>165</sup> *US – Exports Restraints* paras 8.62-8.63.

<sup>166</sup> *US – Exports Restraints* para 8.65.

<sup>167</sup> *US – Exports Restraints* para 8.73.

<sup>168</sup> Gary Clyde Hufbauer, Steve Charnovitz and Jisun Kim, *Global Warming and the World Trading System* (Peterson Institute for International Economics, 2009) 62.

to subsidies, such as interference with prices and reallocation of resources, the legal definition is far less encompassing due to a balancing of underlying rationales of economic, systemic and policy nature.<sup>169</sup>

However, it has also been argued that an interpretation limiting the scope of a financial contribution to only government practices relating to taxation and expenditure is very strict and risks leaving out forms of support that in fact are equivalent, and would invite for states to circumvent the law. Moreover, it has been suggested that such an interpretation would not be coherent with the case law showing that there is no need for there to be a cost to the government.<sup>170</sup> Indeed, it is difficult to see how measures where there is no cost to the government could be included if financial contributions only extend to cover government practices related to expenditure and taxation. Thus, Rubini advocates an interpretation that is not strictly limited to government measures relating to expenditure and taxation but also includes closely related measures with a strong correlation to government practices.<sup>171</sup> Rubini argues that with this interpretation FIT programmes would fall within the ambit of the SCM Agreement.<sup>172</sup>

Indeed, while both the wording of article 1.1 of the SCM Agreement as well as the negotiating history of the SCM Agreement indicates that certainly not all regulatory measures introduced by governments could be considered subsidies, the exclusion argued by Howse of measures constituting a regulation of the electricity market is not unproblematic. As Rubini holds, FITs in many ways lead to similar results from an economic perspective as do other subsidies and he argues that Howse's distinction between delegation of a function and market regulation is not an easy legal test in order to distinguish subsidisation falling under the SCM Agreement from regulatory conduct falling outside of the scope of the SCM Agreement.<sup>173</sup> Against this backdrop, Rubini questions what aspect of FITs would make them market regulations instead of a delegation of function, as a FIT largely consists of a purchase obligation.<sup>174</sup>

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<sup>169</sup> Rubini, *Ain't Wastin' Time No More* (n 160) 541.

<sup>170</sup> See discussion below, section 3.2.4.1.

<sup>171</sup> Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (n 92) 121.

<sup>172</sup> Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (n 92) 122.

<sup>173</sup> Rubini, *Ain't Wastin' Time No More* (n 160) 542.

<sup>174</sup> Rubini, *Ain't Wastin' Time No More* (n 160) 542.

A broader interpretation of the requirement in subparagraph (iv) including also measures different from measure relating to taxation and expenditure also finds support in the case *US – Antidumping and Countervailing Duties*, where the AB considered the meaning of the last requirement in subparagraph (iv), regarding what is normally vested in the government and practice that in no real sense differs from practices normally followed by governments. The AB concluded that this should be judged on what is ordinarily considered part of governmental practice in the member state as well as the classification and functions of entities in WTO members generally.<sup>175</sup> Indeed, Rubini concludes that the interpretation in *US – Antidumping and Countervailing Duties* shows that cases of subparagraph (iv) cannot be limited to instances regarding taxation and expenditure, but is broader than that.<sup>176</sup>

To conclude, the law regarding whether government regulation of FIT programmes operated by private parties can be considered normal government practices is not entirely clear. Arguments can be found both in favour and against that FIT programmes financed by private parties should be included under subparagraph (iv). While there is some evidence suggesting that the requirement of normal government practices limits the applicability to instances related to taxation and expenditure and thus would exclude FIT programmes from the scope of subparagraph (iv), the discussion above has nevertheless shown a development in case law with the case *US – Antidumping and Countervailing Duties* indicating that the scope of the provision might be broader. As this case indicates that the interpretation of normal government practices is not limited to only instances of taxation or expenditure but can also cover regulatory measures, this arguably means that FIT programmes are not automatically exempted due to that they are regulatory measures and thus this interpretation could potentially open up for also FIT programmes to be included within the scope of subparagraph (iv).

It can be argued that the latter, broader interpretation better reflects the balance of interests in the provision. According to Wilke and as discussed in the previous section, the aim of the provision is to reflect a balance between the need to hinder states from circumventing the provision using private parties, and the need for governments to

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<sup>175</sup> *US – Antidumping and Countervailing Duties* para 297 and Rubini, 'Ain't Wastin' Time No More' (n 160) 543.

<sup>176</sup> Wilke (n 75) 15-16.

regulate through directing private parties.<sup>177</sup> It can be argued that such a broader interpretation appears to be more in line with this purpose. If all regulatory measures were excluded, the purpose to prevent circumvention of the subsidy regime by making a private entity providing the financial contribution would be weakened.

In relation to this it can be noted that the strict distinction made by Howse would lead to a different treatment under WTO law of subsidies depending on small differences in design and it can be questioned whether this would be appropriate. If FIT programmes were excluded on the basis that government regulation is not included under subparagraph (iv) an opportunity for states to circumvent the provision would open up. It would lead to that similar measures, only differing in who carries them out, would in one case be deemed to fall outside of the scope of the SCM Agreement and in the other would be included in the SCM Agreement. Moreover, Srikar has pointed out an additional effect stemming from different treatment of FIT programmes depending on who executes them, arguing that FIT programmes administered and executed by public bodies are more common in developing countries. Srikar points out that this leads to discrimination of developing countries and least developed countries (LDCs) where states traditionally account for more of the service provision.<sup>178</sup>

In sum, it is argued that the development in case law towards a broader interpretation of government practices and the purpose of the provision indicates that also FIT programmes operated by private parties could be included under subparagraph (iv) and thus be considered financial contributions by governments.

### **3.2.3 Price support**

While the discussion regarding FIT programmes, in literature as well as in the one case concerning the issue, so far has largely centred around whether FIT programmes amount to financial contributions in accordance with article 1.1(a)(1), it should be kept in mind that also forms of income or price support in accordance with article 1.1(a)(2) are included in the SCM Agreement definition of a subsidy. Thus, this could also be a possibility for a FIT programme to fulfil the requirements of a subsidy. Even though it

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<sup>177</sup> Wilke (n 75) 16.

<sup>178</sup> Srikar (n 42) 64-65.

has not been discussed much, and in fact was not claimed by any of the parties in *Canada – Renewable Energy*, it is possible that this also could be a way of arguing that FIT programmes are included under the definition of subsidy in the SCM Agreement.

Income or price support are measures introduced by governments in order to sustain the income of a certain category of industries or maintain the price of a commodity. Usually such measures aim to prevent the price of a commodity or the income of a category to fall below a certain minimum level. The reference in the provision to article XVI in GATT means that the income or price support measure introduced by the government must operate to increase exports of the subsidised product or to decrease imports of similar products.<sup>179</sup>

Case law under the WTO clarifying this provision is sparse; it has only been considered in two cases under the WTO.<sup>180</sup> In *US – Softwood Lumber IV* the AB commented on the issue and concluded that the provision regarding price support broadens the term financial contribution and seeks to include other measures in addition to the measure outlined within the concept of a financial contribution.<sup>181</sup> While this suggests a broad scope of the term price support the term has also been considered by a later panel in *China – GOES*. In this case the panel concluded that despite the possibility for a broad reading of the term price support, the context in the SCM Agreement, particularly the law regarding the scope of financial contribution, still suggested a more narrow interpretation. With reference to the law relating to financial contribution, the panel held that the focus needed to be on the measures taken by the government and not on the effects of the measure. The panel concluded that the term price support was limited to direct intervention by a government in a market designed to fix the price of a commodity. As an example of such government action the panel mentioned policies of a government to purchase surplus production in order to maintain the price at a certain level.<sup>182</sup>

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<sup>179</sup> Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (n 92) 123 and GATT article XVI.1.

<sup>180</sup> *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States* (15 June 2012) WT/DS414/R <<http://docsonline.wto.org>> (*China – GOES*) para 7.83.

<sup>181</sup> *US – Softwood Lumber IV* para 52, Rubini, ‘Ain’t Wastin’ Time No More’ (n 160) 544 and Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (n 92) 123.

<sup>182</sup> *China – GOES* para 7.85.

Turning to FITs specifically, Rubini argues that FITs would qualify under the term price support<sup>183</sup> while Howse, on the other hand, argues that, with regards to utilities, price regulation by a government should not be considered price support, due to that price regulation reflects various public policy goals, such as for example universal service, and that to consider price regulation of such industries could potentially obstruct the operation of democratic regulatory states.<sup>184</sup> Due to the very limited case law on the area it is difficult to determine whether FIT programmes would be considered price support. Nevertheless, in light of the conclusion by the panel in *China – GOES*, that government measures designed to sustain a certain price level for example by buying surplus products would be considered price support, and the fact that FIT programmes as described in chapter 2 are designed so as to provide a certain price level and indeed guarantees that all electricity produced will be bought, regardless of demand, it seems likely that FIT programmes could be considered a form of price support.

#### 3.2.4 Benefit

A financial contribution by the government will not be considered a subsidy unless the financial contribution confers a benefit, as per article 1.1(b) of the SCM Agreement. Unlike for the term financial contribution, a definition of the term benefit is not provided in the SCM Agreement.<sup>185</sup> A fundamental understanding of this concept was provided by the AB in *Canada – Aircraft*, where the AB essentially held that this requirement means that the recipient of a financial contribution have to be better off than it would have been without the financial contribution.<sup>186</sup> Likewise in *US – Large Civil Aircraft (2nd Complaint)* the AB noted that the assessment of whether a benefit had been conferred aimed to clarify whether the recipient was better off with the financial contribution compared to what the recipient would have been without it.<sup>187</sup>

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<sup>183</sup> Rubini, 'Ain't Wastin' Time No More' (n 160) 544.

<sup>184</sup> Howse (n 7) 13.

<sup>185</sup> Gilbert Gagné and François Roch, 'The US-Canada Softwood Lumber Dispute and the WTO Definition of Subsidy' (2008) 7 *World Trade Review* 547, 521.

<sup>186</sup> *Canada – Aircraft* para 157, Rubini, 'Ain't Wastin' Time No More' (n 160) 545, Trebilcock (n 85) 82 and, Trebilcock and Fishbein (n 82) 21.

<sup>187</sup> Van den Bossche and Zdouc (n 37) 761.

In some cases this assessment is simple, as for example when a government transfers money directly to an enterprise or when a government has been foregoing revenue that it would normally have collected. However, in other cases, such as when a government provides a loan for a company or, indeed, when a government purchases goods from a company, it may not be as obvious whether a benefit has been conferred.<sup>188</sup>

In order to determine whether a benefit has been conferred, i.e. whether a financial contribution has resulted in a more advantageous position for the recipient, the AB in *Canada – Aircraft* held that an assessment is to be made of whether the recipient received the financial contribution on terms more favourable than those available in the market.<sup>189</sup> That the marketplace is to be used as a standard has been confirmed in several cases decided by the AB.<sup>190</sup> In making this determination, earlier panels and the AB has found that it is necessary to make a comparison with a market benchmark reflecting the prevailing market conditions.<sup>191</sup> The AB has explained the methodology to consist of two steps. In order to reach a conclusion on the particular market benchmark it is first necessary to determine what the relevant market is and then to within this market find an appropriate benchmark.<sup>192</sup>

It will, however, in many cases be difficult to find a proper undistorted market benchmark, which was recognised by the AB in *Japan – DRAMS*.<sup>193</sup> In this case, the AB noted that the extent to which markets have been developed and the number of participants will vary between markets and that it may in some markets be difficult to establish what the relevant market is and determine the results from such a market, as prices for example may have been distorted.<sup>194</sup> Nevertheless, the AB emphasised that such constraints cannot alter the framework for the analysis and that “There is but one

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<sup>188</sup> Van den Bossche and Zdouc (n 37) 760 and Rubini, ‘Aint Wastin’ Time No More’ (n 160) 545.

<sup>189</sup> *Canada – Aircraft* para 157.

<sup>190</sup> *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea* (17 December 2007) WT/DS336/AB/R <<http://docsonline.wto.org>> (*Japan – DRAMS*) para 172, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft* (18 May 2011) WT/DS316/AB/R <<http://docsonline.wto.org>> (*EC – Large Civil Aircraft*) paras 974-976 and Rubini, ‘Ain’t Wastin’ Time No More’ (n 160) 545.

<sup>191</sup> Lowenfeld (n 81) 242.

<sup>192</sup> *Canada – Renewable Energy* para 5.169.

<sup>193</sup> Van den Bossche and Zdouc (n 37) 762.

<sup>194</sup> *Japan – DRAMS* para 172.



standard – the market standard – according to which rational investors act.<sup>195</sup> Thus, the marketplace has been identified by the AB to be the relevant focus in determining whether a benefit has been conferred, and this applies equally regardless of the characteristics or imperfections that might exist in a particular market.<sup>196</sup> This issue was also raised in *US – Softwood Lumber IV*, where it was argued that due to the interventions in the Canadian market by the Canadian government, the market conditions in Canada did not reflect a fair market value of timber. The AB then opened up the possibility for using other benchmarks in the case of a distorted market.<sup>197</sup> In this case, the AB found that the benchmark could only be based on prices other than private prices in the country if it has been established that the government’s role as provider of the good in the market distorts those prices.<sup>198</sup>

#### **3.2.4.1 Financing of FITs**

With regards to FIT programmes, a first interesting question in relation to the conferral of a benefit is whether it necessarily requires a cost to the government. This will be of particular importance in situations where the design of FIT programmes does not mean that the government itself bears the cost, such as is the case when the government only through regulation directs private entities to buy electricity at a certain tariff level as discussed in chapter 2. If the concept of a benefit necessarily includes a requirement for there to be cost for the government, such programmes would not be considered to confer a benefit and such FIT programmes would as a result not fulfil the definition of subsidy in the SCM Agreement.

In *Canada - Aircraft* the AB found that whether a benefit has been conferred is to be determined from the perspective of the recipient and is not, as Canada had argued, dependent on whether the granting authority has borne a cost.<sup>199</sup> The AB in *Canada – Aircraft* based its reasoning on the ordinary meaning of the term benefit – which the AB found to include a focus on the recipient – and a reading of article 14 of the SCM Agreement, which stipulates how to calculate the size of a subsidy, and which the AB

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<sup>195</sup> *Japan – DRAMS* para 172.

<sup>196</sup> Rubini, ‘What does the recent WTO litigation on renewable energy subsidies tell us about methodology in legal analysis?’ (n 87) 10.

<sup>197</sup> *Trebilcock* (n 85) 83.

<sup>198</sup> *Gagné and Roche* (n 185) 569.

<sup>199</sup> *Canada – Aircraft* para 160 and *Van den Bossche and Zdouc* (n 37) 760.

found to support the focus on the recipient of the benefit as article 14 refers to the amount of subsidy as the benefit to the recipient.<sup>200</sup>

Of particular importance to the assessment of FIT programmes is the AB's next argument, that an interpretation of benefit which required a cost to the government, as argued by Canada, would mean that situations in which a government directs or entrusts a private body to confer a benefit were excluded from the scope of article 1.1(a)(1), as in those situations there would not be a cost to the government. The AB found that such an interpretation would be at odds with the wording of article 1.1(a)(1) which in subparagraph (iv) explicitly includes within the concept of a financial contribution such situations and the AB thus disagreed with the interpretation advanced by Canada, clarifying that the scope of subsidy also includes situations where there is no cost to the government.<sup>201</sup>

While the situation where a government directs private entities to purchase goods at a favourable price does not mean that the government bears any cost itself for the purchase, it has been argued that this does not exclude such measures from the SCM Agreement.<sup>202</sup> From the discussion above it can be concluded that, indeed, the fact that the design of a FIT programme does not mean that the government bears the costs for the benefit, such as when the government directs private bodies to execute the FIT programme, does not exclude the FIT programme from the scope of the SCM Agreement. The reasoning by the AB in *Canada – Aircraft* clearly shows that actions by a government can confer benefits even though the government has borne no cost. This is of paramount importance to the discussion of whether FIT programmes are specific subsidies, as a finding that the conferral of a benefit requires a cost to the government would necessarily have excluded FIT programmes financed by private parties from the ambit of the SCM Agreement. However, with the finding that a cost to the government is not necessary for a measure to constitute a subsidy, it can be concluded that FIT programmes, regardless of how they are financed, are not automatically exempted from the definition of subsidy on this basis.

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<sup>200</sup> *Canada – Aircraft* paras 154 and 155.

<sup>201</sup> *Canada – Aircraft* para 160.

<sup>202</sup> Howse (n 7) 12.

#### 3.2.4.2 The tariff level

Having established that the concept of benefit does not require a cost to the government, and thus that FIT programmes are not excluded on this basis, the dissertation will now turn to an assessment of whether FIT programmes, as defined above in chapter 2, confer a benefit. The assessment of whether a FIT programme confers a benefit will essentially hinge on whether it provides an advantage to the recipient compared to the general conditions available on the market, and shall be determined in accordance with the case law accounted for above. Thus, the crucial issue would be whether the conditions in the FIT contracts are more favourable than conditions available to producers in the marketplace.

In order to determine whether FIT programmes confer a benefit it is thus necessary to compare the conditions in FIT contracts with the conditions that would be available on the market. While the long duration of the contract could prove problematic if it would be found to be longer than for other contracts available in the market and thus could confer a benefit, the aspect in FIT programmes that above all could prove problematic in that it risks conferring a benefit is the tariff level, as it is usually set above the market rate for electricity from conventional sources as concluded in chapter 2. Therefore, this section will consider this issue.

In order to answer the question of whether such conditions mean that a benefit has been provided, it is necessary to know what is the relevant market and market benchmark. Guidance can be drawn from article 14(d) in the SCM Agreement, concerning how to calculate the amount of subsidy, which has been used in for instance *EC –DRAMS* to determine whether a benefit has been conferred.<sup>203</sup> This provision holds that a purchase of goods should be considered a benefit if it is made for more than adequate remuneration and the adequacy of the remuneration is to be determined in relation to the prevailing market conditions.<sup>204</sup> Consequently, seeing as FIT programmes consist of a purchase of goods, the decisive issue for the determination of a benefit will be whether the purchase is made for more than what it would have yielded under prevailing market conditions. In accordance with the methodology explained above this has to be settled through a comparison with a market benchmark.

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<sup>203</sup> Lowenfeld (n 81) 242.

<sup>204</sup> SCM Agreement article 14(d) and *Canada – Renewable Energy* para 5.183.

The question of whether FIT programmes provide a benefit with regards to the tariff level might at a first glance seem to be easily answered in the positive, as the tariff level usually is set higher than the market price for electricity from conventional sources. It has indeed been argued by authors that the tariff level of FIT programmes means that FIT programmes by definition provide a benefit.<sup>205</sup> Moreover, Rubini claims that the assessment of a benefit in the first stage, i.e. in the determination of whether the definition of a subsidy has been fulfilled, is a limited assessment, as opposed to the more extensive assessment that will have to be undertaken in the course of determining the effects on trade of the subsidy and that in the first determination such concerns should be exempted from scrutiny.<sup>206</sup> Howse argues that whether FIT programmes are conferring a benefit or not are likely to vary between different FIT programmes. Howse is of the opinion that not all FIT programmes will include a conferral of a benefit. He claims that when measures introduced by a government only compensates a producer for actions which the producer otherwise would not have to take, such as investing in equipment for producing renewable energy or distributing electricity from renewable sources to customers in remote areas, the producer has only received compensation for costs and a benefit has not been conferred. The argument is based on the notion that such measures do not leave the recipient better off than any other actor in the market that has not had to undertake the actions that the recipient has.<sup>207</sup> In relation to this, the argument has been advanced that the determination of whether a benefit has been conferred ought to be done in relation to other regulatory requirements, as such requirements may have introduced a competitive disadvantage on the producer. For instance, this could lead to the conclusion that in states with very strict environmental regulations, support measures by governments may only compensate for the extra cost on producers due to the strict regulations.<sup>208</sup>

However, it is submitted that in order to provide an answer to whether FIT programmes provide a benefit, the methodology for the benefit determination accounted for above suggests that the comparison must be made against a market benchmark before such a

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<sup>205</sup> See for example Wilke (n 75) 17.

<sup>206</sup> Rubini, 'Ain't Wastin' Time No More' (n 160) 546.

<sup>207</sup> Howse (n 7) 13.

<sup>208</sup> Bigdeli (n 17) 15.

conclusion can be reached. For the outcome of such an assessment the determination of the relevant market will be of utmost importance as will be seen from case law below.

When it comes to FIT programmes only one case has been tried by the AB, namely *Canada – Renewable Energy*, and in this case it was in fact whether a benefit had been conferred that proved the most difficult to determine and also the criterion on which the claim eventually fell. The case provides important insights into the benefit assessment with regards to FIT programmes.

In *Canada – Renewable Energy*, a case brought by EU and Japan, the AB analysed the WTO compatibility of a FIT programme introduced by Ontario, Canada. In the disputes the complainants challenged certain aspects of Canada's FIT programme. Implemented by the government of the province of Ontario in 2009 to increase the supply of electricity generated from renewable sources, the FIT programme guaranteed to producers of electricity from renewable sources a certain price per kWh for electricity for a contract period of 20 to 40 years. The FIT programme was open to producers in Ontario generating electricity from the renewable sources wind, solar PV, renewable biomass, biogas, landfill gas, and waterpower. The FIT programme included both producers with a capacity to generate large quantities of electricity as well as smaller producers such as farms and homeowners.<sup>209</sup> The Ontario FIT Programme also included local content requirements, thus conditioning eligibility for the FIT programme on the use of locally produced content in the development and construction of production facilities.<sup>210</sup> In both the disputes the claimants held Canada's FIT programme to be inconsistent with certain articles in the TRIMS Agreement and the GATT, but also to be inconsistent with article 3.1(b) and 3.2 of the SCM Agreement.<sup>211</sup> Arguably, the claim under the SCM Agreement was particularly relevant to the claimants as the SCM Agreement under article 4.7 provides for a more rapid remedy than does the DSU.<sup>212</sup> The case particularly provides for important conclusions for FIT programmes in relation to the determination of the relevant market.

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<sup>209</sup> *Canada – Renewable Energy* paras 1.3 and 4.17.

<sup>210</sup> *Canada – Renewable Energy* para 1.4.

<sup>211</sup> *Canada – Renewable Energy* para 1.6.

<sup>212</sup> Rajib Pal, 'Has the Appellate Body's Decision in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* Opened the Door for Production Subsidies?' (2014) 17 *Journal of International Economic Law* 125, 127. See also SCM Agreement article 4.7.

#### 3.2.4.2.1 The relevant market

In accordance with the methodology described above, the determination of whether a benefit had been conferred in *Canada – Renewable Energy* was to be decided in comparison with a market benchmark. The AB started with defining the relevant market. In this respect, the AB disagreed with the finding of the panel - that the relevant market was the market for electricity from all sources of energy, as customers do not distinguish between electricity based on the mode of generation<sup>213</sup> - after having examined both demand-side and supply-side factors.<sup>214</sup> The AB criticised the panel for finding that the fact that electricity is physically the same regardless of how it is produced means that there is only one market for electricity. The AB pointed out that this only shows that there is a high demand-side substitutability but the AB also emphasised the need to analyse supply-side factors when determining the relevant market. In this respect the AB cited *EC and Certain Member States – Large Civil Aircraft*, even though that case regarded an assessment pursuant to articles 6.3(a) and 6.3(b) of the SCM Agreement, where both demand-side and supply-side substitutability was used by the AB to determine the relevant market.<sup>215</sup>

The emphasis of the AB on supply-side factors will prove of utmost importance for the benefit determination with regards to FITs. In *Canada – Renewable Energy* the AB noted that certain supply-side factors with regards to renewable energy, such as the type of energy generated (i.e. base-load or peak-load), had to be taken into account and that such factors might in fact differentiate the market, even though demand-side factors may indicate that there is no difference between electricity from renewable and conventional sources.<sup>216</sup> The AB argued that from an analysis of both demand-side as well as supply-side factors follows that the intervention in the market by a government can have implications for the definition of the relevant market.<sup>217</sup>

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<sup>213</sup> *Canada – Renewable Energy* para 5.168.

<sup>214</sup> Pal (n 212) 127.

<sup>215</sup> *Canada – Renewable Energy* para 5.171.

<sup>216</sup> *Canada – Renewable Energy* para 5.170-5.171.

<sup>217</sup> *Canada – Renewable Energy* para 5.172.

Indeed, it can be argued that one of the most important findings with regards to the WTO consistency of FIT programmes regarded precisely the significance of government intervention in the market for the determination of the relevant market. In this respect, the AB noted that the electricity market in Ontario was heavily influenced by the policy decisions and regulations regarding the supply mix.<sup>218</sup> The AB found that due to several factors, such as high capital costs, few economies of scale and inferior suitability for certain types of energy production, solar and wind energy cannot compete with other energy generating technologies. Therefore, the AB concluded that markets for wind and solar energy could only come into existence as a result of government intervention, through for example the government determining prices for renewable energy or requiring distributors to buy a certain amount of renewable energy. In respect to this, the AB noted that only the existence of a certain supply-mix definition by the government does not in itself amount to a benefit.<sup>219</sup>

Furthermore, the AB opposed the panel's focus on that final consumers do not distinguish between electricity based on the generation technology. The AB pointed out that while final consumers may perceive electricity as the same regardless of generation technology, the same was not necessarily true at the wholesale level, where the government of Ontario purchased electricity based on its supply-mix decisions. Thus, for the government of Ontario, electricity from different generating technologies was not substitutable.<sup>220</sup> The AB concluded that, although demand-side factors weighed in favour of defining the relevant market as the electricity market in whole, supply-side factors showed that a wind and solar electricity market would not exist without government intervention and thus the assessment of whether a benefit had been conferred should be made within a competitive market for wind and solar energy created by the government's definition of the supply-mix.<sup>221</sup> Thus, the focus by the AB in *Canada – Renewable Energy* on supply-side factors and the fact that government intervention was necessary to create a market for renewable energy production made the AB conclude that the relevant market for the assessment of whether a benefit had been conferred was the market for wind and solar power.

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<sup>218</sup> *Canada – Renewable Energy* para 5.173.

<sup>219</sup> *Canada – Renewable Energy* paras 5.174-5.175.

<sup>220</sup> *Canada – Renewable Energy* para 5.176.

<sup>221</sup> *Canada – Renewable Energy* para 5.178.

#### 3.2.4.2.2 The market benchmark

Having found the relevant market to be competitive wind and solar power markets in accordance with the reasoning above, the AB moved on to establish the benchmark against which the existence of a benefit should be assessed.<sup>222</sup>

Embarking on the benchmark analysis, the AB noted that article 1.1(b) should be read in the context of article 14(d) and that it involved a comparison of the alleged subsidy with a benchmark. Referring to *US – Softwood Lumber IV*, the AB underscored that, in the absence of an undistorted market in the country of purchase, the assessment shall instead be done in comparison with an out-of-country market or a constructed benchmark that replicates competitive market conditions. However, the AB cautioned that the new benchmark truly must reflect the market conditions in the country of purchase, as interpreted by the AB in *Canada – Softwood Lumber IV*.<sup>223</sup>

The case law concerning the determination of a benefit in distorted markets appears to be particularly relevant with regards to FITs, because, as Rubini explains, the finding of a benchmark in energy markets might be difficult due to that those markets have to a great extent been subject to government intervention.<sup>224</sup> Howse, who has elaborated on this aspect, argues that energy markets have during extensive time periods been distorted by subsidies from governments for fossil fuels to both producers and consumers and moreover that also physical properties for distribution and retailing of energy, such as electricity grids, favour fossil fuels.<sup>225</sup> Thus, authors have argued that it would prove problematic to find an undistorted benchmark in energy markets.

Nevertheless, in *Canada – Renewable Energy* the AB emphasised that government intervention in energy markets not necessarily meant that appropriate benchmarks could not be found in such markets and that this applied also to instances where a government has created a market. To illustrate this point, the AB mentioned that

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<sup>222</sup> *Canada – Renewable Energy* para 5.179.

<sup>223</sup> *Canada – Renewable Energy* para 5.184.

<sup>224</sup> Rubini, 'Ain't Wastin' Time No More' (n 160) 545.

<sup>225</sup> Howse (n 7) 6.



governments often intervene in electricity markets to create a market with constant and reliable supply, through for example regulating the quantity and type of electricity supplied such as base-load, peak-load and intermediate-load. Although this may have an effect on prices, just like the creation of renewable energy markets may, the AB did not find it to make it impossible to treat such prices as market prices in a benefit analysis.<sup>226</sup>

It can be argued that another important finding with regards to government intervention in markets was that the AB recognised that regulation of the supply-mix to include renewable energy, just like interventions directed at ensuring a reliable supply of electricity, could be important for the long-term sustainability of the electricity market, as the alternative may be reliance on exhaustible energy sources such as fossil fuel, which is not sustainable from a long-term perspective. The AB concluded that a government's choice to include wind and solar energy into the supply mix should not be considered to prevent a benchmark from the market to be used in the assessment of whether a benefit has been conferred.<sup>227</sup> However, the AB emphasised that it is still important to distinguish between when a government creates a market that would not exist without government intervention, and when a government supports players in an already existing market.<sup>228</sup> While the AB recognised that the supply-mix definition by a government could be of importance when determining the benchmark, the AB nevertheless strongly emphasised that the underlying policy objectives for the introduction of such a supply-mix was of no importance, as taking that into account would have been equal of introducing an exception based on environmental grounds in the SCM Agreement.<sup>229</sup>

The AB found that the benchmark for wind and solar electricity should be found in the market for solar and wind energy resulting from the supply-mix definition. The AB concluded that a benchmark should be the terms and conditions available under market-based conditions for each of the technologies, with the supply-mix considered as a prerequisite.<sup>230</sup>

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<sup>226</sup> *Canada – Renewable Energy* paras 5.185.

<sup>227</sup> *Canada – Renewable Energy* para 5.186.

<sup>228</sup> *Canada – Renewable Energy* para 5.188.

<sup>229</sup> *Canada – Renewable Energy* para 5.182.

<sup>230</sup> *Canada – Renewable Energy* para 5.190.

Assessing the benchmarks suggested by the parties to the dispute, the AB found none of them to be appropriate, as they all reflected a price for electricity from blended sources.<sup>231</sup> The AB concluded that an appropriate benchmark would reflect what electricity produced from wind and solar power would yield, within the parameters of the Government of Ontario's definition of the supply-mix.<sup>232</sup>

Although the AB in *Canada – Renewable Energy* found itself to be unable to complete the legal analysis due to that sufficient evidence of a market benchmark had not been presented by the parties to the dispute,<sup>233</sup> the AB nevertheless in its reasoning provided important information for the benefit determination in relation to FIT programmes. The AB found that the appropriate benchmark for the benefit analysis could be administered prices for the same product, if those prices are determined by a price-setting mechanism ensuring market prices, or prices determined through competitive bidding or negotiated prices, in case these prices reflected the lowest possible price offered.<sup>234</sup>

Thus, the reasoning by the AB in *Canada – Renewable Energy* provides important information as to the benefit determination from FIT programmes, in that it provides insights into the determination of appropriate market benchmarks in relation to FIT programmes.

The decision in *Canada – Renewable Energy* has however been criticised by several authors claiming that the AB in its eagerness not to find renewable energy subsidies inconsistent with the law of the WTO committed several errors in its interpretation of the term benefit and in the finding of the market benchmark. Moreover, the approach taken by the AB to the term benefit has been criticised for giving member states large space to subsidise production also in other industries.

For instance, Pal argues that the emphasis put on supply-side factors by the AB, leading it to conclude that the relevant market was not the blended electricity market but rather the market for wind and solar power, was erroneous. In support of this, Pal argues that

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<sup>231</sup> *Canada – Renewable Energy* para 5.204.

<sup>232</sup> *Canada – Renewable Energy* para 5.227.

<sup>233</sup> *Canada – Renewable Energy* para 5.246.

<sup>234</sup> *Canada – Renewable Energy* para 5.228.

the case law the AB included in its argument of supply-side factors referred to a provision in a distinctly different context, namely in determination of serious injury and thus the reasoning was not applicable to the benefit analysis, and that even if the AB was right to include supply-side factors in its reasoning the AB still had no reason to find those factors to outweigh demand-side factors.<sup>235</sup> On the contrary, Pal argues that such an interpretation is inconsistent with earlier interpretations of the term benefit as well as with the object and purpose of the SCM Agreement.<sup>236</sup> Moreover, Pal criticises that the AB included the supply-mix decision in its reasoning, as the supply-mix was part of the very measure the AB was to assess.<sup>237</sup> Pal also criticises the AB's finding that the government of Ontario created another market that did not exist by supporting renewable energy producers, instead Pal argues that in fact the Government of Ontario only supported inefficient supporters in an already existing market, as opposed to creating a market for a whole new product that did not exist before. Ultimately, Pal argues that the interpretation by the AB in *Canada – Renewable Energy* leads to a detrimental result due to that it allows states to choose to promote different production technologies in their markets.<sup>238</sup>

Rubini cautions that the statement by the AB distinguishing between on the one hand governmental market creation and on the other governmental intervention in already existing markets is far from clear and that the vagueness of the decision risk having far-reaching implications for the subsidy regime, due to that the vague language opens up for analogical interpretations in other cases.<sup>239</sup> Rubini holds that the AB's idea was to create space for governments to make supply-mix decisions, without those being regarded as subsidies. However, in doing so, the AB failed to provide answers to crucial questions regarding the limit of policy space for governments.<sup>240</sup>

Moreover, it has been argued that, due to the implications of the interpretation of benefit by the AB giving member states significantly more leeway to subsidise, the AB

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<sup>235</sup> Pal (n 212) 130.

<sup>236</sup> Pal (n 212) 132-133.

<sup>237</sup> Pal (n 212 ) 133-134.

<sup>238</sup> Pal (n 212) 134.

<sup>239</sup> Rubini, 'What does the recent WTO litigation on renewable energy subsidies tell us about methodology in legal analysis?' (n 87) 15.

<sup>240</sup> Rubini, 'What does the recent WTO litigation on renewable energy subsidies tell us about methodology in legal analysis?' (n 87) 15-16.

will not be able to continue to interpret the term benefit in this way but will eventually have to extend the interpretation to cover some of the measure that would with the interpretation in *Canada – Renewable Energy* fall outside of the scope of the SCM Agreement.<sup>241</sup>

Nevertheless, despite the criticism and potential prospect of future decisions of the AB further clarifying the exact scope of its reasoning, it can be concluded that *Canada – Renewable Energy*, being a recently adjudicated case on the benefit determination as well as the only case concerning FIT programmes, provides important information on the benefit assessment with regards to FIT programmes in the law as it stands today. Although the characteristics of FIT programmes, particularly the inclusion of a tariff above the prices paid for electricity from conventional sources, at a first glance appears to clearly provide a benefit to the producer the case *Canada – Renewable Energy* has arguably opened up for a possibility that FIT programmes can be designed so that a benefit is not conferred.

Although the AB in *Canada – Renewable Energy* found that not enough evidence had been presented before the AB in order for it to complete the legal analysis and rule on the issue and thus the case does not tell us that the FIT programme was consistent with WTO law - on the contrary, the reasoning by the AB regarding the wind power prices suggests that the prices paid by Ontario indeed were too high and thus provided a benefit<sup>242</sup> - the case nevertheless is important as the AB's discussion of appropriate benchmarks provides a blueprint for how FIT programmes can be designed in order not to fall within the scope of the definition of subsidy in the SCM Agreement.

### 3.3 Specificity

Pursuant to article 1.2 of the SCM Agreement, a subsidy must be specific for the SCM Agreement to be applicable, meaning that even if a measure fulfils the definition of a subsidy it would still be excluded from the SCM Agreement if it did not fulfil the requirement of specificity. Essentially, specificity concerns the extent to which the subsidy is available across the board to all enterprises or industries or whether a

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<sup>241</sup> See for example Cosby and Mavroidis (n 21).

<sup>242</sup> *Canada – Renewable Energy* para 5.245.

subsidy is limited to only certain industries or enterprises. Only specific subsidies are deemed to distort trade and therefore the SCM Agreement applies to such subsidies only whereas non-specific subsidies not favouring certain industries or enterprises are allowed under the SCM Agreement.<sup>243</sup> The requirements for specificity are set out in article 2 of the SCM Agreement, which pinpoints four different categories of specific subsidies.

According to article 2.1, a subsidy is first specific in the situation where the subsidy is aimed at particular enterprises and second where a subsidy is targeted at particular industry. Third, a subsidy can be specific when it is limited to enterprises within a certain geographical region, according to article 2.2. Fourth and lastly, pursuant to article 2.3 of the SCM Agreement, all prohibited subsidies, i.e. subsidies contingent on export performance or the use of domestic over imported goods, are also considered to be specific.<sup>244</sup>

Thus, for a subsidy to be deemed specific it must be shown that a subsidy is specific to any of the groups mentioned above. However, article 2.1(b) of the SCM Agreement specifies certain criteria that, when adhered to, will ensure that a subsidy is not considered to be specific. Among these criteria is that for a subsidy to be non-specific, it has to be based on objective criteria or conditions.<sup>245</sup>

Nevertheless, even if a subsidy is not in law explicitly reserved for a particular industry or enterprise, i.e. de jure specific, it can still be considered to be de facto specific if the subsidy is only used by a limited number of certain companies or predominantly used by certain companies. It can also be considered de facto specific if the government grants a disproportionate part of the subsidies to certain companies or if the government favours certain companies. Notably, this has been clarified through article 2.1(c) of the SCM Agreement, which expressly holds that even if a subsidy appears to be non-specific but there is reason to believe that the subsidy might in fact be specific, it is possible to take into account additional criteria, such as whether the subsidy

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<sup>243</sup> Magnus Lodefalk and Mark Storey, 'Climate Measures and WTO Rules on Subsidies' (2005) 39 *Journal of World Trade* 23, 30.

<sup>244</sup> SCM Agreement article 2.

<sup>245</sup> SCM Agreement article 2.1(b).

programme is only used by a few enterprises, predominantly used by certain enterprises, whether disproportionately large amounts of subsidy is granted to certain enterprises, and how the granting authority handle the applications for subsidies, i.e. the rate of approval or refusal.<sup>246</sup> The intent of the negotiators of the SCM Agreement with this regulation was to include a broad range of subsidies.<sup>247</sup>

Effectively, the requirement of specificity means that subsidies that are available to a wide range of players in the economy does not fall within the scope of the SCM Agreement and are consequently allowed under WTO law.<sup>248</sup> It has been suggested that the limited case law available so far regarding the specificity requirement suggests that rationale behind this test is to exclude from the discipline of subsidies those that relate to the provision of public goods as well as subsidies granted pursuant to objective criteria or conditions.<sup>249</sup>

Turning to the design of FIT programmes, Howse argues that it would be possible to provide non-specific subsidies to promote the use of renewable energy if they were provided to users of renewable energy and were available generally to all enterprises in the economy.<sup>250</sup> However, as FIT programmes as described above targets producers of renewable energy this might not be the case for FIT programmes. Instead, such programmes would in all likelihood be considered specific as subsidies to enterprises in a particular industry. This is because, as Wilke argues, subsidies for renewable energy will by definition be available only to certain industries and enterprises, namely those involved in producing green energy.<sup>251</sup> Thus, a FIT programme, as designed above, will, even if designed as broadly as possible, necessarily provide a subsidy to a particular industry, namely to the renewable energy industry. Indeed, Rubini questions both the possibility as well as the desirability to design subsidies for renewable energy so as they are not specific. Importantly, Rubini questions the desirableness of such a design, as he

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<sup>246</sup> SCM Agreement article 2.

<sup>247</sup> Trebilcock and Fishbein (n 82) 21-22.

<sup>248</sup> Van den Bossche and Zdouc (n 37) 764.

<sup>249</sup> Bigdeli (17) 21.

<sup>250</sup> Howse (n 7) 13.

<sup>251</sup> Wilke (n 75) 17.

finds in his study that for a subsidy to be effective from an environmental and economic perspective it is in fact necessary for the subsidy to be targeted more closely.<sup>252</sup>

Moreover, even if a FIT would be designed to be available generally for all different sources or technology for renewable energy, thus being as broad as possible, it would still only target a small part of the energy market. Even if in fact renewable energy would constitute the dominant or exclusive part of the energy market, thus making the subsidies available to virtually all players on the energy market, it has to be noted that the energy market is still only a very small part of the total economy.<sup>253</sup> Rubini also points out that particularly the provision in article 2.1(c) of the SCM Agreement risks constituting an obstacle in that a subsidy under this provision can still be considered specific if the subsidy programme is not sufficiently broadly available throughout the economy.<sup>254</sup>

While it is yet unclear how narrowly targeted a subsidy must be to fulfil the specificity requirement, thus for example how small the group of enterprises and industries must be for a subsidy to be specific, as the WTO case law does not provide much guidelines in this question,<sup>255</sup> there is nevertheless evidence in case law that suggests that for a subsidy programme to be considered to be available throughout the economy, more is required than proving that a large number of enterprises or sectors are eligible for the subsidy.<sup>256</sup>

With regards to FITs, designed as outlined above, they would most certainly be regarded as specific subsidies in accordance with article 2.1 of the SCM Agreement. Moreover, as both Wilke and Rubini point out,<sup>257</sup> it appears unlikely that it would be possible to design a FIT that would not be considered to be a specific subsidy, without the very purpose of the subsidy being lost in the process.

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<sup>252</sup> Rubini, 'Ain't Wastin' Time No More' (n 160) 548.

<sup>253</sup> Rubini, 'Ain't Wastin' Time No More' (n 160) 548-549.

<sup>254</sup> Rubini, 'Ain't Wastin' Time No More' (n 160) 548.

<sup>255</sup> Sykes (n 89) 103 and Bigdeli (n 17) 21.

<sup>256</sup> *US – Softwood Lumber IV* and Rubini, 'Ain't Wastin' Time No More' (n 160) 548.

<sup>257</sup> Wilke (n 75) 17 and Rubini, 'Ain't Wastin' Time No More' (n 160) 548.

However, as seen above, it will be possible to design FIT programmes so that they do not confer a benefit and thus do not fulfil the definition of a subsidy. In such cases, the discussion about specificity is not of relevance, as the FIT programmes would be excluded from the ambit of the SCM Agreement already with regards to the assessment of the definition of a subsidy. The question of whether FITs are specific according to the SCM Agreement will only be of relevance with regards to FIT programmes designed to provide a tariff level that reflects a higher price than the market benchmark as described by the AB in *Canada – Renewable Energy* and thus is considered to confer a benefit, and in that case it can be concluded that the specificity requirement would most likely also be fulfilled and the SCM Agreement's rules would thus be applicable to such a measure.



## 4. Conclusions

This dissertation aimed to clarify the WTO law on subsidies with regards to FIT programmes in order to provide some thoughts on the possibility for member states to maintain such programmes in place. In order to do this, a model of a FIT programme containing the most common characteristics of FITs was outlined in chapter 2. In this chapter it was found that there are certain characteristics that will be common to all FIT programmes regardless of where they are operated. The first one was found to be the inclusion of a purchase obligation, imposing on electric utility companies an obligation to purchase electricity from renewable energy producers. Moreover, FIT programmes were found to contain a predefined tariff level, most likely based on the cost-based method, which provides for a recovery of the costs as well as an added reasonable rate of return and which will usually be set above the market price for conventional electricity. Lastly, FIT contracts were found to provide for a long duration of the tariff payment, usually around 20 years. While it was found that all FITs will contain these particular features, it was noted that FIT programmes can be financed and operated in different ways, the most common ways being a government financing the programme using revenues from taxation or a financing of a programme by private parties where the government only acts as a regulator.

After having outlined the basic features of a FIT programme, the dissertation turned to the question of whether a FIT programme containing such features is considered a specific subsidy according to the rules of the WTO SCM Agreement, and thus if the SCM Agreement's discipline on subsidies is applicable. In the analysis the various requirements of the SCM Agreement were clarified and analysed in relation to the relevant aspects of FIT programmes. The analysis shows that despite consisting of the same basic features, different considerations arise depending on how such programmes are operated and financed, notably with regards to if the programmes are carried out by public or private bodies. Particularly this applies to the question of whether there has been a financial contribution, where the difference between public and private financing appears to potentially have implications for the applicability of the SCM Agreement. While it is fairly straightforward to establish that the purchase obligation in FIT programmes makes the programme qualify as one of the actions included in article

1.1(a)(1), as it essentially provides for a purchase of goods, the question of whether such action is attributable to the government has been found to be more problematic.

With respect to this issue, it can be concluded that FIT programmes operated directly by a government or by a government through a public body can be quite easily deemed to fulfil the requirements of a financial contribution by a government. However, it is less clear whether a FIT programme where the government only acts as a regulator whereas the programme is carried out and financed by private parties would be considered a financial contribution by a government. As it is a prerequisite in order for a FIT programme to be considered a subsidy that the financial contribution is made by a government, the conclusion with regards to this requirement is paramount.

While there are some arguments suggesting that a government could design a FIT where it acts as a regulator that would not be qualified as a financial contribution by a government, the most likely outcome appears to be that also FITs financed by private parties could be considered financial contributions by a government. Particularly this is due to a development in case law extending the interpretation of normal government practices beyond those relating to taxation and expenditure, thus opening up for a possibility to include regulatory measures, such as FITs, within its scope.

Additionally, it should be noted that even if a measure would not be considered a financial contribution it could still fulfil the definition of a subsidy if the measure can be considered price support. In this respect it can be argued that, while not entirely certain due to the limited case law on the issue, FITs would most likely be considered price support and could thus also on this basis be considered subsidies.

However, the finding that a FIT would most likely fulfil the requirement of a financial contribution or price support does not necessarily mean that a FIT programme would amount to a subsidy under the SCM Agreement. Notably, as has been seen above, the requirement of a conferral of a benefit appears to be the requirement that provides for an opportunity for states to design FITs in a way so that they will be excluded from the scope of the SCM Agreement. Due largely to the way in which the AB defined the relevant market in *Canada – Renewable Energy* a possibility for states to maintain FIT

programmes was opened up, as this conclusion by the AB effectively opened up for an interpretation of the term benefit that excludes FITs from the scope of the SCM Agreement. The AB's reasoning that supply-side factors, such as factors relating to the production method, should be taken into account when defining the relevant market, lead it to the finding that the relevant market was not the market for electricity from all sources but rather the, by the government created, market for renewable energy.<sup>258</sup> This conclusion is of paramount importance with regards to FIT programmes, as the relevant market will then likely be determined to be limited to the market for renewable energy due to the particular supply-side factors for production of renewable energy. The limitation of the relevant market to the market for renewable energy thus opens up for a possibility for states to design FIT programmes, even including features such as a tariff set higher than the price for electricity from conventional energy sources, without the FIT programmes being considered subsidies and thus risking to breach the SCM Agreement.

While the AB's reasoning has lead to that it is possible for states to design programmes where renewable energy producers are paid more than conventional producers of energy, due to the way the relevant market is determined, states nevertheless need to be mindful of the tariff level when designing such programmes. As can be concluded from the reasoning of the AB in *Canada – Renewable Energy*, there is still a possibility that the tariff level may be deemed to provide a benefit, should it be set too high. Indeed, it was even suggested by the AB that the tariff level in the Ontario FIT programme was set at a too high level and thus would be considered a benefit, although enough evidence had not been provided.<sup>259</sup> Thus, the tariff level still need to not be set higher than what would be available under market-based conditions for each of the technologies, with the supply-mix considered as a prerequisite.<sup>260</sup> In order to ensure that FIT programmes do not provide a benefit, states should take note of the guidance provided by the AB in *Canada – Renewable Energy* on possible ways to determine an appropriate benchmark in the renewable energy market.

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<sup>258</sup> *Canada – Renewable Energy* para 5.178.

<sup>259</sup> *Canada – Renewable Energy* para 5.245-5.246.

<sup>260</sup> *Canada – Renewable Energy* para 5.190.

Seeing as the conferral of a benefit is a prerequisite for a measure to amount to a subsidy according to the SCM Agreement, the absence of a benefit for FIT programmes means that the measures are exempted from scrutiny under the SCM Agreement and thus that the WTO regime on subsidies would not pose any threat to the ability of states to maintain in place such programmes. Thus, regardless of the fact that it in this dissertation has been found that FIT programmes would necessarily be specific according to article 2 of the SCM Agreement, the SCM Agreement would not be applicable as a result of that FITs do not fulfil the definition of a subsidy.

In sum, it can be concluded that FITs, as described in chapter 2, cannot be considered specific subsidies in accordance with the rules in the WTO SCM Agreement, and that it thus is possible for member states to continue to use such programmes in order to promote the use of renewable energy.

After having answered the research questions of the dissertation some concluding thoughts on the law will be provided. In the introduction of this dissertation the graveness of climate change and its link to fossil fuels were stressed and it was suggested that the ability for states to maintain FIT programmes in place was important in order to combat climate change. With this in mind, the conclusion reached in this dissertation, largely due to the outcome in *Canada – Renewable Energy*, that it is possible for states to maintain FIT programmes, could be considered advantageous from an environmental perspective. However, the reasoning in *Canada – Renewable Energy* may also have negative implications in that it might lead to a weakened subsidy regime. As seen in the discussion above in relation to *Canada – Renewable Energy*, it is not only measures aimed at achieving environmental goals that the definition of the market introduced in *Canada – Renewable Energy* will allow. Indeed, as Pal argues,<sup>261</sup> the methodology to determine the relevant market taking into account different production methods opens up for states to choose to promote certain production technologies in their markets. Thus, it opens up for a possibility for states to offer incentives and benefits to industries without the environmental benefit.

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<sup>261</sup> Pal (n 212) 134.

While allowing states to support certain domestic industries may be seen as a reasonable price to pay for the ability to combat climate change, it does not necessarily mean that such opportunities should be opened with regards to other industries, where there is no environmental benefit but where the only result would be that states support inefficient producers using inefficient technology. Such an application of the rules on subsidies appears to counter the very idea and aim of the subsidies regime, to discipline practices that distort international trade.

Hence, in the future a different approach with regards to the regulation of subsidies in order to accommodate measures with an environmental aim without weakening the subsidy regime might be needed. As discussed by some authors,<sup>262</sup> an option that might prove better could be to address the issue through negotiations in the WTO, aiming to carve out an exception for environmental measures in the SCM Agreement. Indeed, such exceptions are not foreign to WTO members as they previously existed in the SCM Agreement in the form of the now expired green light subsidies and environmental exceptions exist in for example the GATT.<sup>263</sup> Although the very slow progress in WTO negotiations might make this seem an uncertain solution, it is nevertheless something that could be considered as it might provide the global trading community with an opportunity to develop the trading rules and tailor them to the new challenges of the 21<sup>st</sup> century.

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<sup>262</sup> See for example Bigdeli (n 17) and Cosbey and Mavroidis (n 21).

<sup>263</sup> SCM Agreement article 8 and GATT article XX.

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