The Canada—FIT Case and the WTO Subsidies Agreement: Failed Fact-Finding, Needless Complexity, and Missed Judicial Economy

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On May 6, 2013, the Appellate Body of the World Trade Organization (WTO) made public its decision in the Canada—Feed-in Tariff Program case. The multitude of observers anticipated a watershed decision regarding renewable energy generation and the application of world trade law to its subsidization. Unfortunately, both the WTO Panel and the Appellate Body irked this constituency with their failure to come to a decisive conclusion under the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). This comment traces this indecisiveness back to an unwarranted complication of the test for demonstrating the existence of a benefit under Article 1.1(b) of the SCM Agreement and to fact-finding failures on the part of the WTO Panel. It will conclude by asking why neither the Panel nor the Appellate Body invoked judicial economy to forego their inconclusive analyses under the SCM Agreement after having found a violation under the General Agreement on Tariffs and Trade 1994 and the WTO Agreement on Trade-Related Investment Measures.


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5. A MISSED OPPORTUNITY FOR JUDICIAL ECONOMY?
On May 6, 2013 the Appellate Body of the World Trade Organization (WTO) made public its decision in the Canada—Feed-in Tariff Program (Canada—FIT) case.\(^1\) The multitude of observers anticipated a watershed decision regarding renewable energy generation and the application of world trade law to its subsidization. Unfortunately, both the WTO Panel\(^2\) and the Appellate Body irked such this constituency by failing to come to

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a decisive conclusion\(^3\) under the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement).\(^4\)

This comment traces this indecisiveness back to fact-finding failures on the part of both the WTO Panel and the Appellate Body and to an unwarranted complication of the test for demonstrating the existence of a benefit, and hence a subsidy, under Article 1.1(b) of the SCM Agreement. These two causes are symptomatic of the proclivity of the WTO Panel and the Appellate Body for condoning renewable energy subsidies by carving out an exemption from the disciplines of the SCM Agreement.

This case comment starts by providing an overview of the Canada—FIT dispute (Part II). Part III focuses on the fact-finding shortcomings of both the Panel and the Appellate Body and on the 2011 Report of the Ontario Auditor General,\(^5\) which could have helped the Panel and the Appellate Body in their analyses of the FIT Program. This case comment will then dive into the unduly complicated methodology used by both the Panel and the Appellate Body when attempting to determine whether the FIT Program conferred a benefit and, hence, a subsidy under Article 1.1(b) of the SCM Agreement. Revisiting the comparatively simple approach of the Panel’s dissent, which decided that the FIT Program did confer such a benefit, will magnify the convolutedness of the Panel and the Appellate Body’s analyses (Part IV).

The final part of this comment will look into why neither the Panel nor the Appellate Body invoked judicial economy to forego their inconclusive analyses under the SCM Agreement after having found a violation under Article III of the General Agreement on Tariffs and Trade 1994 (GATT)\(^6\) and the WTO Agreement on Trade-Related Investment Measures (TRIMs Agreement) (Part V).\(^7\)

2. RELEVANT BACKGROUND

Ontario launched its feed-in tariff program (FIT Program) in 2009 with a view to increase the generation of wind and solar photovoltaic (PV) electricity in Ontario by entering into electricity purchase contracts that provided guaranteed fixed prices over 20 or 40 years. Ontario imposed a local content requirement as a condition for entering into FIT Program contracts: a certain percentage of the wind turbines or solar panels used to generate the electricity had to be produced in Ontario.\(^8\)

\(^3\) Canada—FIT ABR, supra note 1 at para 5.246.
\(^7\) Agreement on Trade-Related Investment Measures, in Annex 1A of the Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1868 UNTS 186 (entered into force 1 January 1995) [TRIMs Agreement].
\(^8\) Canada—FIT ABR, supra note 1 at paras 4.17–4.23.
Japan and the European Union (EU) filed complaints before the WTO with respect to the Ontario FIT Program’s local content requirements. Both Japan and the EU alleged that the Ontario FIT Program violated GATT Article III on the grounds that it afforded less favourable treatment to imported renewable energy generation equipment. Moreover, Japan and the EU argued that the FIT Program’s local content requirement constituted a trade-related investment measure prohibited by Article 2.1 of the TRIMs Agreement.

Both the Panel and the Appellate Body found violations of the national treatment obligations embedded in GATT Article III:4 and Article 2.1 of the TRIMs Agreement. They also found that the local content requirements of the FIT Program were specifically contemplated and prohibited by the illustrative list of measures found within Article 2.2 of the TRIMs Agreement. The Appellate Body therefore recommended that the Dispute Settlement Body (DSB) of the WTO request Canada to bring the FIT Program into conformity with its obligations under GATT and the TRIMs Agreement. This meant either abolishing the FIT Program or eliminating its local content requirement.

Japan and the EU, relying on Articles 3.1(b) and 3.2 of the SCM Agreement, also argued that the FIT Program amounted to a subsidy made conditional upon the use of domestic over imported goods. For this argument to succeed, Japan and the EU had to first demonstrate that a subsidy existed under Article 1.1 of the SCM Agreement, which in turn required them to demonstrate that the FIT Program (a) constituted a financial contribution and (b) conferred a benefit. Next, Japan and the EU had to demonstrate that the FIT Program (c) was made conditional upon the use of domestic over imported electricity generation equipment. When these conditions are met, Article 2.3 of the SCM Agreement provides that the prohibited subsidy is deemed specific and, therefore, requires no demonstration of specificity by the complaining party. Prohibited subsidies are illegal and must be removed by the WTO member who adopted them.

Both the Panel and the Appellate Body reached an impasse and were unable to decide the claim that the FIT Program violated Article 3.1(b) of the SCM Agreement by providing a subsidy made conditional upon the use of domestic over imported electricity generation equipment. In fact, neither the Panel nor the Appellate Body could decide whether the FIT Program constituted a subsidy. Both the Panel and the Appellate Body decided a financial contribution existed. They held that Ontario’s electricity purchases amounted to government purchases of goods as contemplated by Article 1.1(a)(1)(iii) of the SCM Agreement. However, neither the Panel nor the Appellate Body could decide whether Ontario’s electricity purchases under the FIT Program conferred a benefit as construed by Article 1.1(b) of the SCM Agreement.

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9 Canada—FIT Panel, supra note 2 at paras 7.167, 8.2, 8.4, 8.5, 8.6, 8.8, 8.9; Canada—FIT ABR, supra note 1 at paras 5.85, 6.1(b)(v) of WT/DS412/AB/R, 6.1(a)(vi) of WT/DS426/AB/R.

10 Canada—FIT Panel, supra note 2 at paras 6.72, 7.121, 7.154–7.155, 7.166; Canada—FIT ABR, supra note 1 at paras 5.33, 5.89, 6.1(a)(i) of WT/DS426/AB/R.

11 Canada—FIT ABR, supra note 1 at paras 6.2 of WT/DS412/AB/R, 6.2 of WT/DS426/AB/R.

12 Canada—FIT Panel, supra note 2 at paras 7.327–7.328, 8.3, 8.7; Canada—FIT ABR, supra note 1 at paras 1.6, 1.7, 5.245–5.246.

13 Ibid at para 5.128.
The existence of a “benefit” was the issue at the heart of the claims made under the SCM Agreement in the Canada—FIT dispute and will constitute the main focus of this comment.

According to the Panel and the Appellate Body, Article 14(d) of the SCM Agreement can serve as relevant context for determining whether a benefit exists under Article 1.1(b) of the SCM Agreement with respect to the purchase of goods (in this case, electricity) by a government (in this case, Ontario). Article 14(d) of the SCM Agreement stipulates that a benefit exists only if the purchase is made for “more than adequate remuneration” in relation to “prevailing market conditions” that specifically, but not exhaustively, include: “price, quality, availability, marketability, transportation and other conditions of purchase or sale.”

According to the Appellate Body, considering “prevailing market conditions” in a benefit analysis under Article 1.1(b) of the SCM Agreement entails comparing the remuneration with a market benchmark. Both the Panel and the Appellate Body relied on the absence of an “appropriate” market benchmark to justify their absence of a decisive conclusion as to whether the FIT Program conferred a benefit under Article 1.1(b). However, this indecisiveness did not save the FIT Program, as the Appellate Body nevertheless recommended that the DSB request that Canada bring the FIT Program into conformity with GATT and the TRIMs Agreement by either abolishing or amending it.

Significantly, there does not appear to be a marked difference between the Appellate Body’s recommendation and the remedy potentially available under Article 4.7 of the SCM Agreement, which stipulates that if a WTO panel finds a challenged measure to be a prohibited subsidy under Article 3.1 of the SCM Agreement, then the panel must recommend a time period within which the prohibited subsidy must be withdrawn.

Given that the outcome of this case would have likely remained the same regardless of whether the Appellate Body reached a definitive conclusion under the SCM Agreement and that its reasoning under the SCM Agreement provides little guidance going forward, this comment considers, in Part V, whether the Panel and the Appellate Body could have invoked judicial economy in order to avoid analyzing claims under the SCM Agreement.

3. FAILED FACT-FINDING AND THE UNEXPLAINABLE ABSENCE OF THE 2011 ONTARIO AUDITOR GENERAL REPORT

Time and time again, the Appellate Body cites lack of evidence and an incomplete factual record as obstacles preventing a conclusive decision. The unnecessarily complicated methodology used by the Panel and the Appellate Body for determining the existence of a benefit under Article 1.1(b) of the SCM Agreement could perhaps have been avoided had the Panel made proper use of its fact-finding powers.

According to the Appellate Body, WTO panels “have broad fact-finding powers and may seek information from any source.” Article 13 of the WTO Dispute Settlement Understanding

14 Ibid at paras 5.163, 5.166, 5.225.
15 Ibid at para 5.183.
17 Ibid at para 5.215.
The Panel showed great reluctance to use these fact-finding powers. Despite calls from complainants for the Panel to find the market benchmark needed to complete the benefit analysis and to not merely reject proposed market benchmarks, the Panel limited its role to rejecting the complainants’ benefit arguments. Had the Panel seriously intended to decide whether a benefit existed, perhaps it could have conveyed its misgivings to complainants and asked them to supplement the record with additional submissions rather than leaving the benefit question undecided.

Even the Appellate Body suggested that the Panel should not have limited itself to the market benchmarks submitted by the complainants.

The 2011 Annual Report of the Office of the Ontario Auditor General (2011 Ontario AG Report) constitutes one glaring absence from the Panel record. Its absence from the submissions of the EU and Japan (as summarized in the addenda to the Panel Reports) as well as from the Panel and Appellate Body reports raises serious questions as to the constitution of the factual record in the Canada—FIT case. The Ontario Auditor General’s review of the FIT Program provides numerous insights into issues raised before the Panel and the Appellate Body. It will be relied upon throughout this case comment when discussing the existence of a benefit under Article 1.1(b) of the SCM Agreement.

4. THE BENEFIT ANALYSIS REACHED AN UNDULY COMPLICATED LEVEL

4.1 The Quixotic Quest for a Perfect Market Benchmark

As mentioned in Part II, determining whether a financial contribution confers a benefit under Article 1.1(b) of the SCM Agreement requires analyzing the impact of a contribution in comparison with a market benchmark, the parameters of which are laid out in Article 14(d) of the SCM Agreement. This section considers why the Panel rejected all market benchmarks proposed by complainants and how the Panel conceived its own ultimately elusive appropriate market benchmark.

4.1.1 Ontario’s Wholesale Electricity Market Disqualified

The Panel rejected Ontario’s wholesale electricity market as a market benchmark for the purposes of determining the existence of a benefit under Article 1.1(b) of the SCM Agreement. The Panel characterized Ontario’s wholesale electricity market as deprived of effective competition.
given that the Ontario government’s policy decisions and regulations played a predominant role in determining electricity prices.\textsuperscript{22}

The Panel considered that the prevailing conditions of supply and demand had prevented Ontario’s wholesale electricity market from attracting sufficient investment in generating capacity so as to secure a reliable electricity system, which mandated government intervention in the determination of the supply mix.\textsuperscript{23} The Panel therefore considered it inappropriate to use Ontario’s wholesale electricity market as a benchmark,\textsuperscript{24} and the Panel and Appellate Body rejected market benchmarks proposed by the complainants that relied on electricity wholesale prices in Ontario.\textsuperscript{25}

4.1.2 \textbf{Four Proposed Out-of-Provience Electricity Markets Disqualified}

Both the Panel and the Appellate Body rejected four benchmarks submitted by complainants from out-of-province electricity markets.\textsuperscript{26} According to the Panel and the Appellate Body, none of the four out-of-province electricity markets were benchmarks since none exhibited market conditions that would attract sufficient investment in generation capacity so as to allow these markets to equip themselves with the requisite renewable and non-renewable generating capacity to secure electricity supply reliability.\textsuperscript{27}

4.1.3 \textbf{The FIT Program Disqualified due to Indecipherable Price-Setting}

The Appellate Body affirmed that the shortage of evidence and factual findings on the Panel record prevented it from properly determining whether the price-setting methodology under the FIT Program yielded “more than adequate remuneration” as per Article 14(d) of the SCM Agreement.\textsuperscript{28}

The Appellate Body was able to ascertain that prices under the FIT Program were meant to cover costs and provide a reasonable rate of return while striking a balance between several objectives, such as broad participation in the FIT Program for varying technologies and project sizes, price stability, and the promotion of efficient projects.\textsuperscript{29} Beyond that, the Appellate Body could only rely on the finding that Ontario determined FIT prices by relying on a cost-based price methodology and discounted cash flow model that accounted for “reasonable”

\textsuperscript{22} \textit{Canada—FIT ABR}, supra note 1 at paras 5.149, 5.160; \textit{Canada—FIT Panel}, supra note 2 at paras 7.274, 7.308.


\textsuperscript{24} \textit{Canada—FIT Panel}, supra note 2 at para 7.320.

\textsuperscript{25} \textit{Canada—FIT ABR}, supra note 1 at paras 5.150–5.151, 5.193, 5.203, 5.204; \textit{Canada—FIT Panel}, supra note 2 at paras 7.298, 7.308.

\textsuperscript{26} \textit{Canada—FIT ABR}, supra note 1 at paras 5.152, 5.167, 5.193; \textit{Canada—FIT Panel}, supra note 2 at paras 7.306, 7.310.

\textsuperscript{27} \textit{Canada—FIT ABR}, supra note 1 at para 5.152; \textit{Canada—FIT Panel}, supra note 2 at para 7.310.

\textsuperscript{28} \textit{Canada—FIT ABR}, supra note 1 at para 5.234.

\textsuperscript{29} \textit{Ibid.}
capital costs, operating and maintenance costs, and connection costs. Ultimately, the lack of evidence regarding the price-setting methodology used for the FIT Program handcuffed the Appellate Body, which declared itself incapable of determining whether the FIT Program offered market or above-market prices.

4.1.4 The RES Initiative and Quebec Wind Energy Prices: Potentially Fitting, Yet Insufficiently Debated Market Benchmarks

Ontario launched three rounds of the Renewable Energy Supply (RES) Initiative between 2004 and 2008. The latest round, RES III, was launched only one year prior to the start of the FIT Program. The RES initiative aimed at ensuring an energy supply mix that included renewable energy generation sources. RES prices were set following competitive bidding, a “market-based, price-discovery process.” Ultimately, no RES contract was awarded to solar PV generators due to their lack of competitiveness. Therefore, the relevance of the RES initiative as a market benchmark would have been limited to wind power.

The Appellate Body viewed the RES III round of contracts launched in 2008 as a theoretically suitable market benchmark for comparison with the FIT Program after having considered their respective start years (2008 vs. 2009) and types of generation technology (wind). The Appellate Body went as far as stating that comparing FIT prices with RES prices suggests that FIT prices conferred a benefit. However, the Appellate Body found the RES-related evidence had not been sufficiently debated either before the Panel or the Appellate Body, and this incomplete factual record prevented a finding that the FIT Program indeed conferred a benefit.

The Appellate Body also disqualified competitive contracts awarded to wind power electricity generators in Quebec in 2005 and 2008 as a market benchmark. This was again due to insufficient evidence given that the comparability standard required for such an out-of-province benchmark was not raised before the Panel or before the Appellate Body.

The Appellate Body criticized the Panel for failing to explore the possibility that RES III or the Quebec wind energy prices could serve as appropriate benchmarks. The Appellate Body expressed a reluctance to carry out a full-fledged benefit benchmark comparison and blamed this reluctance on the Panel by stating that completing the benefit analysis would draw due process flags given the complexity of the issues at stake, the incomplete factual record before the Panel, the lack of uncontested evidence, and the insufficient debate among disputing parties.

30 Canada—FIT ABR, supra note 1 at paras 5.228, 5.234; Canada—FIT Panel, supra note 2 at para 7.202.
31 Canada—FIT ABR, supra note 1 at para 5.233.
32 Ibid at para 5.236.
33 Ibid at paras 5.229, 5.235, 5.237, 5.240.
34 Ibid at paras 5.241, 5.245.
35 Ibid at para 5.239.
37 Ibid at paras 5.224, 5.232, 5.243–5.244, 5.246.
4.1.5 The Panel’s Proposed Approach and Observations on an Appropriate Market Benchmark

In obiter dicta, the Panel stated that its idealized benchmark would consist of “the terms and conditions that would be offered by commercial distributors of electricity acting under a government-imposed obligation to acquire electricity from generators operating solar PV and wind power plants of a comparable scale to those functioning under the FIT Programme.” The Panel elaborated on this benchmark by stating that a comparison of rates of return for projects under the FIT Program with “the average cost of capital in Canada for projects having a comparable risk profile in the same period” would allow for the determination of whether or not the FIT Program conferred a benefit under Article 1.1(b) of the SCM Agreement. The Panel concluded that the factual record contained no appropriate information that could help carry out such a comparison. The Appellate Body failed to fathom why the Panel limited itself to rejecting the benchmarks proposed by the complainants and to openly formulating its own coveted benchmark as obiter dicta without undertaking any serious benchmark analysis on that basis.

4.2 Readily Available Market Benchmarks

The Appellate Body and the Panel noted that a market could qualify as an appropriate benchmark despite being tainted by government intervention at the stage of determining the existence of a benefit (and ultimately, a subsidy) but not when calculating its amount. The Appellate Body acknowledged that government intervention in the electricity supply network, notably to balance generator supply and consumer demand or to implement an energy supply mix that includes wind- and solar PV-generated electricity, affected electricity prices, yet these prices remained market prices for the purposes of the benefit analysis under Article 1.1(b) of the SCM Agreement.

Moreover, the Appellate Body agreed with the Panel that government intervention limited to internalizing social costs through defining the broad parameters of a market leaves significant space “for private actors to operate within those parameters on the basis of commercial considerations.” These remarks should have sufficed for the Panel and the Appellate Body to use either Ontario’s wholesale electricity market or at the very least RES III as appropriate market benchmarks.

The Appellate Body opened the door to considering an out-of-province market benchmark should no suitable benchmark be found within Ontario. Barring lack of evidence, out-of-province market benchmarks could therefore have been used, provided appropriate adjustments...
under Article 14(d) of the *SCM Agreement* were made to reflect prevailing market conditions in Ontario.\(^{45}\)

The *2011 Ontario AG Report* established comparisons between Ontario FIT Program prices and prices under similar initiatives in the states of Michigan, Vermont, Washington, and Wisconsin in the United States; Denmark, Germany, and Spain in Europe; South Korea in Asia; and the Australian Capital Territory, New South Wales, Queensland, South Australia, Victoria, and Western Australia in Australia. These comparable and useful market benchmarks relied on by the Ontario Auditor General for drawing comparisons could have served to determine the existence of a benefit under Article 1.1(b) of the *SCM Agreement*, subject, if necessary, to appropriate adjustments in line with the criteria suggested by Article 14(d) of the *SCM Agreement*.\(^{46}\)

### 4.3 The Appellate Body’s Separate Markets Approach

In formulating its “separate markets approach,” the Appellate Body had to overcome its previous rejection by the Panel, which had declared baseless the approach of separating a wholesale electricity market from a wind- and solar PV-generated electricity market. The Panel noted that Ontario electricity consumers did not distinguish electricity according to its generation technology “either by way of price or usage” or based on its physical properties.\(^{47}\) As a result, the Panel decided on the existence of a single market for electricity originating from all generation technologies.\(^{48}\)

#### 4.3.1 Separate Markets for Wind- and Solar PV-Generated Electricity

In an attempt to overcome the Panel’s market benchmark impasse, the Appellate Body overturned the Panel’s definition of the appropriate market benchmark for benefit comparisons. According to the Appellate Body, framing the appropriate market benchmark as having to reflect Ontario’s energy supply mix “implie[d] the existence of separate markets for wind- and solar PV-generated electricity,”\(^{49}\) which would render inappropriate a comparison of the FIT Program with a competitive wholesale electricity market consisting of all electricity sources.\(^{50}\)

The Appellate Body therefore decided that a market benchmark for wind- and solar PV-generated electricity should consist of a market exclusively for wind- and solar PV-generated electricity.\(^{51}\) As a result, according to the Appellate Body, the true question was determining whether wind- and solar PV electricity suppliers would have entered Ontario’s wind- and solar PV-generated electricity market—not Ontario’s blended wholesale electricity market—

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\(^{45}\) *Canada—FIT ABR*, supra note 1 at paras 5.226–5.227.


\(^{47}\) *Canada—FIT Panel*, supra note 2 at para 7.318.

\(^{48}\) *Canada—FIT ABR*, supra note 1 at paras 5.155, 5.168–5.169, 5.193; *Canada—FIT Panel*, supra note 2 at para 7.318.

\(^{49}\) *Canada—FIT Panel*, supra note 2 at para 7.318.

\(^{50}\) *Canada—FIT Panel*, supra note 1 at para 5.204.


\(^{52}\) *Ibid* at paras 5.178, 5.190.
without the FIT Program.\(^{53}\) The difficulty here lies in picturing the existence of an entirely distinct and autonomous market for wind- and solar PV-generated electricity when the purchaser (Ontario), the end-users (Ontario electricity consumers), and the physical product (electricity) are all identical to those of conventional electricity.

Numerous important conclusions in the Appellate Body’s decision rested on its requirement that a separate market exist for wind- and solar PV-generated electricity, including the Appellate Body’s rejection of the Ontario wholesale electricity market consisting of all sources of energy and of the four proposed out-of-province benchmarks.\(^{54}\)

### 4.3.2 Separate Markets and the Primacy of Supply-Side Factors

The Appellate Body (and not the Panel) turned to previous Appellate Body decisions regarding Article 6.3 of the *SCM Agreement* in order to legitimize its separate markets approach. Article 6 of the *SCM Agreement* serves to determine whether alleged subsidies constitute actionable subsidies on the basis that their use causes adverse effects to the interests of the complaining party by causing serious prejudice to its interests (Article 5(c) of the *SCM Agreement*).

Before making its case under Articles 5 and 6 of the *SCM Agreement*, a complainant must demonstrate the specificity of the alleged subsidies in accordance with Article 2 of the *SCM Agreement*. A subsidy must be granted (in law or in fact) to an enterprise, an industry, or a group of enterprises or industries, in order to be specific under Article 2 of the *SCM Agreement*. Actionable subsidies are not illegal under the *SCM Agreement*, but a complainant can lawfully retaliate against the respondent if their alleged subsidies are found to have caused adverse effects to the complainant. Should the state having adopted actionable subsidies fail to remove them, the complaining state can implement unilateral countervailing duties as retaliatory measures.

Article 6.3 of the *SCM Agreement* provides four instances where “serious prejudice” is deemed to occur. All four instances refer to the notion of a “market” and have prompted WTO panels and the Appellate Body to dig further into the “market” concept, notably in *European Communities—Measures Affecting Trade in Large Civil Aircraft*\(^{55}\) and in *United States—Subsidies on Upland Cotton*.\(^{56}\)

It must be mentioned that Article 6.3 of the *SCM Agreement* applies to determine whether a subsidy can be characterized as “actionable” after a subsidy has been determined to exist. Neither the EU nor Japan claimed that the FIT Program constituted actionable subsidies, and therefore neither Article 6.3 of the *SCM Agreement* nor the Appellate Body’s decision in

\(^{53}\) *Ibid* at para 5.199.

\(^{54}\) *Ibid* at para 5.204.

\(^{55}\) *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft (Complaint by the United States)* (2011), WTO Doc WT/DS316/AB/R (Appellate Body Report), online: WTO <docsonline.wto.org> [EC—Large Civil Aircraft].

EC—Large Civil Aircraft were directly applicable to the Canada—FIT dispute. Nevertheless, the definitions and analyses of the “market” concept elaborated by the Appellate Body in EC—Large Civil Aircraft and by the Panel and Appellate Body in US—Upland Cotton may provide guidance in interpreting the terms “prevailing market conditions” in Article 14(d) of the SCM Agreement and in determining the relevant market for the benefit analysis under Article 1.1(b) of the SCM Agreement.

The Appellate Body in Canada—FIT noted that a benefit could be determined to exist only by comparing prices of goods “in the relevant market where they compete.” The Appellate Body in US—Upland Cotton stated that two products are considered to be in the same market if they engaged in actual or potential competition in that market (the market being construed as the “area of competition between two products”). In EC—Large Civil Aircraft, the Appellate Body stated that products must be “sufficiently substitutable so as to create competitive constraints on each other” in order to be considered as competing in the same market. According to the Appellate Body, actual or potential competition between products matters because only then can subsidies provided to one of the compared products actually displace the other compared product. It is suggested that the FIT Program might have displaced electricity demand from conventional electricity to wind- and solar PV-generated electricity by guaranteeing the purchase at higher prices of increased wind- and solar PV-generated electricity supply.

Unfortunately, the Appellate Body revisited the definitions and analyses of the “market” concept only to extract the supply-side substitutability criterion in order to differentiate the market for conventional electricity from the market for wind- and solar PV-generated electricity. The Appellate Body relied on its previous decision, EC—Large Civil Aircraft, which stated that the definition of a market under Articles 6.3(a) and 6.3(b) of the SCM Agreement should account for both demand-side and supply-side aspects. Therefore, the Appellate Body considered that both demand-side substitutability and supply-side substitutability should be taken into account when identifying the relevant market benchmark and even acknowledged the “high demand-side substitutability” of physically identical electricity from different technologies. However, by focusing on supply-side substitutability and on its absence from the Panel’s definition of the relevant market benchmark, the Appellate Body went a step further and tilted the balance in favour of supply-side factors without any legal basis to proceed in this way.

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57 EC—Large Civil Aircraft, supra note 55 at para 1119.
58 Canada—FIT ABR, supra note 1 at para 5.169.
59 US—Upland Cotton ABR, supra note 56 at paras 408–409.
60 EC—Large Civil Aircraft, supra note 55 at para 1120.
61 Ibid at paras 1119–1123.
62 Ibid at para 1121.
63 Canada—FIT ABR, supra note 1 at para 5.171.
64 Ibid at paras 5.169–5.170.
In considering supply-side factors of relevance to conventional and wind- and solar PV-generated electricity, the Appellate Body considered that very high capital costs and marginal economies of scale, along with intermittent electricity generation (depending on wind and sun availability) rendered wind- and solar PV-generated electricity incapable of competing with conventional electricity and from exercising “any form of price constraint” on conventional electricity. The Appellate Body underlined the inability of wind- and solar PV-generated electricity to exert price constraint on conventional electricity and relied on this inability to explain that they evolve in separate markets and therefore cannot be compared to one another. However, the Appellate Body’s reasoning ignored the ability of conventional electricity to exert price constraint on wind- and solar PV-generated electricity.

The Appellate Body’s portrayal of the clear competitive superiority of conventional electricity reads as a textbook case of an inefficiently produced good (electricity from renewable sources) facing the competitive pressures of a more efficiently produced identical good (electricity from conventional sources). In general terms beyond renewable energy, by preventing the identification of a benefit when government purchases of goods skew regular application of competitive pressures among identical products in favour of a specific set of producers, the Appellate Body’s separate markets approach signalled a greater tolerance of protectionist policies. Different cost structures for like products mandated by the need to cope with the lack of competitiveness of certain producers do not entail different markets.

According to the Appellate Body, markets for wind- and solar PV-generated electricity exist only by virtue of government intervention in the definition of the energy supply mix. The Appellate Body took the position that this government intervention cannot be viewed as conferring a benefit under Article 1.1(b) of the SCM Agreement. The Appellate Body then attempted to distinguish “non-subsidized” government-created markets from “government interventions in support of certain players in markets that already exist,” the latter amounting to conferring benefits to specific enterprises or industries. The FIT Program appears to fall naturally within the latter scenario as it was made available only to wind- and solar PV-generated electricity suppliers who complied with set percentages of renewable generation equipment produced in Ontario.

The Appellate Body created its separate markets approach by focusing on Articles 6.3 and 14(d) of the SCM Agreement which unduly complicated the benefit analysis mandated by the simply worded and contextually different Article 1.1(b) of the SCM Agreement, despite acknowledging that Article 14(d) of the SCM Agreement provides only “one way to demon-

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66 Canada—FIT ABR, supra note 1 at paras 5.174, 5.178.
68 Canada—FIT ABR, supra note 1 at paras 5.175, 5.188, 5.227.
69 Ibid at para 5.188. Specificity did not mandate a decision in the present case: Article 2.3 of the SCM Agreement (supra note 4) specifies that subsidies made conditional upon the use of domestic over imported goods (Article 3.1(b) of the SCM Agreement) are deemed to confer benefits specific to a group of enterprises.
70 Pal, supra note 65 at 132.
strate that the challenged measures confer a benefit.”

Defining and comparing markets essentially pre-empted the conferral of a benefit as a condition for demonstrating the existence of a subsidy. The Appellate Body effectively crafted a carve-out from disciplines applicable to subsidies under the SCM Agreement by shielding wind- and solar PV-generated electricity from comparison with conventional electricity, even though the purchaser (Ontario), the end-users (Ontario electricity consumers), and the physical product (electricity) are all identical.

Restricting the meaning of the term “benefit”, as used in Article 1.1(b) of the SCM Agreement, through the incorporation of concepts such as “prevailing market conditions” and “more than adequate remuneration” harms the fight against protectionism and also harms the fight against subsidies that impair either the market access or the competitive position of foreign producers. As a corollary, restricting the scope of the term “benefit” opens the floodgates for a surge of protectionist industrial policies. The Appellate Body’s interpretation of the “benefit” requirement for determining the existence of a subsidy neither increases nor clarifies the disciplines of the SCM Agreement.

Rather than characterising the FIT Program as creating a separate market for wind- and solar PV-generated electricity, the Appellate Body should have construed the FIT Program as a support mechanism that increased the supply-side substitutability between conventional and renewable electricity. The FIT Program simply made it possible for renewable energy to access Ontario’s wholesale electricity market by incentivizing the generation of electricity from renewable sources, which would not have occurred but for Ontario’s intervention. Indeed, all parties to the proceedings agreed that wind and solar electricity producers could not have participated in Ontario’s wholesale electricity market on the basis of equilibrium prices available pursuant to the competitive forces at play. In effect, by condoning a government’s ability to create “separate markets” on the sole basis of supply-side factors, the Appellate Body condoned governmental picking of winners and losers and, in this case, making winners out of losers.

Alternately, the Appellate Body could have also made the separate markets approach superfluous by articulating its refusal to compare wind and solar electricity with conventional electricity by distinguishing electricity purchases at the wholesale level (Ontario) from electric-

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71 Canada—FIT ABR, supra note 1 at para 5.162; Canada—FIT Panel, supra note 2 at paras 7.271–7.273.
74 Luca Rubini, The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective (Oxford: Oxford University Press, 2009) at 57.
76 Frontier Economics, supra note 72 at 5–6; see also Pal, supra note 65 at 134.
77 Canada—FIT Panel, supra note 2 at para 7.311.
ity purchases at the retail level (end-consumers) and by limiting its analysis to the wholesale level. The Appellate Body concluded that “electricity from different generation technologies is not substitutable at the wholesale level” based on the fact that Ontario premised its electricity purchases at the wholesale level on its definition of the energy supply mix which required wind and solar electricity. In contrast, the Appellate Body noted that electricity from all generation technologies is blended once fed into the grid and therefore indistinguishable once resold to consumers at the retail level. The Appellate Body could perhaps have justified its refusal to compare wind and solar electricity with conventional electricity by segmenting wholesale and retail level transactions and identifying the wholesale purchases as the relevant market.

4.4 The Existence of a Benefit Under Article 1.1(B) of the SCM Agreement, Separate Markets, and Legitimate Policy Considerations

4.4.1 Vain Caveats to the Separate Markets Approach

The Appellate Body attempted to delimit the implications of its “separate markets” approach on principled grounds. It noted that policy objectives governing the definition of an energy supply mix cannot “entirely prevent a market-based approach to the determination of benefit.” The Appellate Body thus reiterated that finding an appropriate market benchmark for comparison purposes remained the way to proceed. However, given that the Appellate Body would fail to identify such a market benchmark, just as the Panel had previously, it appears as though the Appellate Body was preparing its way out by underlining an unsolvable riddle.

Foreseeing the deleterious consequences of shielding wind- and solar PV-generated electricity from comparison with conventional electricity, the Appellate Body warned against “read[ing] an exception into Article 1.1(b) [of the SCM Agreement] based on the rationale of the subsidy that has no textual basis in the Agreement” and that “introducing legitimate policy considerations into the determination of benefit cannot be reconciled with Article 1.1(b) of the SCM Agreement.” The Appellate Body thus vainly attempted to limit the number of goods that could claim to evolve in a market separate and distinct from that of other highly substitutable goods.

4.4.2 The Appellate Body’s Favourable Bias and the Ontario Auditor General’s Scathing Assessment of the FIT Program

The Appellate Body displayed a bias in favour of the FIT Program by stating that government intervention to define an energy supply mix aims to “reduce[e] reliance on fossil energy
resources,” replace exhaustible fossil fuels, and address “negative and positive externalities” related to conventional and renewable electricity. The Appellate Body also stated that the FIT Program may prove “crucial to the viability and sustainability of the electricity market in the long term” without relying on any documentation or evidence to support these statements.

The Appellate Body called for a rigorous analysis of the full costs of electricity generation in order to justify the existence of separate markets for renewable energy and conventional energy. Yet the Appellate Body settled for complacent statements, surmising that governments often base their definitions of energy supply mix on accounting for externalities and internalizing social costs. The Appellate Body adopted a simplistic black and white understanding that renewable energy generation enjoys an overwhelmingly positive balance of externalities (including guaranteeing long-term supply and addressing environmental concerns) while conventional energy generation should be blamed for a clearly negative balance of externalities (including adverse impacts on human health and on the environment due to fossil fuel emissions and nuclear waste).

By contrast, the 2011 Ontario AG Report concluded that the Government of Ontario had carried out no “comprehensive business-case evaluation” and “no independent, objective, expert investigation” of the FIT Program, which entailed billion-dollar commitments, in order to gauge its various potential impacts on electricity prices, job creation, or greenhouse gas (GHG) emissions—let alone impacts on human health and communities. Moreover, no “thorough and professional cost/benefit analysis” had been undertaken to compare the upsides and downsides of the FIT Program with those of potentially more advantageous alternatives “such as energy imports and increased conservation.”

More specifically, Ontario had “not formally analyzed” the cost and environmental impacts of the backup power required due to the intermittency of wind power and solar PV energy prior to adopting the FIT Program in 2009. A study cited by the Ontario AG noted that 10,000 MW of wind energy would require an extra 47 percent of non-wind sources in case of lack of wind. Gas-fired plants would provide the bulk of intermittent renewable energy in Ontario due to Ontario’s commitment to phasing out coal-fired plants by the end of

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84 Ibid at para 5.186.
85 Ibid.
86 Ibid at para 5.177.
87 Ibid at para 5.186.
88 Ibid at para 5.189.
89 Ibid.
90 2011 Ontario AG Report, supra note 5 at 89.
91 Ibid at 97.
92 Ibid.
93 Ibid at 113.
94 Ibid.
95 Ibid at 114.
Gas-fired plants produce greenhouse gas emissions, thereby reducing the mitigation of wind and solar energy.

With respect to employment, Ontario estimated that the FIT Program would help create approximately 50,000 direct and indirect jobs over three years. However, Ontario did not specify the temporary nature of the great majority of these jobs, nor were the number of jobs lost as result of the FIT Program factored in.

With respect to electricity supply and demand, the Auditor General noted that Ontario's electricity generation capacity has far surpassed demand in recent years, and that demand was expected to remain flat or to decline while supply was expected to increase. Given the necessity of ensuring a strict balance between electricity supply and demand, Ontario must reduce the intake of electricity from conventional electricity sources in order to "make room" for wind and solar electricity on Ontario's grid. This translates into stopping hydroelectricity production to favour wind and solar (which amounts to no environmental gain) and reducing nuclear production, which causes Ontario to incur significant costs and causes much disruption. Ultimately, wind and solar electricity producers continue to get paid under the FIT Program when they are ordered to stop producing electricity in a surplus-power situation. The Auditor General noted that the Independent Electricity System Operator's estimate that Ontario electricity consumers must pay renewable energy generators between $150 million and $225 million per year not to generate electricity under the FIT Program.

Despite evidence that raised doubts as to the intended and actual results of the FIT Program, the Panel and the Appellate Body fully embraced the sustainable development claims associated with the FIT Program.

4.4.3 LEGITIMATE POLICY CONSIDERATIONS AND GATT ARTICLE XX

Instead, the Appellate Body could have examined the controversial question of whether the exceptions under GATT Article XX apply to the SCM Agreement. However, such an alternative may have been cut short, or at the very least discouraged, because Canada does not seem to have invoked its application at any stage of the proceedings. Article XX provides exceptions that can serve to validate measures otherwise in violation of WTO provisions if they are necessary to achieve a limited number of public policy objectives. Two exceptions could arguably be relevant to the FIT Program. First, the exception in favour of measures "necessary to
protect human, animal or plant or health” (Article XX(b)). Second, the exception for measures “relating to the conservation of exhaustible natural resources” (Article XX(g)). In addition, the chapeau to Article XX requires that the measures must not be administered in a way that amounts to an arbitrary or unjustified discrimination or a disguised restriction on international trade. Although the FIT Program could perhaps have fallen within the scope of Article XX(b) or (g), it is unlikely that the requirements of the chapeau to Article XX would have been met since the FIT Program constituted a discriminatory measure that Canada would have been hard pressed to justify.

Hypothetically, Article XX would constitute a sounder, more principled basis to exempt certain subsidies from the disciplines of the SCM Agreement than the development of a “green reading” of the requirements for the existence of a subsidy under the SCM Agreement. The question of whether exceptions under Article XX can be invoked in response to claims based on the SCM Agreement is currently debated on legal and policy grounds and remains unanswered. At the very least, the Appellate Body could have replicated its rigorous approach to environmental claims of respondent states under Article XX when considering the FIT Program.

4.5 The Ontario FIT Program’s Conspicuous Largess and Intelligibly Comparable Markets

The 2011 Ontario AG Report characterized Ontario FIT prices as “fixed rates that are significantly higher than market prices” and as “very generous” and “very attractive” prices. The report stated that Ontario FIT prices were significantly more attractive than under the previous Ontario RES initiative, to a point where they added more than $4.4 billion in costs over 20 years compared to the RES initiative.

Based on comparisons between Ontario FIT Program prices and prices under the aforementioned similar initiatives in the United States, Europe, Asia, and Australia, the 2011 Ontario AG Report concluded the Ontario FIT Program offered prices that were (much) higher than those offered under these admittedly comparable and useful market benchmarks.

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103 Casier & Moerenhout, supra note 67 at 4–5.
105 2011 Ontario AG Report, supra note 5 at 94.
106 Ibid at 93, 103–104, 107.
107 Ibid at 90, 102–104.
108 Ibid at 90, 105–106.
4.6 The Panel Dissent on the Existence of a Benefit

4.6.1 The Panel Dissent’s “Simple ‘But For’ Test”

It is perplexing that the Panel and the Appellate Body took such a rigoristic and complicated approach to determine if a benefit existed despite the plain and simple wording of Article 1.1(b) of the SCM Agreement: “a benefit is thereby conferred.” The Panel’s quixotic quest for a perfect benchmark led the Panel to disregard relevant evidence, which in turn prevented the Appellate Body from finding the appropriate market benchmark.

The Panel and the Appellate Body could have used a much simpler benefit test, which would have consisted in determining whether the governmental purchases of goods conferred an advantage to its recipients in light of the recipients’ position in the marketplace with and without the advantage.109 The benefit test could also have been formulated as whether the financial contribution “makes the recipient ‘better off’ than it would otherwise have been, absent that contribution.”110 The FIT Program specifically achieved this outcome by providing renewable energy producers with prices higher than those of Ontario’s wholesale electricity market.111

In contrast with the Panel majority and the Appellate Body, the Panel dissent decided that wind power and solar PV generators could not operate in the Ontario wholesale electricity market absent the FIT Program. In light of wind power and solar PV generators’ much higher capital costs and less efficient electricity production, and given that electricity purchase prices under prevailing market conditions were much lower than FIT prices, the presence of wind power and solar PV generators in the Ontario wholesale electricity market could only be made possible by the conferral of a benefit to these generators under Article 1.1(b) of the SCM Agreement.112 The simple “but for” test adopted by the Panel dissent suggests the Panel and the Appellate Body could have established the existence of a benefit with little difficulty and without examining a plethora of potential market benchmarks.113 The Panel dissent’s approach closely follows that of the Appellate Body in the Canada—Aircraft case in which the Appellate Body approved the Panel’s understanding that a benefit required the existence of an advantage that places its recipient in a more advantageous position than that provided by the market absent the advantage.114

4.6.2 “Separate Markets” as the Sole Obstacle to the “Simple ‘But For’ Test”

The Appellate Body’s “separate markets” approach truly spelled trouble in that it was also the main reason that the Appellate Body rejected the Panel dissent’s simple “but for” test for determining the existence of a benefit under Article 1.1(b) of the SCM Agreement. Indeed,

109 Canada—FIT ABR, supra note 1 at para 5.148; Canada—FIT Panel, supra note 2 at para 7.271.
110 Canada—FIT ABR, supra note 1 at 115, n 624.
111 Casier and Moerenhout, supra note 67 at 5.
112 Canada—FIT Panel, supra note 2 at para 9.23.
113 Canada—FIT ABR, supra note 1 at paras 5.143, 5.194, 5.196.
the Appellate Body considered that a “but for’ market counterfactual” could not apply when
the market benchmark had to consist solely of wind- and solar PV-generated electricity (i.e.,
a separate market) and not of Ontario’s wholesale electricity market made up of all electricity
sources. ¹¹⁵

5. A MISSED OPPORTUNITY FOR JUDICIAL ECONOMY?

Having reached a dead end under the *SCM Agreement* after a meandering race through an
apparently unsolvable maze, the following question springs to mind: why did the Panel and the
Appellate Body not exercise judicial economy with respect to the *SCM Agreement*? In situations
where a complainant claims violations of multiple WTO provisions from a single or numerous
WTO agreements, WTO panels have the discretion to limit themselves to deciding the claims
that are necessary to secure a positive solution to and effective resolution of the dispute and to
secure the withdrawal of the measures that violate the provision(s) of any WTO agreement(s)
(Articles 3.7 and 21.1 of the WTO *DSU*),¹¹⁶ in spite of the general rule whereby WTO panels
must address all relevant WTO provisions cited by a complainant (Article 7.1 of the *DSU*).
WTO panels must generate findings that enable the WTO DSB to make sufficiently precise
recommendations and rulings so as to allow for prompt compliance by the respondent member
(Article 11 of the *DSU*).

Based on the *DSU*, WTO panels can exercise judicial economy more easily than the
Appellate Body. Article 17.12 of the *DSU* states that the Appellate Body must address each of
the issues raised on appeal. However, in practice, the Appellate Body has strongly encouraged
WTO panels to exercise judicial economy as sparingly as possible so as to give the Appellate
Body the best opportunity to resolve disputes entirely and the DSB the best chance of for-
mulating sufficiently precise recommendations and rulings.¹¹⁷ Panels that entertain claims in
addition to the ones that were decided in order to resolve the dispute entirely will increase the
factual record available to the Appellate Body on appeal and will increase the Appellate Body’s
chances of resolving the dispute entirely. Moreover, the Appellate Body has interpreted Article
17.12 in a less literal fashion, which facilitated its own exercise of judicial economy, although
such instances remain rare.¹¹⁸

The appeal of judicial economy in the *Canada—FIT* case is reinforced by the fact that
Japan and the EU limited their claim to alleging that the FIT Program violated Articles 3.1(b)
and 3.2 of the *SCM Agreement* by providing a subsidy conditional upon local content require-
ments.¹¹⁹ The complainants’ claim suggests that they might not have taken issue with a subsidy
unhindered by a local content requirement. Moreover, the complainants did not invoke the
provisions pertaining to actionable subsidies. The claims under *GATT*, the *TRIMs Agreement*,

¹¹⁵ *Canada—FIT ABR*, supra note 1 at paras 5.197, 5.199.
¹¹⁶ See *United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India (Complaint
¹¹⁷ See *Australia—Measures Affecting Importation of Salmon (Complaint by Canada)* (1998), WTO Doc
¹¹⁸ See *US—Upland Cotton ABR*, supra note 56 at para 510.
¹¹⁹ *Canada—FIT ABR*, supra note 1 at paras 1.6–1.7.
and the *SCM Agreement* were closely tied since they were all predicated on the local content requirement. Hence, it appears as though the Panel and the Appellate Body’s finding of violations under *GATT* and the *TRIMs Agreement* resolved the matter entirely.

The lack of future guidance regarding the existence of a benefit under Article 1.1(b) of the *SCM Agreement* that can be gleaned from the Panel and Appellate Body reports, decimated by the unresolved state of most issues raised due to an incomplete factual record, strengthens the case for judicial economy. The complexity and opaqueness of the pronouncements put forward by the Panel and the Appellate Body also reduced their usefulness and persuasiveness for WTO members in respect of future disputes.

It appears as though the *Canada—FIT* Panel had the discretion to exercise judicial economy so as to avoid entertaining the claims of Japan and the EU regarding the *SCM Agreement*. However, given the likelihood of an appeal, the *Canada—FIT* Panel’s decision to include reasons regarding the *SCM Agreement* in its report can perhaps be explained by an attempt at providing the Appellate Body with as much information as possible in order to resolve the dispute entirely. Ironically, the Appellate Body criticized the Panel on numerous occasions for establishing an incomplete factual record and forcing the Appellate Body into indecision.\(^{120}\) Moreover, the *Canada—FIT* Panel did not need to express whether its aim consisted solely in establishing as complete a factual record as possible.

By contrast, even though the Appellate Body in the *Canada—FIT* dispute did not explicitly have the right to exercise judicial economy under the *DSU*, its practice could have justified exercising judicial economy on appeal in respect of claims under the *SCM Agreement*. The Appellate Body raised the issue of a potential difference in remedy as a relevant criterion in order to decide whether or not there was a need to address the claims under the *SCM Agreement*. It has been suggested that the finding of a violation under the *SCM Agreement* could have afforded Japan and the EU a faster remedy than that provided for violations of the *TRIMs Agreement* and the *GATT*. Article 4.7 of the *SCM Agreement* stipulates that a panel must recommend a time period within which the prohibited subsidy must be withdrawn.\(^{121}\) However, there does not appear to exist a significant difference between this potential remedy and the recommendation of the Appellate Body that the DSB request that Canada bring its measures into conformity with the *TRIMs Agreement* and *GATT*.\(^{122}\) The Appellate Body left the question of whether these two remedies were equivalent unanswered.\(^{123}\)

Ultimately, neither the Panel nor the Appellate Body formulated any statement regarding judicial economy in respect of the *SCM Agreement*. In retrospect, addressing judicial economy and differences in potential remedies directly and at an early stage could have spared the Panel and Appellate Body a lot of time and effort should judicial economy have been deemed warranted.

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\(^{120}\) See *Canada—FIT ABR*, supra note 1 at paras 5.224, 5.232, 5.234, 5.241, 5.243, 5.244–5.246.

\(^{121}\) Pal, supra note 65 at 127.

\(^{122}\) *Canada—FIT ABR*, supra note 1 at para 6.2.

\(^{123}\) Ibid at para 5.7.