

CTEI Working Papers

Canada – Certain Measures Affecting the Renewable Energy Generation Sector (DS412)^a

AMICUS CURIAE SUBMISSION^b

Anastasia Smirnova
Pablo Bentes
Selina Bruderer
Weiwei Zhang

^a This paper was presented as a final paper of the Trade and Investment Law Clinic of 2012 of Graduate Institute of International and Development Studies. Disclaimer: All memoranda issued by the Trade and Investment Law Clinic and available in this website are research papers prepared on a pro bono basis by students at the Graduate Institute of International and Development Studies (IHEID) in Geneva. It is a pedagogical exercise to train students in the practice of international trade and investment law, not professional legal advice. As a result, the memoranda cannot in any way bind, or lead to any form of liability or responsibility for, its authors, the supervisors of the IHEID trade and investment law clinic and/or the Graduate Institute.

^b This paper was modified and verified by the International Institute for Sustainable Development, Canadian Environmental Law Association and Ecojustice Canada and has been submitted to the Panel hearing the dispute *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* (DS412).

Trade and Investment Law Clinic (TILC)

The Trade and Investment Law Clinic is a seminar given by Joost Pauwelyn, Professor of International Law, that offers a unique opportunity to thoroughly analyse trade and investment law and jurisprudence through a combination of practice and theory. Students will work in groups, under the guidance of the Professor, a Supervisor and an Assistant on specific legal questions related to trade and investment law coming from real clients, such as international organisations, governments and NGOs. In addition, sessions will be held with invited professionals to improve legal writing and oral presentation skills. At the end of the semester, the groups will submit written legal memos and orally present their projects in class in the presence of the client and other invited guests.

<http://www.graduateinstitute.ch/ctei/projects/trade-law-clinic.html>

Centre for Trade and Economic Integration (CTEI)

The Centre for Trade and Economic Integration fosters world-class multidisciplinary scholarship aimed at developing solutions to problems facing the international trade system and economic integration more generally. It works in association with public sector and private sector actors, giving special prominence to Geneva-based International Organisations such as the WTO and UNCTAD. The Centre also bridges gaps between the scholarly and policymaking communities through outreach and training activities in Geneva.

www.graduateinstitute.ch/ctei

<http://graduateinstitute.ch/ctei>

International Institute for Sustainable Development (IISD)

Canadian Environmental Law Association (CELA)

Ecojustice Canada (Ecojustice)

BEFORE THE WORLD TRADE ORGANIZATION PANEL

Canada – Certain Measures Affecting the Renewable Energy Generation Sector

(DS412)

AMICUS CURIAE SUBMISSION

10 May 2012

| | |
|---|-----------|
| I. Introduction | 3 |
| II. Legal Arguments | 6 |
| A. Article XX of the GATT 1994 is available as a defence for breaches of provisions of the SCM Agreement | 6 |
| 1. The text and context of the SCM Agreement support application of Article XX of the GATT 1994..... | 6 |
| 1.1 The GATT 1994 and the SCM Agreement <i>together</i> establish the WTO regime for subsidies..... | 6 |
| 1.2 The absence of a specific reference to Article XX of the GATT 1994 in the SCM Agreement does not preclude the application of the general exceptions. | 9 |
| 1.3 The reference to ‘this Agreement’ in Article XX does not foreclose its applicability to the SCM Agreement. | 13 |
| 2. The object and purpose of the WTO Agreement support the application of Article XX of the GATT 1994 to the SCM Agreement. | 14 |
| 3. Rules of international law support the availability of the general exceptions for subsidies. | 15 |
| 4. The negotiating histories of Article XX of the GATT 1994 and the SCM Agreement confirm the need for a broad application of Article XX | 16 |
| 5. There are compelling policy reasons to support the applicability of Article XX of the GATT 1994 to the SCM Agreement. | 18 |
| 5.1 Non-application would lead to absurd results. | 18 |
| 5.2 The applicability of Article XX to the disciplines of the SCM Agreement would not be a <i>carte blanche</i> for trade-distorting subsidies..... | 19 |
| B. The legitimate policy objective of sustainable development should be taken into account when assessing whether climate change subsidies confer a ‘benefit’. | 19 |
| III. Request to the Panel..... | 22 |

I. Introduction

The International Institute for Sustainable Development ('IISD'), the Canadian Environmental Law Association ('CELA') and Ecojustice Canada ('Ecojustice') hereby submit the following *amicus curiae* brief in the matter *Canada — Certain Measures Affecting the Renewable Energy Generation Sector* (DS412).

According to Article 13 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ('DSU'), a Panel can 'seek information and technical advice from any individual or body which it deems appropriate'. Following the Appellate Body ruling in *U.S. — Shrimp* 'a panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not*.'¹ Accordingly, the Panel can consider unsolicited *amicus curiae* briefs submitted by non-governmental organizations ('NGOs') on their own motion.² There is no prescribed procedure for submitting an *amicus curiae* brief to a Panel. Therefore we respectfully submit this brief through the Rules Division of the WTO Secretariat.

Qualifications of the Amici

IISD is a Canadian-based, public policy research institute that has a long history of conducting cutting-edge research into sustainable development, including the interlinkages between international trade and the environment. IISD's Geneva offices house the Global Subsidy Initiative (GSI) — a programme dedicated to analysing the complex interplay between subsidies and sustainable development. CELA is a non-profit, public interest organization established in 1970 to use existing laws to protect the environment and to advocate for environmental law reforms. Funded by Legal Aid Ontario, CELA is one of 77 community legal clinics located across Ontario, 17 of which offer services in specialized areas of the law. Ecojustice is a charitable organization dedicated to strengthening environmental laws in Canada through litigation, research and law reform efforts. Ecojustice has offices in Vancouver, Toronto, Calgary and Ottawa and does work across Canada. While Canada is one of the governments that provide funding to IISD and the CELA, this funding is not connected to our *amicus curiae* brief. We submit this brief on our own initiative and have not received any financial or other incentives related to this work from any of the parties involved in this dispute.

¹ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (6 November 1998) ('*US – Shrimp*'), paragraph 108.

² *Ibid.*, paragraph 110. See also Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS135/R (18 September 2000), paragraph 6.3.

Nature of Interests

We believe that the findings of this Panel could be significant in clarifying the relation of the GATT 1994 Article XX exceptions to current global issues, such as climate change.³ Subsidies are one of several economic policy instruments WTO Members use to combat climate change.⁴ Where correctly implemented, they can be one of the most efficient and least trade distortive instruments to protect the environment.⁵ Given the potential advantages of addressing climate change issues through subsidies rather than more trade-distortive instruments such as tariffs or import restrictions, we are concerned that the latter measures may be afforded much greater leeway under WTO law to pursue legitimate environmental objectives than is offered to subsidies.⁶

We do not take a position as to whether the Canadian measures at issue in this dispute are WTO-consistent. Our sole interest is to submit arguments on how the Panel could use the existing WTO law on subsidies to contribute to a mutually supportive relationship between the WTO Agreements and sustainable development, as called for by the Marrakesh Agreement Establishing the World Trade Organization (‘Marrakesh Agreement’) and the Doha Ministerial Declaration.⁷

How our *Amicus Curiae* Brief Can Contribute to a Positive Solution of this Dispute

In previous cases, Panels and the Appellate Body based their decisions to accept unsolicited amicus briefs primarily on the time of filing and the content of the brief.⁸

First, we submit our *amicus curiae* brief prior to the second substantive meeting of the Panel with the parties. This allows the parties to reply to the brief through written or oral submission if they wish to do so.

³ General Agreement on Tariffs and Trade (Marrakesh, 15 April 1994) (‘GATT 1994’), Article XX.

⁴ P.R. Vergano and E.C. Laurenza, ‘Subsidies to Renewable Energy Sources and International Trade: Issues and Tools to Reconcile Trade Rules and Environmental Policies’, 5 *Global Trade and Customs Journal* (2010), 223.

⁵ B. Metz, et al. (eds), *Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, 2007* (Cambridge University Press, 2007), section 13.2.1.5 on ‘subsidies and incentives’. See also A. Dunkel and F. Rossler, *The Ranking of Trade Policy Instruments Under the GATT Legal System* (unpublished), cited in A.T. Guzman and J.H.B. Pauwelyn, *International Trade Law* (Aspen Publishers, 2009), at 204.

⁶ R. Howse, *Climate Mitigation Subsidies and the WTO Legal Framework: A Policy Analysis*, IISD Trade, Investment and Climate Change Series (IISD, 2010), at 14 and 15; D. Feaver, W. McGoldrick, and V. Boyd-Wells, ‘Is Australia’s EAP a Prohibited Export Subsidy?’, 44 *Journal of World Trade* (2010), 319.

⁷ See World Trade Organization, Ministerial Declaration (WT/MIN(01)/DEC/1, 14 November 2001) (‘Doha Ministerial Declaration’), paragraph 6; and Marrakesh Agreement Establishing the World Trade Organization (Marrakesh, 15 April 1994), Preamble.

⁸ For the timing of filing, see *US – Shrimp*, n. 1 above, paragraph 107; and see *European Communities – Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS135/AB/R (12 March 2001), paragraphs 6.3 and 6.4. For content, see Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R (23 October 2002), paragraphs 168, 169 and 314.

Second, our *amicus curiae* brief provides additional legal arguments that may assist the Panel in its deliberations on the dispute at hand. We note that *amicus curiae* briefs should not be repetitive of the arguments submitted by the parties or the third parties to the dispute.⁹ Our representatives have attended the open hearing of the Panel’s first substantive meeting with the parties and the third parties. In particular, we noticed that no party disputes that subsidies can be an appropriate instrument to support renewable energy. Nevertheless, such subsidies can be deemed prohibited or actionable by the WTO Subsidies and Countervailing Measures Agreement (‘SCM Agreement’).¹⁰ This makes it all the more important that the Panel interprets the SCM Agreement in a way that allows a considered balancing between the Members’ obligations and their rights to protect the environment. For this purpose, we suggest two distinct interpretative approaches for the Panel’s consideration, neither of which has been advanced by the parties to this dispute:

- a) to apply Article XX of the GATT 1994 as a defence for breaches of provisions of the SCM Agreement; and
- b) when assessing whether a ‘benefit’ exists under Article 1.1 of the SCM Agreement, give due consideration to the special character of environmental measures.

We are aware that Canada has not invoked Article XX of the GATT 1994 in its submissions. We further take note that in the Panel’s first substantive meeting with the parties and third parties, Korea (as a third party) expressed concern about the compatibility of the disciplines of the SCM Agreement and Members’ rights to pursue environmental policies. We concur with Korea that this issue is of systemic importance to be considered by the Panel. While the main argument of our *amicus curiae* brief concerns the application of Article XX of the GATT 1994 to the SCM Agreement, many of these arguments are equally valid to demonstrate that legitimate policy goals should be taken into account when assessing the existence of ‘subsidies’ under Article 1.1 of the SCM Agreement.

Specifically, we respectfully invite the Panel to:

- 1) accept our *amicus curiae* brief;
- 2) draft the panel report in a manner that does not prejudice the applicability of Article XX of the GATT 1994 to the SCM Agreement; and
- 3) when assessing whether a ‘benefit’ exists under Article 1.1 of the SCM Agreement, give due consideration to the special character of environmental measures.

⁹ See the Appellate Body’s additional procedure for *amicus curiae* briefs adopted for *EC — Asbestos*, *ibid.*, paragraphs 52-55

¹⁰ Subsidies and Countervailing Measures Agreement (Marrakesh, 15 April 1994) (‘SCM Agreement’).

II. Legal Arguments

A. ARTICLE XX OF THE GATT 1994 IS AVAILABLE AS A DEFENCE FOR BREACHES OF PROVISIONS OF THE SCM AGREEMENT

Article XX of the GATT 1994 on general exceptions occupies an important role within the GATT as an expression of the balance the drafters intended between certain agreed non-trade social objectives and the objectives of trade law. Its crafting shows the care that was taken to ensure the autonomy of the members to pursue such non-trade objectives while remaining within the framework of an agreed set of rules of conduct. In specific circumstances, the pursuit of those social objectives — which include environmental protection — may breach even such fundamental principles as non-discrimination. Two exceptions are of particular relevance to the protection of the environment: paragraphs (b) and (g) of Article XX. Pursuant to these two paragraphs, WTO members may adopt policy measures that are inconsistent with even such fundamental principles as non-discrimination in the pursuit of the protection of human, animal or plant life or health (paragraph (b)), or the conservation of exhaustible natural resources (paragraph (g)).

The chapeau of Article XX of the GATT 1994 reads:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures [...] (emphasis added)

It is important to note that the Article XX exceptions apply to ‘this Agreement’. The narrowest meaning proposed in the literature equates ‘this Agreement’ with the GATT 1994.¹¹ In other words, Article XX applies not only to some but to *all* provisions of the GATT 1994. Accordingly, the general exceptions apply to all provisions of the GATT 1994, including rules on subsidies and countervailing duties.

1. The text and context of the SCM Agreement support application of Article XX of the GATT 1994

1.1 The GATT 1994 and the SCM Agreement *together* establish the WTO regime for subsidies

The GATT 1994 regulates subsidies and countervailing duties in three provisions. First, according to Article XVI:1 of the GATT 1994, subsidies that affect a WTO member’s own or foreign exports have to be notified, and where it is determined that such subsidies cause ‘serious prejudice’ to the interests of other members, the granting member shall on request

¹¹ B.J. Condon, ‘Climate change and unresolved issues in WTO Law’, 12:4 *Journal of International Economic Law* (2009), 903.

discuss with the affected members the possibilities of limiting the subsidization. Paragraphs 2 to 5 of the same Article impose obligations in particular on export subsidies, among which are the commitment to avoid the use of subsidies on the export of primary products (paragraph 3), and the prohibition of certain export subsidies that result in ‘the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market’ (paragraph 4). Second, Article VI of the GATT 1994 regulates the imposition of countervailing duties (‘CVDs’) as a ‘special duty levied for the purpose of offsetting any bounty or subsidy [...]’. Paragraph 6(a) of the same provision determines that CVDs may only be imposed if material injury is threatened or caused to the domestic industry. Additionally, paragraph 3 of this provision limits the amount of CVDs to the amount of subsidization. Moreover, Article III:8(b) of the GATT 1994 establishes a carve-out from national treatment for certain producer subsidies (though other types of subsidies are still subject to national treatment under the other provisions of Article III of the GATT 1994).

The SCM Agreement elaborates on the GATT 1994 disciplines on subsidies. It builds on and develops the GATT disciplines on subsidies as described above. Of primary importance is Article 1 of the SCM Agreement, which provides a rigorous definition of subsidies – a definition not attempted in the GATT 1994 despite the fact that it is arguably needed to fully understand the disciplines contained therein. As part of that definition, the SCM Agreement introduces and defines, in Article 2, the concept of specificity.

More specifically, Part II of the SCM Agreement (prohibited subsidies) elaborates on Article XVI:4 of the GATT 1994 by enumerating subsidies (such as export subsidies) that may not be granted by Members.

Part III of the SCM Agreement (actionable subsidies) elaborates and clarifies Article XVI:1 of the GATT 1994 by rigorously defining ‘serious prejudice’ (Article 6) and the footnote to Article 5(c) of the SCM Agreement explicitly states that serious prejudice so defined ‘is used in this Agreement in the same sense as it is used in paragraph 1 of Article XVI of GATT 1994’.

Part V of the SCM Agreement (countervailing measures) clarifies the conditions for imposing CVDs set out in Article VI of the GATT 1994 (e.g. by defining the term ‘domestic industry’) and regulates procedural questions relating to the imposition of CVDs (e.g. by setting guidelines for the calculation of the amount of subsidies by investigating authorities in Article 14).

The local content subsidies under Article 3.1(b) of the SCM Agreement are already the type of discriminatory measures disciplined under Article III of the GATT 1994. The SCM Agreement reinforces this discipline by flatly prohibiting the subsidies in question.

The wording of several provisions of the SCM Agreement underlines the close relationship between the SCM Agreement and the GATT 1994.¹²

Article 32.1 of the SCM Agreement underlines that ‘no specific action against a subsidy of another Member can be taken except in accordance with the provisions of the GATT 1994, *as interpreted* by this Agreement’ (emphasis added). Accordingly, the SCM Agreement ‘interprets’ or elaborates on the provisions of the GATT 1994. The footnote to this provision specifies that ‘this paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate’. This reaffirms the right of WTO Members to take actions under other relevant provisions of the GATT 1994, including Article XX on general exceptions. The Appellate Body in *US – AD/CVD* referred to this provision as relevant context that indicates the close relationship between the GATT 1994 and the SCM Agreement.¹³

The close relationship between the GATT 1994 and the SCM Agreement distinguishes the case before this Panel from the Appellate Body ruling in *China – Raw Materials*. That case related to the application of Article XX of the GATT 1994 to one of China’s obligations under its Protocol of Accession to the WTO. One of the grounds for refusing the application of Article XX of the GATT 1994 was that ‘[...] China's obligation to eliminate export duties arises exclusively from China's Accession Protocol, and not from the GATT 1994 [...]’.¹⁴ In the present dispute, in contrast, Canada’s obligations in respect of subsidies are grounded in the GATT 1994 and only further elaborated in the SCM Agreement. That Article XX was not available in *China – Raw Materials*, therefore, offers no guidance on whether the general exceptions apply to the SCM Agreement. If anything, the criterion used by the Appellate Body in that case (i.e. whether the obligations in question ‘arise from’ the GATT 1994) supports the application of Article XX in the present dispute and for subsidies in general.

In *China – Audiovisuals*, the Appellate Body did apply GATT 1994 Article XX to another obligation in China's Accession Protocol as it found a ‘clearly discernible, objective link’ between the provisions that China sought to justify and the regulation of trade in goods.¹⁵ The link between the provisions of the SCM Agreement and the GATT 1994 is even stronger to support the application of the general exceptions to the SCM Agreement.

¹² The sheer number of over 20 references to the GATT 1994 in the SCM Agreement in itself already gives a strong indication of this close relationship.

¹³ Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (‘*US – AD / CVD*’), WT/DS379/AB/R (25 March 2011), paragraphs 561 - 563.

¹⁴ Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R (22 February 2012) (‘*China – Raw Materials*’), paragraph 293.

¹⁵ Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (19 January 2010) (‘*China – Audiovisuals*’), paragraph 233.

1.2 The absence of a specific reference to Article XX of the GATT 1994 in the SCM Agreement does not preclude the application of the general exceptions

The SCM Agreement does not contain an explicit provision on the application of Article XX of the GATT 1994. However, there is no need for an express reference to give way to the application of a provision, particularly if the provision is of a general nature.¹⁶ As underlined by the Appellate Body in *Canada – Autos*, ‘[...] omissions in different contexts may have different meanings, and [an] omission, in and of itself, is not necessarily dispositive.’¹⁷ For instance, in *US – AD/CVD*, the Appellate Body expressed concerns about and overturned the Panel’s reasoning that WTO agreements do not prohibit the imposition of double remedies between domestic subsidies and anti-dumping duties because Article VI:5 of the GATT 1994 only explicitly prohibits double remedies in the case of export subsidies.¹⁸

While Article 3 of the TRIMs Agreement explicitly incorporates Article XX of the GATT 1994, this does not mean that such an explicit incorporation is a precondition for the availability of Article XX of the GATT 1994.¹⁹ Put differently, as is the case for the SCM Agreement today, even if Article 3 of the TRIMs Agreement had not been included in the that Agreement, Article XX would still have been available under the TRIMs. As much as Article 2 of TRIMs (and the Annex to the TRIMs) is an elaboration on GATT Articles III and XI, the SCM Agreement is an elaboration on GATT Articles VI and XVI. In both cases, Article XX of the GATT 1994 remains available unless its application has been explicitly precluded. The SCM Agreement does not contain such a preclusion. Hence, Article XX continues to apply to subsidies under the SCM Agreement.

As underlined by the Appellate Body in *US – Customs Bond*, the availability of Article XX of the GATT 1994 defence to the Annex 1 agreements raises ‘systemic issues’.²⁰ In *Brazil – Desiccated Coconut*, the Appellate Body made it clear that ‘[t]he relationship between the GATT 1994 and the other goods agreements in Annex 1A is complex and must be examined on a case-by-case basis.’ It is not a question that can be decided with reference to the wording of the provisions of the SCM Agreement alone. Consequently, the meaning of the omission of an explicit provision in the SCM Agreement on the availability of the GATT 1994 exceptions has to be interpreted in the context provided by (i) the single undertaking principle, (ii) the close relationship between the GATT 1994 and the SCM Agreement; (iii) the inherent right of

¹⁶ L. Rubini, ‘Ain’t Wasting Time No More: Subsidies for Renewable Energy, the SCM Agreement, Policy Space, and Law Reform’, 15:2 *Journal of International Economic Law* (2012), 33.

¹⁷ Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R (19 June 2000), paragraph 138.

¹⁸ See *US – AD/CVD*, n. 13 above, paragraph 567.

¹⁹ L. Rubini, *The Subsidization of Renewable Energy in the WTO: Issues and Perspectives* (August 3, 2011), at 33, available at <<http://ssrn.com/abstract=1904267>>. See Agreement on Trade-Related Investment Measures (‘TRIMs’) (Marrakesh, 15 April 1994).

²⁰ Appellate Body Report, *United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WT/DS343/AB/R (1 August 2008), paragraph 310.

states to regulate; and (iv) the narrow character of the SCM's provisions on non-actionable subsidies.

First, the GATT 1994 and the SCM Agreement constitute a single international treaty, namely, the Marrakesh Agreement. This is expressly recognized in Article II.1 thereof, which provides that:

The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as 'Multilateral Trade Agreements') are integral parts of this Agreement, binding on all Members.

Thus, the GATT 1994 and the SCM Agreement, together with the other covered agreements, form an integral part of the WTO Agreement. This suggests that '[w]ithin this framework, all WTO Members are bound by all the rights and obligations in the WTO Agreements and its Annexes 1, 2 and 3', including both the GATT 1994 and the SCM Agreement.²¹ Moreover, as part of an 'integrated, more viable and durable multilateral trading system encompassing the [GATT 1994] ... and all of the results of the Uruguay Round',²² all provisions of the WTO Agreement must be interpreted harmoniously, in a manner that gives meaning and effect to all of them.²³

Second, as established above, the GATT 1994 and the SCM Agreement *together* establish a comprehensive WTO framework of disciplines for subsidies. Similar to the Appellate Body's finding in *Korea — Dairy* that '[...] any safeguard measure imposed after the entry into force of the *WTO Agreement* must comply with the provisions of *both* the *Agreement on Safeguards* and Article XIX of the GATT 1994',²⁴ subsidies need to comply with *both* the SCM Agreement and the provisions on subsidies in the GATT 1994. Hence, the application of Article XX to Articles III, VI and XIV of the GATT 1994 implies that the general exceptions also apply to the SCM Agreement. In the words of the *US — Line Pipe* panel when examining the application of Article XXIV of the GATT 1994 to the Safeguards Agreement: 'a contrary interpretation would ignore the close interrelation between' Articles III, VI and XIV of the GATT 1994 and the SCM Agreement.²⁵

²¹ Appellate Body Report, *Brazil — Measures Affecting Desiccated Coconut*, WT/DS22/AB/R (20 March 1997), paragraph 13.

²² See Marrakesh Agreement Establishing the World Trade Organization, n. 7 above, fourth recital.

²³ See Appellate Body Report, *Argentina — Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R (12 January 2000), paragraph 81. See also Appellate Body Report, *Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R (12 January 2000) ('*Korea — Dairy*'), paragraph 81; Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (20 May 1996) ('*US — Gasoline*'), at 23; Appellate Body Report, *Japan — Taxes on Alcoholic Beverages*, WT/DS10/AB/R (1 November 1996) ('*Japan — Alcoholic Beverages II*'), at 106.

²⁴ See *Korea — Dairy*, *ibid.*, paragraph 77.

²⁵ Panel Report, *United States — Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R (29 October 2001), paragraph 7.150. The Panel addressed the application of GATT Article XXIV to GATT Article XIX and the Agreement on Safeguards. Having found a violation of parallelism, the Appellate Body saw no need to address the question and declared the Panel's findings moot and of no legal effect. See Appellate Body Report, *United States — Definitive Safeguard Measures on Imports of*

Third, states have the inherent right to regulate – a right only modified by explicit agreement. In *EC — Hormones*, the Appellate Body affirmed that it cannot be lightly assumed ‘that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation’.²⁶ In *China — Audiovisuals* the Appellate Body held that Members have a right to regulate trade as an ‘inherent power enjoyed by a Member’s government, rather than a right bestowed by international treaties such as the WTO Agreement.’²⁷ When exercising this right, Members have to balance numerous important public interests. By including Article XX into the GATT 1947 (and incorporating the provision unchanged into the GATT 1994) Members clarified the manner in which they can exercise their inherent right to protect important public interests such as the conservation of exhaustible natural resources and the health of human, animal and plant life.²⁸ In *U.S. — Gasoline*, the Appellate Body confirmed that Article XX protects WTO Members’ ‘large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement’.²⁹

Accordingly, it cannot lightly be assumed that Members have diminished this autonomy with regard to subsidies by adopting the SCM Agreement. The relevant question is not whether the drafters of the SCM Agreement explicitly confirmed the application of Article XX of the GATT 1994; rather, it is whether the drafters expressed any intention to not apply GATT Article XX. They did not. As a result, Article XX of the GATT 1994 continues to apply to subsidies both under the GATT 1994 and the SCM Agreement.

Other international tribunals have acknowledged states’ inherent right to regulate even in the absence of an explicit reference in the treaty. The *Saluka v. Czech Republic* Partial Award notes that the expropriation provision in the bilateral investment treaty in dispute was drafted ‘very broadly’ and does not contain any exception for the exercise of regulatory power. However, the Tribunal read into the treaty that a deprivation can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order.³⁰ In a similar vein, the *Chemtura v. Canada* Award found that measures taken within a regulator’s mandate, in a non-discriminatory manner, motivated by increasing awareness of the dangers to human health and the environment are a valid exercise of the State’s regulatory or ‘police’ powers and does not constitute an expropriation.³¹ That is to say that such an inherent right to regulate

Circular Welded Carbon Quality Line Pipe from Korea, WT/DS202/R (8 March 2002), paragraph 199.

²⁶ Appellate Body Report, *European Communities - Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R (13 February 1998), paragraph 165.

²⁷ See *China — Audiovisuals*, n. 15 above, paragraph 222.

²⁸ Compare L. Rubini, *The Subsidization of Renewable Energy in the WTO: Issues and Perspectives*, NCCR Trade Working Paper No 2011/3 (21 June 2011), at 34.

²⁹ See *U.S. — Gasoline*, n. 23 above, at 30.

³⁰ *Saluka Investments BV (the Netherlands) v. Czech Republic*, UNCITRAL, Partial Award (17 March 2006), paragraphs 254–261.

³¹ *Chemtura Corporation v Canada*, Award, Ad hoc — UNCITRAL Arbitration Rules, IIC 451 (2 August 2010), 266. See also *Methanex v. United States*, where the Tribunal held that ‘... as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alia, a foreign investor or investment is not deemed expropriatory and compensable unless

is not contingent upon the existence of specific treaty language or explicit exceptions. A country's regulatory or police powers are inherent and continue to exist unless explicitly contracted out when negotiating a treaty.

Fourth, the existence of Article 8 of the SCM Agreement in no way prejudices the applicability of GATT 1994 Article XX to the SCM Agreement. In Part IV ('Non-Actionable Subsidies') of the SCM Agreement, Article 8 provided a carve-out for certain subsidies 'aimed at socially beneficial policy objectives'.³² This carve-out covered, *inter alia*, subsidies granted to adapt to new environmental requirements and for research and development.³³ There is no incongruence between the existence of these narrowly cast carve-outs to the SCM Agreement and the argument that the drafters intended Article XX to apply as more general exceptions to the same Agreement. The Article 8(c) environmental carve-out was intended to cover a very specific situation: where governments might want to defray the costs of new environmental regulations on existing facilities. It defined as 'non-actionable' one-time payments of up to 20% of adaptation costs for existing facilities, provided those costs were 'directly linked to and proportionate to a firm's planned reduction of nuisances and pollution,' and with the provisos that such payments not cover the actual costs of replacement, that they not cover any manufacturing cost savings that might be achieved, and that the payments be available to 'all firms which can adopt the new equipment and/or production processes.'

If we compare this to Article XX of the GATT 1994 provisions on the environment, which cover all measures 'necessary to protect human, animal or plant life or health', and measures 'relating to the conservation of exhaustible natural resources', it seems clear that the narrow exceptions in the SCM could not have been intended as a specific development of the more general public welfare exceptions offered in Article XX of GATT 1994. As such, there is no reason to believe that the two sets of exceptions were not intended to apply simultaneously.

Even if we conceive of Article 8 of the SCM Agreement as a specific derivative of Article XX of GATT 1994, this argument still stands. In the *Nicaragua* case, the International Court of Justice clarified that the general rule (here Article XX of the GATT 1994) remains in force even when a more specific rule (here the SCM Agreement's provisions elaborating on the GATT 1994) is agreed to by States.³⁴ In this regard, in *US – AD/CVD* the Appellate Body acknowledged that notwithstanding specific provisions in the SCM Agreement (Article

specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.' See *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005), part IV, chapter D, paragraph 7.

³² WTO, *World Trade Report 2006: Subsidies, Trade and the WTO* (WTO, 2006), at 201.

³³ Article 8 and 9 of the SCM Agreement lapsed after 5 years as foreseen in Article 31 of the SCM Agreement because of lack of consensus in the SCM Committee. See *World Trade Law Report 2006*, *ibid.*, at 201.

³⁴ International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (U.S. v. Nicaragua)*, [1986] ICJ Reports 3, paragraph 179. See also *Southern Bluefin Tuna Case (Australia and New Zealand v. Japan)*, Award on Jurisdiction and Admissibility (4 August 2000), Arbitral Tribunal constituted under Annex VII of the United Nations Convention for the Law of the Sea, paragraphs 53 - 55.

1.1(a)(1)), the general rules on attribution in the International Law Commission’s Articles on State Responsibility should be taken into account.³⁵

Accordingly, when a more specific rule is adopted, the general rule takes on a residual or fall-back character. It continues to apply to issues not covered (or no longer covered) by the more specific rule. In other words, Article XX of the GATT 1994 offers the residual or fall-back exception for environmental subsidies in the SCM Agreement.³⁶

In conclusion, should WTO Members have wished to abolish the right to justify WTO-inconsistent subsidies based on Article XX of the GATT 1994, ‘language to that effect’³⁷ would have been included in the SCM Agreement. In the absence of such language, there is no reason to assume that Members limited the application of Article XX of the GATT 1994 with the adoption of the SCM Agreement. Consequently, the GATT 1994 as interpreted by the SCM Agreement allows Members to impose prohibited or actionable subsidies if they meet the strict conditions of Article XX of the GATT 1994. Thus, Members can rely on Article XX of the GATT 1994 to justify WTO-inconsistent subsidies regardless of whether they are found to be inconsistent with the GATT 1994 *or* the SCM Agreement *or* both.

1.3 The reference to ‘this Agreement’ in Article XX does not foreclose its applicability to the SCM Agreement

The term ‘this Agreement’ in the chapeau of Article XX of the GATT 1994 has no clear ‘ordinary’ meaning of its own. This term was contained in the GATT 1947, prior to the Uruguay Round, when the GATT 1947 itself constituted the primary multilateral trade agreement. The GATT 1947 was carried over into the WTO Agreement essentially as it is, without being rewritten to take into account its new place as one of many related ‘goods’ agreements, bound together in an annex. The reference to ‘this Agreement’ must, therefore, necessarily be interpreted in the light of today’s placement of this provision and the link of the GATT 1994 to other Annex 1A agreements, as discussed above.

In *China – Audiovisuals*, the Appellate Body did not interpret the reference to ‘this Agreement’ as limiting the application of Article XX to the GATT 1994. In the earlier *Brazil – Desiccated Coconut* case, the Appellate Body found that the meaning of ‘this Agreement’ in Article 32.3 of the SCM Agreement refers to the SCM Agreement *and* Article VI of the GATT 1994.³⁸ Accordingly, the meaning of ‘this Agreement’ is not inherently limited to the covered agreement that it is used in.³⁹

³⁵ See *US – AD/CVD*, n. 13 above, paragraph 316.

³⁶ See A.T. Guzman and J.H.B. Pauwelyn, n. 5 above, at 357.

³⁷ Compare *China – Raw Materials*, n. 14 above, paragraph 293.

³⁸ See *Brazil – Desiccated Coconut*, n. 21 above, at 17.

³⁹ Compare the ‘likeness’ analysis in *Japan – Alcoholic Beverages II*, n. 23 above, at 21.

2. The object and purpose of the WTO Agreement support the application of Article XX of the GATT 1994 to the SCM Agreement

The WTO Agreement seeks to strike a balance between, on the one hand, the expansion of production and trade in goods and services, and, on the other hand, sustainable development and the protection of the environment. Indeed, WTO Members recognize, in the first recital of the preamble of the WTO Agreement, that:

... their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.⁴⁰

The balance between trade and environmental concerns reflected in the WTO Agreement cannot be achieved if the disciplines of the SCM Agreement and of the GATT 1994 were applied in isolation. Rather, the carefully crafted balance between trade promotion and social and environmental protection objectives reflected in the WTO Agreement can only be achieved if the disciplines of the SCM Agreement and of the GATT 1994 are applied cumulatively, and interpreted in a harmonious and integrated fashion.

The Uruguay Round Agreement Decision on Trade and Environment, which was adopted upon the conclusion of the Uruguay Round negotiations, further highlights the object and purpose of the WTO Agreement as far as environmental protection is concerned:

... there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other.⁴¹

The *Doha Ministerial Declaration* reaffirms the importance of this balance:

We recognize that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a

⁴⁰ See Marrakesh Agreement establishing the World Trade Organization, n. 7 above, Preamble.

⁴¹ *Uruguay Round Agreement Decision on Trade and Environment* (Marrakesh, 15 April 1994), Preamble.

disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements.⁴²

A similar balance between trade and environmental concerns is reflected in the sixth recital of the TBT Agreement, upon which the Appellate Body in *US – Clove Cigarettes* recently relied in interpreting the ‘treatment no less favourable’ requirement of Article 2.1 of that Agreement.⁴³ In that dispute, the absence of a general exception in the text of the TBT Agreement did not prevent the Appellate Body from interpreting Article 2.1 of that Agreement in a manner that explicitly recognizes a WTO Member’s right to adopt trade-restrictive measures, provided that those measures pursue legitimate policy objectives, such as the protection of the environment. Similarly, the absence of an explicit reference to a general exception in the text of the SCM Agreement cannot be held to suggest that WTO Members are prohibited from providing subsidies where such subsidies pursue legitimate environmental objectives in line with Article XX of the GATT 1994.

A crucial linkage to ensure this balance is the continued application of Article XX of the GATT 1994 not only to subsidies, tariffs, regulations and quotas under the GATT 1994, but also to subsidies under the SCM Agreement.⁴⁴ To reconcile the objectives of trade expansion and environmental protection, Members should choose less trade restrictive measures if they are equally suitable to protect the environment. This is reflected in Article XX of the GATT 1994 itself, in that certain measures are only justified by the general exceptions if they are ‘necessary’, i.e. less trade restrictive than all other possible measures.⁴⁵ If correctly implemented, subsidies are less trade restrictive than, for example, quantitative restrictions and tariffs.⁴⁶ Accordingly, a reasonable balance between the expansion of trade and environmental protection can only be achieved if subsidies are among the measures Members can choose under Article XX of the GATT 1994. If Members *should* choose the less trade restrictive measure in the light of the overall goal of the WTO Agreement they certainly have the *right* to do so.

3. Rules of international law support the availability of the general exceptions for subsidies

Pursuant to Article 31.3(c) of the Vienna Convention on the Law of Treaties, interpreters shall

⁴² See Doha Ministerial Declaration, n. 7 above, paragraph 6.

⁴³ See Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R (4 April 2012) (*US – Clove Cigarettes*); and Agreement on Technical Barriers to Trade (Marrakesh, 15 April 1994).

⁴⁴ Compare L. Rubini, n. 28 above, at 34.

⁴⁵ Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (17 December 2007), paragraph 156.

⁴⁶ J.H. Jackson, W.J. Davey, A.O. Sykes, *Legal Problems of International Economic Relations: Cases, Materials and Text*, fourth edn (West Group, 2002), at 769 – 772.

take into account ‘any relevant rules of international law applicable in the relations between the parties.’⁴⁷ Given that disputes involving green subsidies touch upon questions of sustainable development and climate change, one needs to look into the pertinent rules in these areas. The importance of such a consistent and dynamic rather than self-contained and static interpretation was emphasized by the Appellate Body in *US – Shrimp* where Article XX of the GATT 1994 was interpreted ‘in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.’⁴⁸ In light of these concerns, the principle of sustainable development should be given due consideration. The International Court of Justice in *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* has given weight to the need for environmental protection and the concept of sustainable development even without any explicit treaty language to this effect:⁴⁹

Owing to new scientific insights and to a growing awareness of the risks for mankind ... new norms and standards have been developed.... Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.⁵⁰

4. The negotiating histories of Article XX of the GATT 1994 and the SCM Agreement confirm the need for a broad application of Article XX

Pursuant to Article 32 of the Vienna Convention on the Law of Treaties, the negotiating history of a treaty can be taken into account ‘in order to confirm the meaning resulting from the application of article 31’. The negotiating history of Article XX of the GATT 1994 supports a broad application of its general exceptions. In the London draft, Article 37 of what later became the chapeau of Article XX of the GATT 1994 did not yet refer to ‘this Agreement’ but to ‘undertakings in Chapter IV of this Charter relating to import and export restrictions’.⁵¹ The formulation ‘this Agreement’ was introduced in the Geneva Conference by the Benelux and French delegations to generalize the application of Article XX of the GATT including to disciplines in GATT Articles III, VI and XVI.⁵² In other words, the term ‘this

⁴⁷ Convention on the Law of Treaties (Vienna, 23 May 1969), Article 32.

⁴⁸ See *US – Shrimp*, n. 1 above, paragraph 129.

⁴⁹ International Court of Justice, *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* Judgment of 25 September 1997, [1997] ICJ Reports 92.

⁵⁰ *Ibid.*, paragraph 140.

⁵¹ Preparatory Work from WTO Archives, Committee II, Technical Sub-Committee, Ninth Meeting held on Wednesday, 13 November 1946 at 10.30 am, E/PC/T/C.II/50 (13 November 1946), at 7ff; and Preparatory Work from WTO Archives, Committee II, Draft Report of the Technical Sub-Committee, E/PC/T/C.II/54 (16 November 1946), at 32ff.

⁵² Record of Work Performed, UN Econ. Social Council, GATT Doc. No. E/ PC/T/103 (19 June 1947), at 43.

Agreement’ was introduced to broaden rather than to limit the application of the Article XX exceptions.

The *travaux préparatoires* of the SCM Agreement equally confirm applicability of Article XX of the GATT 1994 to the SCM Agreement. First and foremost, nothing in the negotiating history indicates that Article XX should not apply to the SCM Agreement. Furthermore, the negotiating history demonstrates an intimate interrelation between these two agreements. At the very beginning of the Uruguay Round the participants explicitly specified the objective of the talks, namely: ‘Negotiations on subsidies and countervailing measures shall be based on a review of Articles VI and XVI and the MTN Agreement on Subsidies and Countervailing Measures with the objective of improving GATT disciplines...’⁵³ Thus, the negotiators highlighted the particular interconnection between GATT 1994 and the SCM Agreement. This initial close link does not exist between the GATT 1994 and, for instance, the Protocol of Accession of China.

The drafters’ intent to elaborate in the SCM Agreement on already existing GATT 1994 disciplines is even more pronounced with regard to prohibited subsidies. As observed by the GATT Secretariat Note, ‘some participants ... considered that subsidies proposed for this category were already covered by Article III of the General Agreement Some other participants explained that although these subsidies were already prohibited by other provisions of the General Agreement, their inclusion into the category of prohibited subsidies would serve the purpose of better clarity and certainty.’⁵⁴

Also, the *travaux préparatoires* clarify that the intention of the parties was to leave room for non-trade objectives including environmental protection within the SCM Agreement. Subsidies and countervailing measures were not a new topic for negotiators (they were already regulated by Articles III, VI and XVI of the GATT and the Subsidies Code of 1979). The predecessor of the SCM Agreement, the Subsidies Code, states in its preamble that ‘subsidies are used by governments to promote important objectives of national policy.’⁵⁵ Such a position was reiterated several times during the Uruguay Round.⁵⁶

⁵³ WTO/GATT Ministerial Declaration on the Uruguay Round (Declaration of 20th September 1986), Part I, D Subjects for negotiation, Subsidies and countervailing measures.

⁵⁴ Note by the Secretariat, Meeting of 26-27 September 1989, Negotiating Groups on Subsidies and Countervailing Measures, MTN.GNG/NG10/13 (16 October 1989), at 8.

⁵⁵ Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (Document LT/TR/A/3, 1979).

⁵⁶ For instance, during the Meeting on 1-2 June 1987 of the Negotiating Group on Subsidies and Countervailing Measures, several delegations emphasized ‘the principle that subsidies other than export subsidies were widely used as important instruments for the promotion of social and economic policy objectives and that the rights of signatories to use such subsidies to achieve these and other important policy objectives which they considered desirable could not be restricted’. Later the same idea was recalled in the submission by India of 30 November 1989, stating ‘In respect of subsidies other than export subsidies, signatories have clearly recognized in the Subsidies Code that these are widely used as important instruments for promotion of social and economic policy objectives.’ See Note by the Secretariat, Meeting of 1 - 2 June 1987, Negotiating Groups on Subsidies and Countervailing Measures, MTN.GNG/NG10/2 (10 June 1987).

5. There are compelling policy reasons to support the applicability of Article XX of the GATT 1994 to the SCM Agreement

5.1 Non-application would lead to absurd results

A production subsidy, compared to instruments discriminating against imports, has the virtue that it results only in a change of the production structure but not in the structure of consumption. That is to say the prices of the output of that industry relative to other prices will not change. By contrast, tariffs, quotas and other border measures do not only impact the production structure, but also prices. Accordingly, in contrast to other border measures, subsidies do not change patterns of consumption. This is why subsidies have been widely accepted as the economically most efficient trade policy instrument.⁵⁷ Given that Article XX of the GATT 1994 is available to justify tariffs and quotas, from an economic viewpoint the general exceptions should also be available to subsidies, as the more efficient measure.

Hence, a finding that Article XX of the GATT 1994 is not available as a justification for SCM-inconsistent climate change subsidies would lead to the absurd result that more trade restrictive measures such as quantitative restrictions under Article XI of the GATT 1994 could be justified, whilst less trade restrictive measures such as subsidies could not. This result would be even more absurd when one considers that subsidies may legitimately be proposed by a complaining WTO Member as ‘reasonably available less trade-restrictive alternative measures’ to demonstrate that a quantitative restriction is *not* ‘necessary’ and thus not justified under Article XX of the GATT 1994.

Moreover, this interpretation is particularly problematic in the case of environmental policies. The market for environmental technologies is characterized by large initial fixed costs of entry, due to the need for significant investments in research and development. This is particularly true in the case of renewable energy technologies such as those used for solar and wind power, where up-front capital requirements are significant while operation and maintenance costs are negligible. In these circumstances, initial demand for environmental products is such that consumers are not willing to pay a price that is high enough for a producer to recover its initial investment, particularly when faced with competition from cheaper, environmentally-unfriendly alternatives. As a result, little significant investment in such clean technologies will take place in the absence of some sort of government intervention. Commensurate with the normative categories reflected in the WTO Agreements, we submit that it is desirable that such intervention takes the form of less trade-restrictive subsidies, rather than more trade-restrictive import restrictions.

For these reasons, the non-applicability of Article XX of the GATT 1994 to breaches of the SCM Agreement risks upsetting the relative balance of choices when WTO Members select the means by which they will pursue their environmental objectives. When faced with an

⁵⁷ See A. Dunkel and F. Rossler, n. 5 above, at 204.

option between a more trade-restrictive import restriction and less trade-restrictive subsidies, if Article XX does not apply to the SCM Agreement, a Member may opt for the former simply by virtue of the applicability of Article XX as an affirmative defence.

5.2 The applicability of Article XX to the disciplines of the SCM Agreement would not be a *carte blanche* for trade-distorting subsidies

Article XX of the GATT 1994 by virtue of its nature as a general exception, has been narrowly interpreted and applied by WTO panels and the Appellate Body. Environmental subsidies, like any other subsidies that might be covered by GATT 1994 Article XX, will thus be subject to rigorous scrutiny before they are justified. The general exceptions will only apply to subsidies that ‘not only come under one or another of the particular exceptions — paragraphs (a) to (j) — listed under Article XX; [...] [but] also satisfy the requirements imposed by the opening clauses of Article XX’.⁵⁸ Accordingly, subsidies that ‘constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade’⁵⁹ would not be justified.

B. THE LEGITIMATE POLICY OBJECTIVE OF SUSTAINABLE DEVELOPMENT SHOULD BE TAKEN INTO ACCOUNT WHEN ASSESSING WHETHER CLIMATE CHANGE SUBSIDIES CONFER A ‘BENEFIT’

Many of the arguments on the application of Article XX of the GATT 1994 to the SCM Agreement that we elaborated above equally support other options to embrace environmental concerns under the SCM Agreement, such as to give weight to the legitimate policy objective of a subsidy when assessing whether the ‘benefit’ exists under Article 1.1 of the SCM Agreement.

This approach is in line with the recent findings in *U.S. – Clove Cigarettes* where the Appellate Body interpreted the treatment no less favourable requirement of Article 2.1 of the TBT Agreement so as to incorporate legitimate governmental objectives:

... the context and object and purpose of the TBT Agreement weigh in favour of reading the ‘treatment no less favourable’ requirement of Article 2.1 as prohibiting both de jure and de facto discrimination against imported products, while at the same time permitting detrimental impact on competitive opportunities for imports that stems exclusively from legitimate regulatory distinctions.⁶⁰

⁵⁸ See *US — Gasoline*, n. 23 above, at 22.

⁵⁹ See GATT 1994, n. 3 above, Article XX, chapeau.

⁶⁰ See *US — Clove Cigarettes*, n. 43 above, paragraph 175.

Although the SCM Agreement contains no preamble, following the Appellate Body in *U.S. — Lumber CVD* the object and purpose of the SCM Agreement ‘is to strengthen and improve GATT disciplines relating to the use of subsidies and countervailing measures, while, recognizing at the same time, the right of Members to impose such measures under certain conditions’.⁶¹ Accordingly, ‘benefit’ in the SCM Agreement needs to be interpreted in light of the object and purpose of the GATT 1994.

Sustainable development and protection and preservation of the environment are fundamental goals of the WTO, as enumerated in the Preamble of the Marrakesh Agreement.⁶² This preambular language of the Marrakesh Agreement informs all the covered agreements including the SCM Agreement, explicitly acknowledging the objective of sustainable development.

The SCM Agreement does not provide guidance on how benefit should be defined for the purpose of determining the existence of a subsidy.⁶³ In the context of subsidies granted for environmental purposes, such as those at issue in this case, there are two considerations that argue for a cautious interpretation. First, it is problematic to define as ‘benefits’ financial contributions that are intended to internalize environmental benefits. It is widely acknowledged that governments have a duty to address environmental problems within their territories, and myriad international legal agreements commit states to also addressing *global* environmental issues such as climate change. Customary international law, as summarized in the Rio Declaration on Environment and Development, affirms that ‘States have ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.’⁶⁴ Under the UNFCCC, Parties agree that they shall, *inter alia*, ‘formulate [and] implement ... programmes containing measures to mitigate climate change.’⁶⁵ One of the most important routes for such action is via fiscal and regulatory policy that internalizes environmental costs. However, the scale of the climate change problem dictates that this will not be sufficient; government support for early stage commercialization of mitigation technologies — policy designed to have governments pay the necessary price for achieving broad social benefits — will also be necessary in some sectors.⁶⁶

If the financial contributions by a government are exactly matched to the unpaid social benefits that will be derived from the investment that they support, then there is a question as to whether this can be correctly construed as a benefit to the receiving firm. Certainly there is

⁶¹ Appellate Body Report, *United States — Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada*, WT/DS257/AB/R (20 December 2005), paragraph 64.

⁶² See Marrakesh Agreement Establishing the World Trade Organization, n. 7 above, Preamble.

⁶³ The guidance provided in Article 14 is explicitly intended for application to Part V only.

⁶⁴ Rio Declaration on Environment and Development (A/CONF.151/26, 14 June 1992), Vol. I, Annex I, Principle 2.

⁶⁵ United Nations Framework Convention on Climate Change (New York, 9 May 1992), Article 4(d).

⁶⁶ N. Stern, *Stern Review on the Economics of Climate Change* (Her Majesty’s Treasury, 2006), chapter 16 (Policy Responses for Mitigation).

the possibility that such payments will put the firm in an advantaged competitive position relative to its unsupported competitors. But in such a case it is the unsupported competitors, and not the receiving firm, that face inaccurate market price signals.

A second question is, if the above approach to defining benefits is rejected and a more traditional approach is followed, how to identify the appropriate market benchmark. In *Canada – Aircraft*, the Appellate Body identified the marketplace as an appropriate benchmark for determining the existence of a benefit:

... because the trade-distorting potential of a ‘financial contribution’ can be identified by determining whether the recipient has received a ‘financial contribution’ on terms more favourable than those available to the recipient in the market.⁶⁷

This is inescapably problematic in a case where there is no market for the product in question, or if the market is so distorted by regulatory strictures (as in the case of utilities which are regulated monopolies; or markets for greenhouse gas emissions allowances, which are created wholly by regulation) that definitively finding an ‘undistorted’ market price is impossible.⁶⁸ This is especially relevant for climate change subsidies.

Such difficulties are not confined to the approach adopted in *Canada – Aircraft*. Clearly there are also significant challenges involved in determining, for example, the extent to which a given subsidy might exactly match social benefits. But the difficulties associated with the traditional approach in this context are further argument to seek a more appropriate framework within which to understand the meaning of ‘benefit.’ In the case of measures that seek to internalize significant environmental externalities, it would be preferable to use a framework that grants a fair degree of deference to governments’ pursuit of legitimate non-trade policy objectives. If Article XX of GATT 1994 were available as a defence for such measures, it would serve as an ideal means by which to grant such measured deference. But in the absence of Article XX as a defence, it falls to other elements of the law to ensure that WTO law accords the deference intended for legitimate environmental measures under the GATT 1994’s general exceptions.

⁶⁷ Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R (4 August 2000), paragraph 157.

⁶⁸ See R. Howse, n. 6 above, at 6 and 13.

III. Request to the Panel

In light of the foregoing, we respectfully invite the panel to:

- 1) draft the panel report in a manner that does not prejudice the applicability of Article XX of the GATT 1994 to the SCM Agreement;
- 2) when assessing whether a ‘benefit’ exists under Article 1.1 of the SCM Agreement, give due consideration to the special character of environmental measures.

Respectfully submitted,



Aaron Cosby
International Institute for Sustainable
Development (IISD)
Tel: +1 (250) 362-2275
Email: acosbey@iisd.ca



William Amos
Ecojustice Canada
Tel: +1 (613) 562-5800, ext 3378;
Email: wamos@ecojustice.ca



Ramani Nadarajah
Canadian Environmental Law Association
(CELA)
Tel: +1 (416) 960-2284, ext 217
Email: ramani@cela.ca



Hugh Wilkins
Ecojustice Canada
Tel: +1 (416) 368-7533, ext 534
Email: hwilkins@ecojustice.ca