SUBSIDIES OF THE AUSTRALIAN CLEAN ENERGY PACKAGE

FELICITY DEANE

The Australian Clean Energy Package has been introduced to respond to the global challenge of climate change and reduce Australia's greenhouse gas emissions. It includes legislation to establish an emissions trading scheme. In support of the entities that are liable under this Package, there are a number of assistance measures offered to alleviate the financial burden that the Package imposes. This paper considers whether these assistance measures are subsidies within the context of the law of the World Trade Organization. In order to do this, the rules of the Agreement on Subsidies and Countervailing Measures are examined. This examination enables an understanding of when a subsidy exists and in what circumstances those subsidies occasion the use of remedies under the law.

1.1 INTRODUCTION

The Clean Energy Package (the Package) was introduced in Australia in July 2011. The underlying purpose of the Clean Energy Package is to reduce greenhouse gas (GHG) emissions in order to respond to both the global challenge of climate change and the obligations of the international climate change regime.[1] The Package includes legislation to establish an emissions trading scheme (ETS). Further, assistance measures have been introduced to alleviate the economic stress caused by the introduction of the Package, in particular the carbon pricing mechanism (the CPM). This paper considers the assistance measures of the Package in the context of the WTO subsidies laws.

There are a significant number of assistance measures introduced by the package. Of particular relevance to the WTO law are two assistance measures: the Jobs and Competitiveness Program (the JCP) and the Energy Security Fund (the ESF).[2] These measures are closely related to the CPM and provide assistance through free unit distribution. In addition, this paper considers one of the programs of assistance that is legally segregated from the Australian CPM, the Steel Transformation Plan Package (the STPP). The STPP is introduced through its own standalone legislative instruments.[3]

By considering the Package assistance measures, the overriding purpose of this paper is to consider the compliance of each of these with the law of the WTO. In this regard, each assistance measure is analysed separately to determine if it infringes the requirements of the Subsidies and Countervailing Measures Agreement (the SCM Agreement)[4] or any other WTO annexed agreements.

This paper is divided into four parts. In part one of this paper, an overview of the WTO law regulating subsidies is provided. This paper focuses on the law within the SCM Agreement, in particular, the definition of subsidies within this agreement. In part two of this paper, the JCP is examined. The requirements of prohibited subsidies are also examined in detail. The third part of this paper examines the STPP. It considers the STPP alongside other assistance measures available to the steel manufacturing industry and evaluates the collective impact of these measures within the context of the law of the WTO. Finally, the paper considers the ESF assistance scheme. Although there are a number of ESF characteristics similar to the JCP, the nature of the ESF and its purpose as an assistance package for energy security leads to unique features that require separate analysis.

1.2 THE WTO RULES REGULATING SUBSIDIES

1.2.1 The Definition of Subsidies

The laws of the World Trade Organization (WTO) impose requirements that relate to the use of subsidies by members. Historically, subsidies have been used by states to protect domestic entities from competition and to maintain export levels. In some cases subsidies may be granted for legitimate policy purposes, such as environmental objectives. Despite the potential benefits of subsidies, their existence can undermine free trade.[5]

For the most part, the WTO law requirements for subsidies are set out in the SCM Agreement. In addition to the SCM Agreement, rules on subsidies can be found in the *Agreement on Agriculture*,[6] the *General Agreement on Tariffs and Trade* (the GATT)[7] and the *General Agreement on Trade in Services* (the GATS).[8] The focus of this article is on the rules contained within the SCM Agreement, although the rules within the GATT and the GATS are also briefly considered.

The SCM Agreement contains the first instrumental definition of subsidies conceptualised since the inception of GATT.[9] Commentators suggest this definition applies across each of the agreements regulating subsidies.[10] It is through this definition that members identify the scope of the SCM Agreement. As noted in the *US – Softwood Lumber III* dispute, '[a] subsidy is exhaustively defined in Article 1 of the SCM Agreement.'[11]

The definition of a subsidy is contained in Article 1.1 of the SCM Agreement. It states that

> a subsidy shall be deemed to exist if:
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
> (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)1;
> (iii) a government provides goods or services other than general infrastructure, or purchases goods;
> (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;
> or
> (a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;
> and
> (b) a benefit is thereby conferred.[12]

Therefore, the three criteria for a subsidy to exist in accordance with the SCM Agreement are:

- a financial contribution is made;
- the contribution is made by a government;[13] and,
- a benefit is conferred as a result of the financial contribution.[14]

This paper will consider both the first and the third criteria in more detail. The second criterion is less likely to cause panel deliberations. This is especially the case for certain categories of financial contribution.

The Criterion of a Financial Contribution

There are many forms of financial contribution that governments may offer to benefit enterprise.[15] The SCM Agreement defines a financial contribution as follows:

- a direct or potential direct transfer of funds; [16]
- government revenue that is otherwise due has been foregone;[17] or,
- the direct provision of goods or services.[18]

Although by appearances straightforward, these categories of financial contribution have led to lengthy deliberations by both Panels and the Appellate Body. The category most relevant to the Package assistance measures is government revenue that has been foregone.

The concept of 'foregone revenue' was considered by the Panel in some detail in the *US–FSC dispute*.[19] In this dispute, members challenged the provisions of the United States Internal Revenue Code that established special tax treatment for foreign sales corporations. The challenge was issued on the basis that this tax treatment was inconsistent with the obligations of the SCM Agreement.[20]

The Panel for this dispute considered whether the phrase 'otherwise due' implied a normative benchmark. The Panel acknowledged that this benchmark must rest in actual substantive realities rather than being restricted to a 'formalistic' approach.[22] As such, external norms, specifically of the jurisdiction in question, must inform the benchmark for revenue 'otherwise due'.

The Panel in the first instance for this dispute proposed a 'but for' test to determine whether government revenue was otherwise due. This was subsequently considered by the Appellate Body:

> The Panel had interpreted the term "otherwise due" as referring to the situation that would prevail "but for" the United States' tax measures under consideration. The Panel held that it would determine whether, absent these measures, there would be a higher tax liability, meaning that it would examine the situation "that would exist but for the measure in question". [23]

The Appellate Body cautioned against the use of this test in all circumstances. It suggested that it would be relatively simple for a member to legislate to avoid breaching such an obligation:[24]

> As Members, in principle, have the sovereign authority to determine their own rules of taxation, the comparison under Article 1.1(a)(1)(ii) of the SCM Agreement must necessarily be between the rules of taxation contained in the contested measure and other rules of taxation of the Member in question. Such a comparison enables Panels and the Appellate Body to reach an objective conclusion, on the basis of the rules of taxation established by a Member.

The Appellate Body in this dispute declared that it is the *members' own right to choose what to tax and what not to tax*.[26] This means, the member itself sets this benchmark. It is not defined through a global norm for taxation of a particular commodity or type of income. Rather the comparison is of the domestic fiscal treatment of 'legitimately comparable income',[27] or *comparable obligations*. In other words what is 'otherwise due' depends on the rules of taxation that members establish for themselves. Therefore, the comparison required to determine whether revenue has been foregone relates to the jurisdiction itself rather than to what other WTO members choose to tax.

The Conferral of a Benefit

Once it has been established that a financial contribution has been made by government, for a subsidy to exist it must cause a benefit to be conferred. The first point to note with regard to 'benefit' is that its existence must be satisfied independently of financial contribution. In the Brazil – Aircraft dispute the Panel determined that a financial contribution had not been tendered. This was reached on the basis that no benefit had been conferred. The Appellate Body for this case was quick to reprimand the Panel for this error, noting that:

> the Panel compounded its error in finding that the "financial contribution" ... is not a "potential direct transfer of funds" by reasoning that a letter of commitment does not confer a "benefit". In this way, in its interpretation of Article 1.1(a)(i), the Panel imported the notion of a "benefit" into the definition of a "financial contribution". This was a mistake. We see the issues – and the respective definitions – of a "financial contribution" and a "benefit" as two separate legal elements in Article 1.1 of the SCM Agreement, which together determine whether a subsidy exists... [28]

Although this separation is acknowledged, Ghiollarnath notes that the second category of financial contribution, that is revenue that was otherwise due has been foregone, includes a 'built in' benefit benchmark. [29] This is because the benefit can be assumed by the use of the phrase 'otherwise due'. Therefore, for this category at least, it is generally unnecessary to consider whether a contribution also confers a benefit.

The second aspect relating to the conferral of a benefit is that the benefit must actually be conferred. The language of Article 1.1(b) requires that the existence or lack of existence of a benefit thereof is determined through consideration of the position of the beneficiary. In this regard, the Appellate Body in the Canada – Aircraft dispute rejected the argument that the benefit could be determined in accordance with the 'cost to government'.[30]

> The term 'benefit'… implies that there must be a recipient. This provides textual support for the view that the focus of the inquiry under Article 1.1(b) of the SCM Agreement should be on the recipient and not on the granting authority… we believe that Canada's argument that 'cost to government' is one way of conceiving of 'benefit' is at odds with the ordinary meaning of Article 1.1(b)... [31]

Concluding Comments

The above listed criteria establish that a subsidy exists. However, a subsidy does not infringe the SCM Agreement obligations unless it also falls within one of the categories of prohibited or actionable subsidies. These categories are explored in more detail next within this article.

1.2.2 Prohibited Subsidies

The SCM Agreement contains a so-called 'traffic light approach' to subsidies management.[32] Red light subsidies are prohibited, as they are viewed as an opportunity for trade distortion. Yellow light subsidies are actionable subsidies that must be specific in accordance with Article 2. Finally, green light subsidies were once non-actionable, and did include research subsidies, environmental subsidies and aid to disadvantaged regions.[33] However, the non-actionable subsidies provision has expired. [34]

The requirements for a prohibited subsidy are contained in Article 3 of the SCM Agreement. These subsidies fall into one of two categories:

- export subsidies; and,
- import substitution subsidies.[35]

1.2.3 Actionable Subsidies

The requirements to demonstrate that a subsidy is actionable are considerably more complex than the criteria to establish that subsidies are prohibited. These requirements are contained in Article 5 of the SCM Agreement. Article 5 provides that 'adverse effects' can take three different forms. These are:

- Injury to the domestic industry of another Member;
- Nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994; or,
- Serious prejudice to the interests of another Member.

The nature of the criteria to demonstrate adverse effects has led to suggestions that Article 5 of the SCM Agreement cannot be challenged on an 'as such' basis. An 'as such' challenge disputes the measure as it appears or the law itself. This is compared to an 'as applied' challenge that disputes how the measure is implemented. A panel refuted this claim in its adjudication of the *US – Offset Act (Byrd Amendment)* dispute. In this dispute, the Panel noted that:

> It seems that the central argument that the US is making … is that the Act must be applied before there can be a violation under Article 5 which, in its view, means that subsidies must be granted under the Act. This is manifestly incorrect. [36]

1.2.4 Concluding Comments

Thus far this paper has presented the criteria that must be demonstrated by any member that wishes to rely on the SCM Agreement provisions. These criteria are vital to the analysis in this paper. In order to determine whether the Package bestows subsidies within the context of the WTO law, these criteria must be applied to the assistance measures. The next part of this paper undertakes this task.

1.3 The Jobs and Competitiveness Program

The JCP represents the largest source of assistance for liable entities under the CPM.[37] The basis of the JCP is that it is designed to assist emissions-intensive trade-exposed (EITE) industries by providing them with free carbon units.[38] The purpose of the JCP is to maintain the international competitiveness of these industries and by doing so prevent relocation of Australian industries to foreign countries.[39] Practically the JCP is designed to achieve these goals by ensuring EITE industries that may incur significant costs through the introduction of the CPM can gradually transition to an economy where their GHG emissions incur costs.

The JCP links financial support to production levels of both new and existing EITE industries.[40] The assistance is based on historical information provided by the entity. However, the assistance is contingent on production remaining in Australia.[41] Assistance under the JCP distinguishes between 'highly emissions intensive activities' and 'moderately emissions intensive activities'.[42] Those activities that fall within the former category are eligible for free unit assistance for up to 94.5 per cent of their annual liability under the CPM.[43]

Assistance under the JCP is not confined to activities that incur a direct emissions liability. Costs that are incurred by companies that relate to indirect emissions, that do not require the surrender of carbon units, are also supported by the JCP.[44] These additional costs include all additional charges incurred as a result of electricity use, where costs have increased as a result of the introduction of the CPM and other charges relating to the Package.[45] This indirect assistance is also provided in the form of free carbon units.

The eligibility for the JCP is based on an entity's emissions intensity and trade exposure.[46] The JCP links trade exposure to a quantitative assessment and a qualitative test. The quantitative test requires that the ratio of the 'value of imports and exports to the value of domestic production' be greater than 10 per cent in any of the eligible years.[47] The program's emissions intensity threshold is an 'average emissions per million dollars of revenue or emissions per million dollars of value-added.'[48] If the quantitative test is not satisfied, then the qualitative test may be used. This test requires a liable entity demonstrate a lack of capacity for passing on costs to its customers due to international

competition. [49]

Some commentators have suggested that the JCP may insulate EITE industries to the extent that it may provide some 'unintended protectionism'.[50] Certainly, the documentation supporting the introduction of the JCP provides some evidence that its intention may not align with the requirements of the SCM Agreement.[51] For example, the Explanatory Memorandum to the Clean Energy Bill 2011 (Cth) states that the JCP is 'targeted towards industries that conduct trade-exposed activities and have the most significant exposure to a carbon price.'[52]

This and other similar statements raise the question of whether the JCP is a subsidy and, as such, whether it complies with the relevant laws of the WTO that are designed to govern this issue.

1.3.1 The Issue of A Financial Contribution By Government?

In order to determine if the assistance that the JCP provides amounts to a financial contribution, the assistance must fulfil one of the three categories under the SCM Agreement. Importantly, the satisfaction of this category does not necessarily mean a benefit exists.[53] A benefit must be demonstrated independently of the existence of a financial contribution.

As mentioned above, there are three categories of financial contribution within the SCM Agreement.[54] A financial contribution may be any one of the following:

- a direct or potential direct transfer of funds; [55]
- government revenue otherwise due that has been foregone;[56] or,
- the direct provision of goods or services.[57]

The provision of assistance under the JCP is in the form of free carbon unit allocation, which during the fixed price period of the CPM will cost in excess of $23 per unit.[58] Although it is possible to argue that the JCP provides a financial contribution in any one of the three forms, it is most likely to fall within the category of revenue that is otherwise due that has been foregone.

It was noted above that the measure of 'revenue due' will be based on a member's own taxation requirements. Using a country's own taxation requirements as a benchmark means that it will be unnecessary to determine whether other WTO members have imposed similar levels of carbon pricing domestically. In this regard, because a country's own taxation requirements are the required benchmark, the conjecture here is that the provision of free carbon units within Australia is 'revenue foregone'.

The justification for the claim that the provision of free carbon units is 'revenue foregone' is reflected by the following example. Company A, a liable entity under the CPM, is carrying on an eligible activity under the JCP and is categorised as a highly emissions intensive company. During an eligible year of the CPM Company A has emitted 500,000 tonnes of carbon dioxide equivalent (CO2-e). The consequence of assistance measures of the JCP is that where Company A would have been required to purchase 500 carbon units, they need only purchase 27 units. The other 473 have been provided free by regulator in accordance with the JCP. The regulator has foregone revenue from 473 units. [59]

The alternative may be demonstrated by considering Company B. Company B does not carry on an EITE activity and is therefore ineligible for assistance. If Company B emits 500,000 tonnes of CO2-e it must purchase all 500 carbon units.[60] If the first fixed price period is used in this example, Company A would be liable to pay $621 while Company B's expense would amount to $11,500. Therefore, when the circumstances of the market within Australia are examined, it can be demonstrated that the JCP enables revenue that is otherwise due, to be foregone. It follows that the JCP satisfies the first requirement of a subsidy.

To establish that the government has foregone due revenue also fulfils the second requirement of the subsidy definition. That is, that the financial contribution was made by government. [61] The satisfaction of the category of 'revenue foregone' arguably also satisfies the third requirement of the definition of subsidy, namely that a benefit has been conferred.[62] Although this is not disputed, this criterion requires slightly more explanation.

1.3.2 The Conferral of Benefit

There is no definition of 'benefit' within the SCM Agreement. However, Article 14 of this agreement offers some guidance to resolve whether a benefit exists.[63] As noted in each of the article's sub-paragraphs, the provision of a financial contribution by government will only be beneficial where the contribution deviates from usual market conditions. For example, in the Canada — Aircraft dispute, the Appellate Body asserted that for a benefit to exist, the recipient of the financial contribution had to be better off than they would otherwise have been.[64] In this dispute, the marketplace was deemed the appropriate ground for comparison.[65] This confirmed the position of the Appellate Body in the *US — Lead and Bismuth II* dispute.[66] In this dispute, the Appellate Body declared that:

> The question whether a 'financial contribution' confers a 'benefit' depends, therefore, on whether the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market.[67]

The question of which methodology is the most appropriate for the computation of a benefit was explored in the *US — Softwood Lumber* disputes. The Panel in *US — Softwood Lumber III* concluded that a member's benefit could only be calculated by comparing the market conditions in the Member's *own territory*. [68]

The issue of which markets are appropriate for comparison also arose in the *US—Softwood Lumber IV* dispute.[69] In this dispute the United States authorities relied on 'cross-border comparisons' between timber prices in the United States and those in Canada to calculate the amount of the countervailing measure.[70] The Panel noted this approach and suggested that it was erroneous:

> [i]n light of the fact that the USDOC acknowledged the existence of a private stumpage market in Canada, we find that the resort to US prices as the benchmark for the determination of benefit on grounds that private prices in Canada were distorted is inconsistent with Article 14 (d) [of the] *SCM Agreement*. [71]

Despite this assertion by the Panel, the Appellate Body for this dispute ultimately ruled against Canada on this issue and accepted the United States' position that the large volume of government sales distorted Canadian prices.[72] The Appellate Body suggested that in a case where there was no adequate private market in the exporting country, alternative methodologies could be considered. [73] It noted:

> an investigating authority may use a benchmark other than private prices of the goods in question in the country of provision, when it has been established that those private prices are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods. When an investigating authority resorts, in such a situation, to a benchmark other than private prices in the country of provision, the benchmark chosen must, nevertheless, relate or refer to, or be connected with, the prevailing market conditions in that country, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale, as required by Article 14(d). [74]

For this reason, it is generally a member's own market that must provide the benchmark for the existence of a benefit. However, where that market has been 'distorted' through the role of the government, another market may set the appropriate benchmark. This is only where that other market demonstrates an adequate connection to the conditions of the market under scrutiny.

In order to illustrate that the JCP confers a benefit, it is therefore necessary to consider the conditions of the market, as it is these that provide the standard for analysis.[75] Before these conditions are explored, it is recognised that there may be a reasonable suggestion that the JCP does not confer an actual benefit at all. This is because of the requirement that any beneficiary of the JCP may need to surrender the carbon units allocated to them for their emissions liability.

The benefit offered to eligible entities by the JCP appears short-lived. This is because the free units issued are surrendered to the regulator almost immediately as payment for the corresponding liability imposed by the CPM. An argument against the existence of a benefit may be bolstered by the requirement that beneficiaries of the JCP must also abide by the reporting and record keeping requirements imposed by the *Clean Energy Act 2011* (Cth) (the Clean Energy Act).[76] Therefore, the requirement to report may partially offset the benefit that the free carbon units may provide.

The success of this argument is doubtful when the SCM Agreement jurisprudence is considered. The Appellate Body has determined that subsidies are to be judged in accordance with the market where it exists, rather than against the tax programs and regulatory requirements imposed that accompany any provision of assistance.[77] This argument is also likely to fail on the basis that the JCP offers assistance for both direct and indirect emissions from electricity and steam use.[78] Because liability is only imposed for direct emissions, the monetary value of the JCP assistance may be greater than the value of a participant's liability under the CPM. The inclusion of a buy-back mechanism in the fixed price period and the transferability of JCP units in the fixed price period are evidence of this.[79] It follows that beneficiaries under the JCP receive a benefit. This conclusion is supported by the reasoning of the Appellate Body in the US – FSC dispute where it was pointed out that 'tax exemptions … confer upon the recipient the obvious benefit of reduced tax liability and, therefore, reduced tax payments.' [80]

Contemporary Existence of the JCP Benefit

Another element potentially raised by the present tense verb phrase 'is conferred' in Article 1.1(b) is timing. In other words, whether there is a requirement that the benefit continues to exist. In the *US – Lead and Bismuth II* dispute, the United States argued that the use of the present tense in Article 1 required that a benefit only had to be demonstrated at the time of the 'financial contribution'. [81] The Appellate Body rejected this argument and suggested that the article did not resolve the issue of timing: [82]

> The United States ... appeals the Panel's finding that the investigating authority must demonstrate the existence, during the relevant period of investigation or review, of a continued 'benefit' from a prior 'financial contribution' ... We do not agree with the Panel's implied view that ... an investigating authority must always establish the existence of a "benefit" during the period of review in the same way as an investigating authority must establish a "benefit" in an original investigation ... In an original investigation, the investigating authority must establish that all conditions set out in the SCM Agreement for the imposition of countervailing duties are fulfilled. In an administrative review, however, the investigating authority must address those issues which have been raised before it. [83]

This reasoning indicates that to bring a dispute before a

Panel, it is necessary that the complainant demonstrate all elements of a subsidy. However, should these elements cease to exist, the Appellate Body may still consider the circumstances that existed at the time of the Panel ruling.

Interestingly, the fact that a measure is withdrawn or expires does not prevent a Panel from ruling upon its compliance issues with the WTO law.[84] This was made clear by the following statement in the *US – Wool Shirts and Blouses* dispute:[85]

> In the absence of an agreement between the parties to terminate the proceedings, we think it is appropriate to issue our final report regarding the matter set out in the terms of reference of this Panel in order to comply with our mandate ... notwithstanding the withdrawal of the US restraint. [86]

In the *Australia – Automotive Leather* dispute a retrospective remedy was imposed on a past subsidy.[87] This ruling was met with significant criticism from the members of the WTO at the time, due to the possibility that it could open complaints for subsidies that had been long revoked.[88] This supports the conclusion that to bring a matter before a Panel that has either been withdrawn or has expired should be accompanied by the need to show a continued benefit. The fact that a subsidy had once existed should not be enough to initiate a challenge.

This issue is particularly relevant to the analysis of the JCP as a subsidy. This is because the *Clean Energy Act* states that the purpose of the JCP is to provide *transitional* assistance.[89] Despite this claim of temporary status, there is nothing within the legislation detailing how assistance will be phased out.[90] Rather the *Clean Energy Act* requires that when the JCP is to be cancelled, periods of notice must be accorded to those who are eligible for assistance. [91]

On the basis of this analysis, the JCP fulfils the definition of a subsidy under the SCM Agreement.[92] Although this is a significant finding, it is not the final element that a complainant will need to demonstrate to challenge the JCP successfully. To establish a breach of the SCM Agreement requirements, a subsidy must also be either prohibited or actionable.

1.3.3 The Prohibition of the Jobs and Competitiveness Programme

For the SCM Agreement to prohibit a subsidy, that subsidy must be either an export subsidy or an import substitution subsidy. The former category is demonstrated by establishing a connection between export levels and the provision of a subsidy. The latter category of prohibited subsidy forbids import substitution subsidies. Article 3.1(b) prohibits 'subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.'[93] For this reason, to classify the JCP as a prohibited subsidy, it must be an export subsidy, as there is no link to the use of domestic over imported goods within the program.

For an export subsidy to be demonstrated three criteria must be established. First, a framework must grant a subsidy; second, the grant must be 'tied to' something; and finally that something is 'actual or anticipated exportation or export earnings'.[94] There is no difference in the outcome if a subsidy is *de jure* or *de facto* contingent. Either way it is prohibited.

The eligibility for the JCP is based on both emissions intensity and an assessment of trade exposure.[95] The emissions intensity test is not relevant to the question of whether the JCP is a prohibited subsidy and therefore it is not explored here. The trade exposure test will provide the basis to evaluate whether the JCP assistance is a prohibited export subsidy.

As was noted earlier, the test for the trade exposure of an activity within the context of the JCP is based on a quantitative assessment or a qualitative test. The quantitative assessment requires the ratio of the 'value of imports and exports to the value of domestic production' to be greater than 10 per cent in any of the eligible years.[96] If this is not established, then the qualitative test, requiring a lack of capacity for passing on costs due to international competition, may be relied upon.[97]

Dispute settlement bodies have not been inclined to examine the 'many reasons' motivating legislators.[98] Rather, they have preferred to examine the 'design, architecture and structure'[99] of a measure 'to permit identification of a measure's objectives or purposes as revealed or objectified in the measure itself.' [100] Despite this, it is recognised here that it is useful to consider the reasons for the inclusion of the trade-exposure criterion in the JCP. These reasons provide greater understanding of this provision and may assist in the determination of whether the JCP represents an export subsidy.

The Australian legislators have introduced the JCP in response to 'the impact that the [carbon pricing] mechanism may have on the international competitiveness of emissions-intensive trade-exposed activities.'[101] The Explanatory Memorandum notes:

> the Program provides significant support for jobs and protects the competitiveness of these emissions-intensive trade-exposed industries from risks for emissions-intensive trade-exposed activities to be located in, or relocated to, foreign countries as a result of different climate change policies applying in Australia compared to foreign countries. [102]

Therefore, the intention of this program is in part to protect the competitiveness of industries that may be vulnerable to international pricing. This demonstrates a link between the JCP and a desire to maintain export levels from Australian industries.

Nevertheless, there are some barriers to finding the JCP is a prohibited subsidy. First, the eligibility under the JCP is based on past performance, not future or current export performance. For this reason, the meaning of 'actual or anticipated exportation or export earnings' is relevant. 'Anticipated earnings' describes future earnings rather than those that have occurred in the past. [103] This does not accord with the eligibility test under the JCP.

In contrast 'actual earnings' describe earnings that exist as matters of fact.[104] This denotes an element of past performance. For earnings to exist in fact, the act of exportation must have occurred in the past. However, the test of trade exposure under the JCP is not in the immediate past. The years that are relevant under the JCP are 2004-05, 2005-06, 2006-07 or 2007-08. Therefore, the issue arises whether these years are too far in the past to have any bearing on contemporary export levels.

Therefore, there are arguments both for and against the conclusion that the JCP is a prohibited subsidy. On the one hand, only one of two criteria for JCP assistance relates to actual exportation, albeit many years in the past. On the other hand, the program provides the subsidy regardless of whether the entities export or sell the product in the domestic market. To clarify: the activity itself attracts the subsidy, not the installation or the firm that has a greater portion of the export market share. Therefore, the result of this 'subsidy' will not be to reduce the cost of exported goods in relation to the domestic market. Products destined for the domestic market will receive the same benefits. Hence, the subsidy is not provided on the contingency that the products of an entity will actually be exported.

For this reason, it may be necessary to examine the intention behind the introduction of the JCP. As the subsidy is based on apprehension that Australian industries' international market share will decrease, it is possible to argue that the intention is protectionist and therefore it should be prohibited.[105] On this basis, there is a line of reasoning that supports that this measure is an export subsidy and prohibited by the SCM Agreement.[106] Certainly, because of the strict criteria within the WTO law surrounding prohibited subsidies, there are compliance risks with linking any subsidy to export levels.

1.3.4 The Application of the Exception Provisions

When the WTO members first introduced the SCM Agreement, it contained a provision that listed a number of non-actionable subsidies. These subsidies include research subsidies, environmental subsidies and aid to disadvantaged regions.[107] The non-actionable subsidies provision has since expired in accordance with Article 31 of the SCM Agreement. [108] Therefore, there are no exception provisions under the SCM Agreement itself.

Following the *China – Audiovisual* dispute settlement report[109] there has been some speculation about the use of the GATT exception provisions for other Annex 1A agreements. [110] The General Interpretative Note to Annex 1A appears to contradict this. It provides for resolution of a conflict between the GATT 1994 and other agreements in Annex 1A of the WTO Agreement. This suggests that in the event of a conflict between the provisions of GATT 1994 and any other agreement of Annex 1A, the provisions of the non-GATT agreements are given priority. This note reads:

> In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the "WTO Agreement"), the provision of the other agreement shall prevail to the extent of the conflict. [111]

Certainly, until recently the General Interpretative Note to Annex 1A left little doubt that the GATT exceptions could only be used to excuse a GATT infringement.[112] However, the reasoning of the Appellate Body in the *China – Audiovisual* dispute now leaves this issue somewhat unresolved. [113]

In the *China – Audiovisual* dispute, the United States challenged a number of measures limiting the right to import reading materials and audiovisual home entertainment products into China.[114] These measures were challenged under China's Protocol of Accession rather than the GATT 1994.[115] To justify the breaches, China relied on Article XX of the GATT. China did this even though there were no breaches of the GATT. [116]

While the Panel did not make a decision on this issue, the Appellate Body allowed the exception to apply.[117] The Appellate Body's reasoning hinged on the following sentence of China's Accession Protocol: '[w]ithout prejudice to China's right to regulate trade in a manner consistent with the *WTO Agreement*.'[118] The use of this sentence in the Accession Protocol enabled justification for using a GATT exception for a 'non-GATT' breach.

The conclusion here is that although this decision may have proverbially cracked open the door to the application of GATT exceptions to non-GATT provisions, a clearer decision is necessary for that door to swing open. Howse made this clear when suggesting

> the [Appellate Body] would also have to make the important jurisprudential step of finding that Article XX applies to the SCM Agreement (a step that now seems more plausible after what the AB seemed to say about Article XX and the right to regulate in China-Publications). [119]

Using this rationale, there are no existing exceptions to the SCM Agreement requirements and therefore any established breaches cannot be justified.

1.4 The Impact of Assistance Measures on the Steel Manufacturing Industry

Although the JCP is the largest source of assistance introduced by the Clean Energy Package, it is not the only source that may be deemed a subsidy in the context of the SCM Agreement. This section of this paper focuses on the steel manufacturing industry.

The legislation establishing the STPP was introduced separately from the Clean Energy Package.[120] However, the operation of the STPP is inextricably linked to the Clean Energy Act and the broader Package. This is reflected by the fact that the STPP legislation was designed to commence operation after the Clean Energy Act received Royal Assent. [121]

The STPP is an entitlement program specific to the Australian Steel Industry. Some entities will be able to claim the STPP assistance in addition to the allocation of free carbon units under the JCP. [122] The objective of the STPP is to improve environmental outcomes for the Australian Steel Manufacturing Industry and to promote the development of workforce skills in the industry. [123] Specifically, the regulator administers this program to enable eligible corporations to enhance the competitiveness and economic sustainability of the Australian steel manufacturing industry in a 'low carbon economy'. [124]

A corporation is eligible to apply for assistance under the STPP if it is responsible for producing at least 500,000 tonnes of crude carbon steel through one of the methods listed in the *Steel Transformation Plan Act 2011* (Cth) (the Steel Transformation Plan Act). Therefore, to establish that the STPP is a subsidy, the following questions remain outstanding:

- Is the STPP a financial contribution?
- Is this a contribution made by government? and,
- Is there a benefit conferred by the contribution?

The Financial Contribution of the STPP

The STPP originally included two separate assistance components. The Competitiveness Assistance Advance (CAA) was introduced to assist the steel industry to transition to a 'low carbon economy'.[126] Funds from the CAA were not issued after 30 June 2012. Therefore, this is an expired subsidy. However, the fact that a measure has expired does not preclude a Panel from arbitrating on its compliance with the SCM Agreement.[127] The CAA assistance was in the form of a direct transfer of funds and therefore there is little difficulty in concluding that this measure satisfies this subsidy requirement. Despite recognising this, the focus of the following analysis is on the existing assistance measures of the STPP.

The second aspect of the STPP is referred to as the Steel Transformation Plan (STP). Similar to the CAA the STP provides assistance in the form of funds transferred by the government to eligible entities.[129] The payments are legislated to cease on 31 December 2016. As noted for the CAA, there is no difficulty in satisfying the requirement of a financial contribution based on this form of assistance.

Does the STPP Provide a Benefit?

It has been recognised that the demonstration of a benefit requires a comparison. This comparison necessitates that the conditions of the contribution are more favourable for the recipient than those of the broader market.[131] It is evident that an eligible corporation under the STPP will benefit from the assistance measures provided.[132] However, the payments made in accordance with the STPP are for 'for eligible innovation, eligible investment and eligible production activities.' [133] These categories are defined in the *Steel Transformation Plan Act* and include a broad range of activities.[134] Eligible corporations are required to submit an annual business plan detailing strategies to meet the requirements for this assistance.[135]

While it could be suggested that the obligations imposed on the eligible corporations may negate any benefits, it is unlikely that a Panel or Appellate Body will take this view. As noted previously, obligations that accompany a financial contribution do not have an impact on the existence of a benefit according to the rules of the SCM Agreement. The STPP provides a benefit when a comparison is made with the market in general. Therefore, the conclusion here is that the STPP is a subsidy within the SCM Agreement definition.

1.4.1 Is The STPP A Prohibited Subsidy?

The Australian Steel Manufacturing Industry is a trade-exposed industry. [136] Despite this, the criteria for the STPP subsidy do not include a condition that a recipient exports. Notably, the Appellate body has made it clear that to establish an export subsidy it is insufficient to demonstrate that a beneficiary exports products. [137]

Because there is no evidence that the STPP is contingent on exports it is not prohibited under the SCM Agreement. However, the category of actionable subsidies may be relevant. This is especially so when the combined effects of the subsidies available to the steel manufacturing industry are examined. The manufacturing of steel is an eligible activity under the JCP. [138] It is highly emissions-intensive and therefore eligible for the maximum assistance available under the JCP. The assistance offered to this industry under the JCP is in addition to assistance of the STPP. [139]

1.4.2 Is the Steel Manufacturing Industry The Recipient of Actionable Subsidies?

Article 5 requires that 'no member should cause adverse effects to the interests of other members' through injury to domestic industry or nullification or impairment of benefits accruing under GATT 1994 or cause serious prejudice to the interests of another member.[140] As such, there are three categories of adverse effects for an actionable subsidy. Before considering each of these categories, it is important to note a subsidy must be specific to be actionable.

Specificity

The product of steel is used in a variety of secondary products. This variety has the effect of causing some diversity in the steel industry. There is no existing test to determine the breadth of the 'industry' requirement in the Article 2 specificity requirement.[141] This is clear from the statements of the Panel in the *US – Cotton* dispute.[142] In this dispute the Panel determined:

> The breadth of this concept of "industry" may depend on several factors in a given case. At some point that is not made precise in the text of the agreement … a subsidy would cease to be specific because it is sufficiently broadly available throughout an economy as not to benefit a particular limited group of producers of certain products … Whether a subsidy is specific can only be assessed on a case-by-case basis.[143]

The term specificity, as it relates to industry and enterprise, was clarified in the *US – Softwood Lumber IV* dispute.[144] In this case the Panel concluded that grouping 'certain enterprises' did not require that all enterprises produce the same specific end-products. For example, industries such as 'wooden kitchen cabinet and bathroom vanity' industry and the 'wooden door and windows' industry were *too* specific.[145] Rather a group of 'certain enterprise' need only commercially engage with a similar 'type of product'. In this dispute the 'wood products industry' was sufficiently specific.[146]

On the basis of the Panel's reasoning on the *US – Softwood Lumber IV* dispute it is apparent that assistance to the steel manufacturing industry will be sufficiently specific to satisfy SCM Agreement requirements in Article 2. Indeed, the Panel's reasoning suggests that it will be unnecessary to consider the specific uses of the steel manufactured. Rather, as the assistance is granted when the 'type of product' manufactured is steel, the assistance will be deemed specific.

Nullification or Impairment

One of the least used categories of actionable subsidies is the category demonstrating adverse effects through 'nullification or impairment'. The current section's analysis can exclude the examination of the 'nullification or impairment' effect. This category prohibits members from nullifying or impairing a benefit attained from tariff concession negotiations. The product of steel does have a tariff concession listed within the Australian Schedule of Concessions. However, this category of 'adverse effect' is only applicable where the nullification or impairment of benefits is undertaken on a systematic basis.[147] This systematic basis is not demonstrated here. Therefore, the effects of the steel manufacturing subsidies are required to cause either 'injury' or 'serious prejudice' to be actionable.

'Injury' and 'Serious Prejudice'

The categories of 'injury' and 'serious prejudice' have distinct requirements listed within the SCM Agreement itself. These categories both require that either an 'injury to a domestic industry' or 'serious prejudice to another member's export interests' is identified. Further, the subsidy in question must be demonstrated to be the cause of the adverse effect. Both these categories generally require that the injury or serious prejudice is in relation to a 'like product'.[149]

The Appellate Body has acknowledged that different criteria establish the existence of these two categories, but that these criteria may also be relevant to inform the other:

> although "material injury" is a distinct concept from "serious prejudice" and that the factors to be considered in each determination are set out in Article 15 and Article 6.3 respectively, the Appellate Body has observed that, while provisions that relate to a determination of "injury" rather than "serious prejudice" must not automatically be transposed into Part III of the SCM Agreement, they may nevertheless be relevant. [150]

Therefore, the criteria for these categories are in some cases specific and distinct, but can also be relevant to both.

Importantly, the criteria to establish these two categories of actionable subsidies are fundamentally measureable in nature. They require that comparisons are made.[151] Certainly, it is difficult from the language of the Steel Transformation Plan Act alone to satisfy the requirements of either of these categories. As the scope of this paper does not allow consideration of the economic impacts of the subsidies, the analysis is necessarily limited. However, there is one important legal issue that may lead to a greater likelihood of a finding of an actionable subsidy. That is whether the impact of the subsidies should be collectively analysed.

Wood and Edis have made the following observation in relation to the assistance measures under the Clean Energy Package and Steel Transformation Plan Act:

> The steel package [assistance measures under the Clean Energy Package] effectively protects the Australian [steel] industry not from a carbon price, but from structural adjustments in the global steel industry. This industry assistance cannot be justified by reference to carbon pricing. It reverts to the protectionist policies abandoned in the 1980s.[152]

It is suggested here that, if the effects of the subsidies are considered together, it is foreseeable that a Panel or Appellate Body will consider that the subsidies are actionable. This is more probable than if the effects are examined independently.[153] Therefore, the question arises whether it is appropriate to examine the subsidies collectively, or as separate measures with distinct outcomes.

The question of collective subsidy analysis was raised in the *US–Large Civil Aircraft (2nd complaint)*[154] dispute. In this dispute both the Panel and Appellate Body were required

to consider the effects of two distinct subsidies. The Panel for this dispute concluded that two subsidies should not be collectively considered because of differences in 'causal mechanisms'.[155] However, the Appellate Body for this dispute disagreed with this finding:

> We are of the view that the Panel should have, in this dispute, considered whether the effects of … tax rate reductions complemented and supplemented the effects of … R&D subsidies … in other words, whether it would have been appropriate to cumulate their effects. We do not consider the mere fact that the two groups of subsidies operated through distinct causal mechanisms could, alone, have resolved the questions of whether each group had effects relevant to the serious prejudice alleged and whether those effects were capable of being combined in the Panel's analysis of serious prejudice because they contributed similarly to the relevant market phenomena. [156]

Using the reasoning articulated by the Appellate Body in the *US — Large Civil Aircraft (2nd Complaint)* dispute, it is reasonable to conclude that the effects of the subsidies offered to the steel manufacturing industry should be analysed collectively. This means that the likelihood of finding that the steel manufacturing industry's subsidies are actionable is greatly increased.

Interestingly, the fact that one of the subsidies — the JCP — may be prohibited does not alter this conclusion.[157] Indeed, even if one of the subsidies is also prohibited, the collective 'adverse effects' must still be demonstrated. They will not be presumed.[158]

The Criterion of 'Like Products' for 'Adverse Effects'

In order to demonstrate that a subsidy has caused 'an injury' or 'serious prejudice', [159] it is often necessary that the subsidy has an adverse effect upon a 'like product'. The phrase 'like product' is used throughout the WTO agreements. Despite its frequent use, this phrase has some associated complexities. The first is that it is not clearly defined in any of the WTO agreements or associated documentation. Second, it is unclear whether the definition of 'like products' differs depending on the article in which it is used.

The definition of 'like products' for the purposes of the SCM Agreement is specifically clarified by footnote 46 within Article 15 of the SCM Agreement:

> Throughout this Agreement the term "like product" ... shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration. [160]

Van Den Bossche argues that compared to the use of the phrase 'like products' within the GATT, the definition used by the SCM Agreement seems somewhat more narrow and specific.[161] However, the Panel for the *Indonesia – Autos* dispute found the interpretation of the phrase in other provisions of the WTO agreements to be 'useful guidance' for the interpretation within the SCM Agreement. [162] In this dispute the Panel provided a detailed list of the characteristics that can be taken into account when considering whether two products are like.[163] These characteristics include:

- physical characteristics;
- brand loyalty;
- brand image/reputation;
- after-sales service;
- status and resale value;
- product use;
- substitutability;
- price;
- end use; and,
- tariff classification.[164]

Without examining specific circumstances of two different steel products, it is difficult to draw a normative conclusion. Rather, it is possible to conclude that not all types of steel products will be 'like' but some will be. A differential in manufacturing process is not listed as a characteristic that changes a product's 'likeness'. Nevertheless, different steel products will have different end-uses, different re-sale values and different tariff classification.[165] For this reason, it will be necessary to consider the specific circumstances of any WTO member challenge in regards to the steel assistance provided under the Clean Energy Package.

1.4.3 Concluding Comments

The assistance measures offered to the steel manufacturing industry may be actionable subsidies. This conclusion is tentative. To establish the relevant actionable subsidy categories requires comparisons. These comparisons are of economic effects, while here it is only possible to consider theoretical outcomes.

Despite this, the suggestion is that a Panel or Appellate Body should consider the effects of the steel manufacturing industry subsidies collectively. The collective analysis will intensify the beneficial effects of the subsidies for the Australian steel manufacturing industry. Therefore, the pre-requisite adverse effects will be more readily established than if the effects were separate measured.

Finally, in order to establish that a subsidy is actionable, a complainant must demonstrate that the impact of the 'adverse effect' is on a 'like product'. This evaluation must take place on a case-by-case basis.

1.5 The Energy Security Fund

The final assistance package that this paper examines is the ESF. [166] There are three components that make up this assistance measure. First, the fund provides both cash

payments and free carbon units to emissions-intensive coal fired generators.[167] Second, the fund allows for compensation for the closure of 2000 megawatts of coal-fired energy by 2020. Finally, the fund establishes an Energy Security Council. [168] The purpose of this new government body is to advise on risks to Australia's energy supply and provide advice assuring the future energy security of the nation.[169]

This paper is concerned with the ESF only to the extent that it may provide either a prohibited or an actionable subsidy under the law of the WTO. Therefore, the first limb of assistance, that which enables provision of cash payments and free carbon units to emissions-intensive coal fired electricity generators, is the only element of the fund analysed in this paper. [170]

The nature of energy and electricity means that it may be the subject of regulation either of trade in goods or trade in services.[171] It is important to conclude which is applicable here, as the requirements for subsidies under the GATS are substantially less onerous than those under the SCM Agreement.[172] As noted previously, the rules for subsidies that exist in accordance with the rules of the GATS only require that parties 'enter into negotiations in order to avoid the trade distortive effects'. This can be contrasted with the more prescriptive remedy provisions of the SCM Agreement.

In order to resolve whether the ESF is a goods or a service subsidy, the test for eligibility under the fund must first be examined. This examination reconciles which industries are beneficiaries of the assistance and on what basis the assistance is provided. As this is a subsidy designed to maintain 'energy security', it is important to resolve at which point the subsidy is available along the energy supply chain.

1.5.1 Eligibility Under the Energy Security Fund

The purpose of the assistance provided by the ESF is to maintain energy security by providing assistance to emissions-intensive generation assets. [173] This assistance is intended to aid coal-fired electricity generators to face losses in the value of their assets as a result of the introduction of the CPM and to ensure Australia's energy security needs are met through investor confidence. [174]

In order to receive assistance under the Energy Security Fund a coal-fired electricity establishment must satisfy the eligibility test.[175] There are three requirements of this test:

- during the period between 1 July 2008 and 30 June 2010 the generation complex must be in operation and connected to a grid with a grid capacity of at least 100 megawatts; [176]
- between 1 July 2008 and 30 June 2010 at least 95 per cent of the energy generated must be attributable to the combustion of coal; and,
- the carbon dioxide equivalent (CO2-e) emissions intensity of the generation complex must be greater than 1.0, where emissions intensity is equal to emissions divided by gigawatt hours of electricity generated. [177]

The fund provides assistance to a 'generation complex' for emissions that are attributable to the combustion of coal to provide electricity. The provision of assistance is based on the 'historical energy' produced by a generation complex.[178] Therefore, the generators receive the subsidy for the act of generating electrical energy. For this reason, the impact of the subsidy will presumably be on the price, or the supply, of electricity.

Electricity is a 'secondary energy source as it is produced by the conversion of energy sources.' Electricity is not a fuel, nor is it a 'physical substance'.[180] Predominately in Australia, electricity is produced through the conversion of energy in coal.[181] Generators can also produce electricity from other sources, such as through the renewable energy sources of sun and wind.[182] The WTO law position on energy related processes was articulated in a Note by the Secretariat in 1998 as follows:

> In spite of the element of uncertainty regarding electricity, it seems generally accepted that the production of primary and secondary energy [does] not constitute services subject to the GATS, but result in goods, whose trade is subject to the GATT, as the production service is incorporated in the value of the good produced. Transportation and distribution of energy constitute services according to the GATS if they are provided independently. Other services intervene in the energy value added chain (from production to resale to consumers), including construction, engineering, and consulting services. These services, however, are better defined as energy related services rather than energy services.[183]

For this reason it appears that electrical energy is a product within the law of the WTO,[184] whereas energy *may be* depending on its source. Evidently, any energy that is in the form of coal, oil or gas is classified as a product or a good, but WTO law classification of solar energy and other renewable forms is uncertain. [185]

Therefore, because the ESF provides a subsidy 'in respect of highly emissions intensive generation assets',[186] *the electricity generated through coal combustion is the subsidised product*.[187] This means that the subsidy assists those entities engaged in the production of electricity. Therefore, as electricity is accepted as a product, the subsidy will be regulated by the provisions of the SCM Agreement as the agreement relevant to products.

This position can be contrasted with what appears to be a contrary view of the matter of electricity services and the GATS. Marceau indicates that the GATS may be applicable across the energy generation sector when stating

'[a]ll services related to trade in energy can be covered by the GATS. Thus the GATS tentacles touch a multitude of aspects of the energy trade.'[188] Further, some commentators have suggested that the treatment of electricity as a good is erroneous and should be reconsidered. As noted:

> The fundamental divide between goods and services does not offer an appropriate basis for addressing and regulating energy in an integrated manner in domestic and international law. Electricity is a case in point. It is traditionally treated as a good, but in fact, by its nature and its dependence upon grids, it is much more like a service, or perhaps a mixture of both. There is no clear perception of defining energy in terms of goods and services, and services relating to energy are not properly defined under GATS … With the advent of disciplines on services … existing legal definitions of electricity should be reviewed … It is submitted that electricity should be defined as a service and should no longer be treated as a good. [189]

Considering this, it is appropriate to understand the subsidy rules that apply to services along with the SCM Agreement requirements. Although it does appear at present that electricity will be treated as a good, it is important to remember that the agreements that consider goods, and those that address services, are not mutually exclusive. This was noted in the *EC- Bananas III* dispute:

> measures ... could be found to fall within the scope of both the GATT 1994 [and the SCM Agreement] and GATS. These are measures that involve a service relating to a particular good or service supplied in conjunction with a particular good. In all such cases in this third category, the measure in question could be scrutinized under both the GATT 1994 and GATS. [190]

1.5.2 The Application of the SCM Agreement Rules to the ESF

The ESF has a number of features that are similar to the JCP. For example, the main source of assistance under the ESF is the provision of free carbon units to emissions-intensive generators. The analysis provided above in relation to the JCP is therefore also valid for the ESF. This paper does not re-examine whether free carbon units are a financial contribution that accords a benefit. Rather, the conclusion here, based on the above discussion, is that the ESF provides a financial contribution for the same reasons as the JCP. [191]

On the issue of the conferral of a benefit, the WTO law jurisprudence does indicate that when a financial contribution is in the form of revenue foregone, the finding of a benefit will be assured through a 'reduced tax liability'.[192] Although this is accepted, an interesting issue was recently raised in the combined dispute settlement report of *Canada – Renewable Energy* and *Canada – Feed in Tariff* Program.[193] In this dispute, the question of a benefit arose in regards to the Canadian electricity market. In a split decision of the Panel, it was concluded that the Canadian electricity market did not offer an appropriate market to determine the existence of a benefit.[194] The Panel suggested that, as a result of prolonged government intervention, the market was not subject to regular competitive market forces.[195]

Despite recognising the Panel's arguments in this dispute, it is submitted here that the ESF would indeed offer a benefit to the recipients, on the basis of a reduced tax liability. In this instance, the rate of taxation levied on the electricity market may not prove to be the appropriate basis for comparison, simply because not all generators of electricity — in particular users of renewable energy — would incur liability through the CPM. In this regard, a more appropriate basis for comparison may be the degree of liability incurred by other entities through the CPM.

Is the ESF Actionable?

Australia neither imports nor exports electricity internationally. [196] All electricity produced within Australia is used in Australia. Furthermore, there is no evidence that the ESF promotes the use of domestic over imported products. For these reasons the ESF cannot be classified as a prohibited subsidy under the SCM Agreement. For the ESF to be challenged under SCM Agreement provisions, it must be as an actionable subsidy.

To be an actionable subsidy, the specificity requirement of Article 2 of the SCM Agreement must be demonstrated.[197] Although this paper has recognised that there are no established guidelines for specificity, there is little doubt that the subsidy provided under the ESF is sufficiently specific to satisfy Article 2 of the SCM Agreement. This is because this fund provides a subsidy only to those industries responsible for the generation of electricity through the combustion of coal.[198] This narrow group of beneficiaries will establish the necessary specificity required for an actionable subsidy.

The other requirements for actionable subsidies under Article 5 of the SCM Agreement are less easily satisfied. As noted, for a subsidy to be actionable, it must demonstrate 'adverse effects' of which there are three categories.[199] These categories are:

(a) injury to the domestic industry of another Member;
(b) nullification or impairment of benefits;
(c) serious prejudice to the interests of another Member.[200]

The nature of the ESF subsidy makes it conceptually difficult to classify as an actionable subsidy because of the issue of 'adverse effects'. The first category of *injury to another member's domestic industry* is not applicable. This is because the ESF subsidy attaches to electricity generating assets. The assistance is provided in accordance with liability incurred through the CPM. The emissions liability for electricity generated through coal combustion is calculated on the basis of the quantity of coal combusted.[201]

The origins of both the generation assets and the coal combusted are irrelevant to the assistance amount. For this reason, the only market affected by this assistance measure is the electricity market.

Generation of electricity is in response to demand, as it cannot be stored for future use.[202] Because there are no imports or exports of electricity within Australia, any injury the subsidy causes will be to the Australian market.[203] Hence, there will be no injury to the domestic industry of another member.

Similarly, the second category for actionable subsidy does not apply. This category requires demonstration of nullification or impairment of benefits accruing under GATT 1994. This is not applicable here as the nullification or impairment referred to is a tariff reduction.[204] Given that there are no imports or exports of electricity to or from Australia, there are no tariffs on electricity, as demonstrated by *Australia's Schedule of Concessions* to the GATT. [205]

If the ESF is an actionable subsidy, the third category must apply. This category requires that no member should cause 'serious prejudice to the export interests' of another member. The difficulty with demonstrating this for a subsidy that relates to electricity rests in the fact that electricity is not imported into Australia. The reason for this is that, for foreign competition to exist, interconnection capacity between Australia and another member would need to be in place.[206] As Australia's interconnected regions are confined within the nation's geographical boundaries, harming export interests of another member is not possible.[207] It follows that the ESF will not be an actionable subsidy under the SCM Agreement.

1.5.3 The Application of the GATS Subsidies to the ESF

Article XV of the GATS requires that members enter into negotiations in order to avoid the trade distortive effects of service subsidies.[208] This provision is therefore more advisory than directive. However, there is one important enforceable requirement within the GATS subsidy provisions.

The Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (the Guidelines)[209] suggest that any subsidies that are discriminatory in nature within the meaning of the national treatment provision in Article XVII of the GATS need to be scheduled within a member's *Schedule of Specific Commitments*. [210] The direction provided by the guidelines is not necessarily accepted as a commonsense approach by some commentators.[211] The reason for this is that the approach set out in the Guidelines suggests that any subsidies designed only for the benefit of domestic services or service suppliers must be listed as a limitation to national treatment within a member's Schedule. Importantly, this does not extend to those service suppliers who are engaged in Mode 1 and Mode 2 service supply. As stated in the Guidelines:

> There is no obligation in the GATS which requires a Member to take measures outside its territorial jurisdiction. It therefore follows that the national treatment obligation in Article XVII does not require a Member to extend such treatment to a service provider located outside the territory of another Member. [212]

This means that even if the full national treatment commitments are undertaken for a particular service sector, only those suppliers actually present in the territory of a member are entitled to the same subsidies offered to domestic services and service suppliers.[213]

At this point it is relevant to refer back to the discussion regarding electricity generation as a good rather than a service. Because of its current understanding as a good by WTO members, there is no listing within the *Services Sectoral Classification List* (the SSCL) for electricity generation.[214] Indeed, services recognised by the SSCL in relation to electricity are limited to 'services incidental to energy distribution'. This will be limited to services associated with distributing and transmitting rather than generating electricity. In the case of Australia, only Mode 3 supply has been liberalised within the *Australian Schedule of Commitments*.[215] Because the ESF provides assistance on the basis of generation, there does not appear to be any existing commitment within the Australian Schedule of Commitments that would be infringed by this assistance measure.

In support of this conclusion, there are no requirements under the ESF provisions for a recipient to be an Australian citizen or an Australian corporation. Therefore, a foreign entity could claim the benefits of the ESF as long as all other conditions for the grant of assistance are satisfied. Indeed, a foreign entity would only be excluded from these benefits in the same circumstances as an Australian entity. That is, the activity itself does not qualify under the conditions for the ESF. For this reason, in conjunction with the above considerations, the ESF complies with the WTO law requirements.

1.6 Conclusion

Within this paper three assistance measures implemented as part (or alongside) the Clean Energy Package have been considered. In this regard, this paper has established that the JCP may be a prohibited subsidy in accordance with the rules of the SCM Agreement. In this case, a complainant will have access to SCM Agreement remedies.

This paper has considered the likelihood that the subsidies available to the steel manufacturing industry would fall within the classification of actionable subsidies under the SCM Agreement. The restricted analysis of this issue makes it difficult to conclude with any certainty on this particular matter. It may nevertheless be suggested that there is a strong probability that the steel industry assistance will cause 'adverse effects'. This is because the

effects of the applicable subsidies — being the JCP and the STPP — should be collectively analysed rather than separately examined.

Finally, the ESF, by its nature, will not be either actionable or prohibited within the SCM Agreement. Further, although electrical energy is currently classified as a good by WTO members, there is some confusion associated with this. Indeed some commentators have suggested that electrical energy should be regulated by the GATS provisions rather than those of the GATT. For this reason, the GATS rules in relation to subsidies were briefly examined in this paper. The conclusion in this matter was that, even if the GATS rules did apply, the ESF would not infringe any of the obligations contained therein.

Based on the analysis in this paper, there are subsidies introduced by the Clean Energy Package that are either prohibited or actionable in the context of the rules of the SCM Agreement. Failing to revise these measures could result in the initiation of dispute settlement proceedings before a WTO panel. Alternatively, aggrieved members may choose to introduce countervailing duties. Therefore, Australian legislators would be well advised to consider the WTO subsidies rules and make appropriate amendments to the Package assistance measures.

AUTHOR PROFILE

Felicity completed a Bachelor of Law and a Bachelor of Commerce at the University of Queensland. Immediately following graduation Felicity moved to Seattle where she studied United States taxation law. Following this, she returned to Australia to study a PhD in emissions trading and the WTO law. Her PhD was submitted for examination in March 2013.

REFERENCES

[1] Australian Government, Commonwealth of Australia, *Securing A Clean Energy Future: The Australian Government's Climate Change Plan* (2011) v; *Clean Energy Act 2011* (Cth) s 3.

[2] *Clean Energy Act 2011* (Cth) pts 7 and 8.

[3] *Steel Transformation Plan Act 2011* (Cth).

[4] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) Annex 1A ('*Agreement on Subsidies and Countervailing Measures*').

[5] See discussion, Joseph Stiglitz, *Globalization and Its Discontents* (Penguin Books Ltd, 2002) 244– 5.

[6] *Marrakesh Agreement Establishing the World Trade Organization,* opened for signature 15 April 1994, 1867 UNTS 3 *(entered int*o force 1 January 1995) Annex 1A ('*Agreement on Agriculture*').

[7] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) Annex 1A ('*General Agreement on Tariffs and Trade 1994*').

[8] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force1 January 1995) Annex 1B ('*General Agreement on Trade in Services 1994*').

[9] Sadeq Z Bigdeli, 'Incentive Schemes to Promote Renewables and the WTO Law of Subsidies' in Thomas Cottier, Olga Nartova and Sadeq Z Bigdeli (eds), *International Trade Regulation and the Mitigation of Climate Change* (Cambridge University Press, 2009) 155, 157.

[10] Pietro Poretti, *The Regulation of Subsidies within the General Agreement on Trade in Services of the WTO* (Kluwer Law International, 2009) 111.

[11] Panel Report, *United States — Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*, WTO Doc WT/DS236/R (27 September 2002) 7 [4.26].

[12] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force1 January 1995) Annex 1A (*'Agreement on Subsidies and Countervailing Measures'*) Article 1.1.

[13] Carol Ni Ghiollarnath, *Renewable Energy Tax Incentives and WTO Law: Irreconcilably Incompatible?* (Wolf Legal Publishers, 2011) 150. See also Peter Van Den Bossche, The Law and Policy of the World Trade Organization (Cambridge University Press, 2nd ed, 2008) 564. An entity will constitute a public body if it is controlled by the government : *Korea – Commercial Vessels.*

[14] Appellate Body Report, *Brazil — Export Financing Programme For Aircraft,* WTO Doc WT/DS46/AB/R, AB-1999-1 (20 August 1999) [157].

[15] Ghiollarnath, above n 13, 150.

[16] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force1 January 1995) Annex 1A ('*Agreement on Subsidies and Countervailing Measures*') Article 1.1 (a)(1)(i).

[17] Ibid Article 1.1 (a)(1)(ii).

[18] Ibid Article 1.1 (a)(1)(iii).

[19] Appellate Body Report, *United States — Tax Treatment for Foreign Sales Corporations — Recourse to Article 21.5 of the DSU by the European Communities*, WTO Doc WT/DS108/AB/RW, AB-2001-8 (14 January 2002). This dispute involved recourse to the Panel by the EC as it was suggested that the United States had not complied with the DSB's recommendations and rulings. See Panel Report, United States — *Tax Treatment for 'Foreign Sales Corporations' — Recourse to Article 21.5 of the DSU by the European Communities*, WTO Doc WT/DS108/RW (20 August 2001) [1.6].

[20] Appellate Body Report, *United States — Tax Treatment for Foreign Sales Corporations — Recourse to Article 21.5 of the DSU by the European Communities*, WTO Doc WT/DS108/AB/RW, AB-2001-8 (14 January 2002) [2].

[21] Ibid.

[22] Panel Report, *United States — Tax Treatment for 'Foreign Sales Corporations' - Recourse to Article 21.5 of the DSU by the European Communities*, WTO Doc WT/DS108/RW (20 August 2001) [8.37].

[23] *WTO Analytical Index: Guide to WTO Law and Practice* (Cambridge University Press, 2nd ed, 2007) 756.

[24] Appellate Body Report, *United States — Tax Treatment for Foreign Sales Corporations*, WTO Doc WT/DS108/AB/RW, AB-2001-8 (20 February 2000) [91] cited in *WTO Analytical Index: Guide to WTO Law and Practice* (Cambridge University Press, 2nd ed, 2007) 757.

[25] Appellate Body Report, *United States — Tax Treatment for Foreign Sales Corporations*, WTO Doc WT/DS108/AB/RW, AB-2001-8 (20 February 2000) [89]–[90].

[26] Ibid.

[27] Appellate Body Report, *United States — Tax Treatment for Foreign Sales Corporations - Recourse to Article 21.5 of the DSU by the European Communities*, WTO Doc WT/DS108/AB/RW, AB-2001-8 (14 January 2002) cited in WTO Analytical Index: Guide to WTO Law and Practice (Cambridge University Press, 2nd ed, 2007) 755.

[28] Appellate Body Report, *Brazil — Export Financing Programme For Aircraft* WTO Doc WT/DS46/AB/R, AB-1999-1 (20 August 1999) [157] (emphasis in original).

[29] Ghiollarnath, above n 13, 154.

[30] Ibid.

[31] Appellate Body Report, *Canada — Measures Affecting the Export of Civilian Aircraft*, WTO Doc WT/DS70/AB/R, AB-1999-2 (20 August 1999) [154] quoted in *WTO Analytical Index: Guide to WTO Law and Practice* (Cambridge University Press, 2nd ed, 2007) 762.

[32] See, for example, Poretti, above n 10, 30–1.

[33] Ibid 31.

[34] *Agreement on Subsidies and Countervailing Measures*, Article 31.

[35] *Agreement on Subsidies and Countervailing Measures Article 3.2* cited in Van Den Bossche, above n 13, 571.

[36] Panel Report, *United States — Continued Dumping and Subsidy Offset Act of 2000*, WTO Doc WT/DS217/AB/R, WT/DS234/R (16 September 2002) [4.463].

[37] Revised Explanatory Memorandum, Clean Energy Bill 2011 (Commonwealth of Australia) 15.

[38] *Clean Energy Act 2011* (Cth) ss 143–4.

[39] Revised Explanatory Memorandum, Clean Energy Bill 2011 (Commonwealth of Australia) 151.

[40] Despite providing assistance to 'industries' for 'activities' based on 'production levels', the impact of the subsidies would be on the products manufactured through these activities. Therefore, the Agreement on Subsidies and Countervailing Measures applies as an Agreement to regulate subsidies on products.

[41] Revised Explanatory Memorandum, Clean Energy Bill 2011 (Commonwealth of Australia).

[42] Australian Government, *Commentary on Exposure Draft Regulations for the Jobs and Competitiveness Program under the Clean Energy Bill* (September 2011) 8.

[43] Ibid.

[44] This assistance requires that any *additional costs* incurred by industries as a result of the GHG price mechanism are assessed.

[45] Revised Explanatory Memorandum, Clean Energy Bill 2011 (Commonwealth of Australia) 154. Department of Climate Change and Energy Efficiency, 'Assessment of Activities for the Purposes of the Jobs and Competitiveness Program' (Guidance Paper, Australian Government, September 2011) 22.

[46] Department of the Prime Minister and Cabinet, Parliament of Australia, *Securing Australia's Energy Future* (2004) 115, Table 15.

[47] Ibid. Eligible years are 2004–05, 2005–06, 2006–07 or 2007–08.

[48] Ibid.

[49] Department of Climate Change and Energy Efficiency, 'Assessment of Activities for the Purposes of the Jobs and Competitiveness Program' (Guidance Paper, Australian Government, September 2011) 28.

[50] Harry Clarke and Robert Waschik, 'Designing a Carbon Price Policy: Is the Australian Climate Plan Fair to Australia's Energy-Intensive, Trade-Exposed Industries?' (2012) 45(1) *Australian Economic Review* 105, 105.

[51] Gary Clyde Hufbauer, Steve Charnovitz and Jisun Kim, *Global Warming and the World Trading System* (Peterson Institute for International Economics, 2009) 92; Revised Explanatory Memorandum, Clean Energy Bill 2011 (Commonwealth of Australia) 35.

[52] Revised Explanatory Memorandum, Clean Energy Bill 2011 (Commonwealth of Australia) 151.

[53] Appellate Body Report, *Brazil — Export Financing Programme For Aircraft,* WTO Doc WT/DS46/AB/R, AB-1999-1 (20 August 1999) [157] (emphasis in original).

[54] Ghiollarnath, above n 13, 150.

[55] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force1 January 1995) Annex 1A ('Agreement on Subsidies and Countervailing Measures') Article 1.1 (a)(1)(i).

[56] Ibid Article 1.1 (a)(1)(ii).

[57] Ibid Article 1.1 (a)(1)(iii).

[58] These units were to cost $23 for 2012, $24.15 for 2013, $25.40 for 2014. Rosemary Lyster, 'Australia's Clean Energy Future Package: Are We There Yet?' (2011) 28 *Environmental and Planning Law Journal* 446, 450.

[59] This is based on a 94.5 per cent assistance level.

[60] This simplistic example does not take account of ACCUs, eligible international units or the secondary market. Clearly the use of these GHG units would change the government entitlement.

[61] Ghiollarnath, above n 13, 155.

[62] Ibid.

[63] This article is contained within Part V of the SCM Agreement, which is concerned specifically with countervailing duties.

[64] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WTO Doc WT/DS70/AB/R, AB-1999-2 (20 August 1999) [157].

[65] Ibid.

[66] Appellate Body Report, *United States — Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WTO Doc WT/DS138/AB/R AB-2001-1 (10 May 2000).

[67] Ibid [68].

[68] Panel Report, *United States — Preliminary Determinations with Respect to Certain Softwood Lumber from Canada,* WTO Doc WT/DS236/R (27 September 2002) 6 [4.21], 116 [8.1].

[69] Panel Report, *United States — Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada*, WTO Doc WT/DS257/R (23 August 2003).

[70] Alan Sykes, 'The Questionable Case for Subsidies Regulation: A Comparative Perspective' (Research Paper No 380, Stanford University School of Law, 2009) 26.

[71] Panel Report, *United States — Final Countervailing Duty Determination with Respect to certain Softwood Lumber from Canada*, WTO Doc WT/DS257/R (23 August 2003) [7.64].

[72] Sykes, above n 70, 26.

[73] Robert Howse, 'Climate Mitigation Subsidies and the WTO Legal Framework: A Policy Analysis' (Publication, International Institute for Sustainable Development, May 2010).

[74] Appellate Body Report, *United States — Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada*, WTO Doc WT/DS257/AB/RW, AB-2003-6 (19 January 2004) [103] quoted in Gilbert Gagne and Francois Roch, 'The US-Canada Softwood Lumber Dispute and the WTO Definition of Subsidy' (2008) 7(3) *World Trade Review* 547, 556.

[75] Appellate Body Report, *United States — Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WTO Doc WT/DS138/AB/R AB-2001-1 (10 May 2000) [68].

[76] *Clean Energy Act 2011* (Cth) s 151.

[77] Tracey Epps and Andrew Green, *Reconciling Trade and Climate Change: How the WTO Can Help Address Climate Change* (Edward Elgar Publishing Inc, 2010) 111.

[78] Clarke and Waschik, above n 50, 106.

[79] Revised Explanatory Memorandum, Clean Energy Bill 2011 (Commonwealth of Australia) 154 [5.19].

[80] Appellate Body Report, *United States — Tax Treatment for Foreign Sales Corporations*, WTO Doc WT/DS108/AB/RW, AB-2001-8 (20 February 2000) [140].

[81] *WTO Analytical Index: Guide to WTO Law and Practice* (Cambridge University Press, 2nd ed, 2007) 764.

[82] Ibid.

[83] Appellate Body Report, *United States — Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WTO Doc WT/DS138/AB/R, AB-2001-1 (10 May 2000) [59]–[63] (emphasis added).

[84] David Palmeter and Petros C Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (Cambridge University Press, 2004) 26.

[85] Panel Report, United States — *Measure Affecting Imports*

of Woven Wool Shirts and Blouses from India, WTO Doc WT/DS33/R (adopted 23 May 1997) upheld by Appellate Body Report, United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WTO Doc WT/DS33/AB/R (adopted 23 May 1997).

[86] Panel Report, *United States — Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WTO Doc WT/DS33/R (adopted 23 May 1997) [6.2] quoted in Palmeter and Mavroidis, above n 84, 27.

[87] Panel Report, *Australia — Subsidies Provided to Producers and Exporters of Automotive Leather*, WTO Doc WT/DS126/R (25 May 1999).

[88] Gavin Goh, 'Australia's Participation in the WTO Dispute Settlement System' (2002) 30 *Federal Law Review* 203.

[89] *Clean Energy Act 2011* (Cth) s 143 (c).

[90] The Productivity Commission will review and revise the assistance granted under the JCP. See Revised Explanatory Memorandum, Clean Energy Bill 2011 (Commonwealth of Australia) 13.

[91] *Clean Energy Act 2011* (Cth) s 157; Donald Feaver, Will McGoldrick and Victoria Boyd-Wells, 'Is Australia's EAP a Prohibited Export Subsidy' (2010) 44 *Journal of World Trade* 319, 344.

[92] The assistance provided under the JCP can be compared to assistance under the NZ ETS and the EU ETS. For more discussion on these other emissions trading assistance measures, see Appendix H.

[93] SCM Agreement, Article 3.1(b).

[94] Appellate Body Report, *Canada — Measures Affecting the Export of Civilian Aircraft*, WTO Doc WT/DS70/AB/R, AB-1999-2 (20 August 1999) [169] cited in Van Den Bossche, above n 13, 573; A footnote to the applicable SCM Article clarifies that, for something to be de facto 'contingent … on export performance', it has to be 'in fact tied to actual or anticipated exportation or export earnings' Agreement on Subsidies and Countervailing Measures Article 3.1(a) footnote 4.

[95] Department of the Prime Minister and Cabinet, Parliament of Australia, *Securing Australia's Energy Future* (2004) 115, Table 15.

[96] Ibid. Eligible years are 2004–05, 2005–06, 2006–07 or 2007–08.

[97] Department of Climate Change and Energy Efficiency, 'Assessment of Activities for the Purposes of the Jobs and Competitiveness Program' (Guidance Paper, Australian Government, September 2011) 28.

[98] See, eg, Appellate Body Report, *Japan — Taxes on Alcoholic Beverages*, WT/DS8/AB/R. WT/DS10/AB/R, WT/DS11/AB/R (1 November 1996) DSR 1996:1, 27; Appellate Body Report, Chile - Taxes on Alcoholic Beverages, WTO Doc WT/DS110/AB/R WT/DS87/AB/R (adopted 12 January 2000) [71]. But see, Panel Report, *Canada — Certain Measures Concerning Periodicals*, WTO Doc WT/DS31/R (report circulated 14 March 1997) [475].

[99] Appellate Body Report, *Chile — Taxes on Alcoholic Beverages*, WTO Doc WT/DS110/AB/R WT/DS87/AB/R (adopted 12 January 2000) [71].

[100] Ibid.

[101] Revised Explanatory Memorandum, Clean Energy Bill 2011 (Commonwealth of Australia) 157.

[102] Ibid 151.

[103] 'Anticipated' is defined in Catherine Soanes, Sara Hawker and Julia Elliot (eds), *Oxford English Dictionary* (Oxford University Press, 6th ed, 2010) 28.

[104] Ibid 8 for a definition of 'actual'.

[105] Revised Explanatory Memorandum, Clean Energy Bill 2011 (Commonwealth of Australia) 157.

[106] This is supported by the analysis provided in Feaver, McGoldrick and Boyd-Wells, above n 91, 339; Hufbauer, Charnovitz and Kim, above n 51, 92.

[107] Poretti, above n 10, 31.

[108] Van Den Bossche, above n 13, 561.

[109] Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc WT/DS363/AB/R (19 January 2010).

[110] Robert Howse on *International Economic Law and Policy Blog* (3 April 2011) <http://worldtradelaw.typepad.com/ielpblog/2011/04/article-xx-domestic-production-of-environmental-goods.html> cited in Marie Wilke, 'Feed-in Tariffs for Renewable Energy and WTO Subsidy Rules: An Initial Legal Review' (Issue Paper No. 4, International Centre for Trade and Sustainable Development, August 2011) 30.

[111] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) Annex 1A ('General Agreement on Tariffs and Trade 1994') General Interpretive Note to Annex 1A.

[112] Frieder Roessler, 'Appellate Body Ruling in China-Publications and Audiovisual Products' (2011) 10(1) *World Trade Review* 119, 131; But see Marie Wilke, 'Feed-in Tariffs for Renewable Energy and WTO Subsidy Rules: An Initial Legal Review' (Issue Paper No. 4, International Centre for Trade and Sustainable Development, August 2011) 20.

[113] Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc WT/DS363/AB/R (19 January 2010).

[114] Fernando Pierola, 'The Availability of a GATT Article XX

Defence with Respect to a Non-GATT Claim: Changing the Rules of the Game?' (2010) 5 *Global Trade and Customs Journal* 172, 172.

[115] Protocols of accession contain the terms negotiated by a member state in the process of becoming a WTO member. In this case the United States challenged a variety of provisions within various Chinese measures as inconsistent with paragraph 5.1 of China's Accession Protocol.

[116] Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc WT/DS363/AB/R (19 January 2010) [233].

[117] Roessler, above n 112, 131.

[118] *Accession of the People's Republic of China*, WTO Doc WT/L/432 (23 November 2001) (Decision of 10 November 2001) [5.1].

[119] Howse, above n 110.

[120] *Steel Transformation Plan Act 2011* (Cth).

[121] Ibid s 2.

[122] Tony Wood and Tristan Edis, 'New Protectionism Under Carbon Pricing: Case Studies of LNG, Coal Mining and Steel Sectors' (Report No 2011-X, Grattan Institute, September 2011) 30.

[123] *Steel Transformation Plan Act 2011* (Cth) s 3(2).

[124] Ibid s 5.

[125] Ibid s 4.

[126] Ibid s 5.

[127] Appellate Body Report, *United States — Subsidies on Upland Cotton*,WTO Doc WT/DS267/AB/R (3 March 2005) 98 [273].

[128] *Steel Transformation Plan Act 2011* (Cth) s 9.

[129] Ibid s 9.

[130] Ibid s 14.

[131] Appellate Body Report, *Canada — Measures Affecting the Export of Civilian Aircraft*, WTO Doc WT/DS70/AB/R, AB-1999-2 (20 August 1999) [157]; Panel Report, *Australia — Subsidies Provided to Producers and Exporters of Automotive Leather*, WTO Doc WT/DS126/R (25 May 1999) [9.56].

[132] *Steel Transformation Plan Act 2011* (Cth) s 10.

[133] *Steel Transformation Plan 2012* (Cth) s 1.4.

[134] Ibid s 1.9 – 1.18.

[135] Ibid s 2.7.

[136] EITE Expert Advisory Committee, Parliament of Australia, *Establishing the Eligibility of Emissions-Intensive Trade-Exposed Activities* (2011) 37, 55.

[137] Appellate Body Report, *Canada — Measures Affecting the Export of Civilian Aircraft*, WTO Doc WT/DS70/AB/R, AB-1999-2 (20 August 1999) [171].

[138] EITE Expert Advisory Committee, Parliament of Australia, *Establishing the Eligibility of Emissions-Intensive Trade-Exposed Activities* (2011) 37, 54. Both integrated iron and steel manufacturing as well as manufacturing of carbon steel from cold ferrous feed are acknowledged to be EITE activities.

[139] *Steel Transformation Plan 2012* (Cth) s 7.2; Joint Select Committee on Australia's Clean Energy Future Legislation, Parliament of Australia, *Advisory Report on the Clean Energy Bills and the Steel Transformation Bill 2011* (2011) 122.

[140] *Agreement on Subsidies and Countervailing Measures* Article 5(a) – (c).

[141] Van Den Bossche, above n 13, 570.

[142] Panel Report, *United States — Subsidies on Upland Cotton,* WTO Doc WT/DS267/R (8 September 2004).

[143] Ibid [7.1143], quoted in Van Den Bossche, above n 13, 570.

[144] Panel Report, *United States — Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada*, WTO Doc WT/DS257/R (23 August 2003).

[145] Andrew Green, 'Trade Rules and Climate Change Subsidies' (2006) 5 *World Trade Review* 377, 400.

[146] Ibid.

[147] GATT Panel Report, *European Economic Community — Payments And Subsidies Paid To Processors And Producers of Oilseeds And Related Animal-Feed Proteins*, GATT Doc L/6627 (14 December 1989, adopted 25 January 1990) GATT BISD 37S/86 36 [148].

[148] This includes the threat of material injury and material retardation of the establishment of an injury. See *Agreement on Subsidies and Countervailing Measures*, footnote 45.

[149] The exception to this is in the category of serious prejudice where some 'effects' need only be demonstrated on the 'same market'.

[150] Panel Report, *United States — Measures Affecting Trade In Large Civil Aircraft* (Second Complaint), WTO Doc WT/DS353/R (31 March 2011) 714 [7.1844] citing Appellate Body Report, *United States — Subsidies on Upland Cotton,* WTO Doc WT/DS267/AB/R (3 March 2005) [438].

[151] *Agreement on Subsidies and Countervailing Measures* Articles 15.1, 15.7 and 6.3, 6.4, 6.5.

[152] Tony Wood and Tristan Edis, 'New Protectionism Under Carbon Pricing: Case Studies of LNG, Coal Mining and Steel Sectors' (Report No 2011-X, Grattan Institute, September

2011) 30.

[153] This would of course depend on the comparison demonstrating one of the required impacts.

[154] Appellate Body Report, *United States — Measures Affecting Trade In Large Civil Aircraft* (Second Complaint), WTO Doc WT/DS353/AB/R, AB-2011-3 (12 March 2012).

[155] Panel Report, *United States — Measures Affecting Trade In Large Civil Aircraft* (Second Complaint), WTO Doc WT/DS353/R (31 March 2011) 707 [7.1824].

[156] Appellate Body Report, *United States — Measures Affecting Trade In Large Civil Aircraft (Second Complaint)*, WTO Doc WT/DS353/AB/R, AB-2011-3 (12 March 2012) 554 [1320].

[157] Ibid 493 [1185].

[158] Ibid 493 [1185].

[159] Some paragraphs of Article 6.3 do not require that 'likeness' is established.

[160] *Agreement on Subsidies and Countervailing Measures,* footnote 46 (emphasis added).

[161] Van Den Bossche, above n 13, 578.

[162] Panel Report, *Indonesia — Certain Measures Affecting the Automobile Industry,* WTO Doc WT/DS54/R WT/DS55/R WT/DS59/R WT/DS64/R (adopted 23 July 1998) [14.174] cited in Van Den Bossche, above n 13, 578.

[163] Ghiollarnath, above n 13, 231.

[164] Panel Report, *Indonesia — Certain Measures Affecting the Automobile Industry,* WTO Doc WT/DS54/R WT/DS55/R WT/DS59/R WT/DS64/R (adopted 23 July 1998) [14.172] – [14.253] cited in Ghiollarnath, above n 13, 231–2.

[165] *The International Convention on the Harmonized Commodity Description and Coding System,* opened for signature 14 June 1983, 1503 UNTS 167 (entered into force 1 January 1988).

[166] Australian Government, Commonwealth of Australia, *Securing a Clean Energy Future: The Australian Government's Climate Change Plan* (2011) 71.

[167] Revised Explanatory Memorandum, Clean Energy Bill 2011 (Commonwealth of Australia) 171–2.

[168] Australian Government, Commonwealth of Australia, *Securing a Clean Energy Future: The Australian Government's Climate Change Plan* (2011) 75.

[169] Ibid 75.

[170] Revised Explanatory Memorandum, Clean Energy Bill 2011 (Commonwealth of Australia) 171.

[171] Thomas Cottier et al, 'Energy in WTO Law and Policy' (Individual Project No 6, 2010).

[172] Sadeq Z Bigdeli, 'Incentive Schemes to Promote Renewables and the WTO Law of Subsidies' in Thomas Cottier, Olga Nartova and Sadeq Z Bigdeli (eds), *International Trade Regulation and the Mitigation of Climate Change* (Cambridge University Press, 2009) 155, 178.

[173] Revised Explanatory Memorandum, Clean Energy Bill 2011 (Commonwealth of Australia) 175.

[174] *Clean Energy Act 2011* (Cth) s 159.

[175] Ibid s 160.

[176] Ibid s 166.

[177] Ibid s 168.

[178] Ibid s 167.

[179] Australian Energy Market Operator, 'An Introduction to Australia's National Electricity Market' (Report, AEMO, July 2010) 2.

[180] Cottier et al, above n 172, 9.

[181] Australian Energy Market Operator, 'An Introduction to Australia's National Electricity Market' (Report, AEMO, July 2010) 4.

[182] *Australian Energy Regulator v Stanwell Corporation Limited* [2011] FCA 991, 5.

[183] *Energy Services,* WTO Doc S/C/W/52 (9 September 1998) (Note by the Secretariat).

[184] Cottier et al, above n 172; *The International Convention on the Harmonized Commodity Description and Coding System,* opened for signature 14 June 1983, 1503 UNTS 167 (entered into force 1 January 1988) HS Code 2716.00.

[185] *Energy Services,* WTO Doc S/C/W/52 (9 September 1998) (Note by the Secretariat) [36] cited in Cottier et al, above n 172, 3.

[186] *Clean Energy Act 2011* (Cth) s 159.

[187] When the impacts of the subsidy are considered under the *Agreement on Subsidies and Countervailing Measures* the comparison for affects is on the conditions for industries that produce a 'like product.' This means the subsidy does not necessarily need to directly attach to a product, but the *Agreement on Subsidies and Countervailing Measures* will apply if any product is produced through the subsidised activity. See discussion Van Den Bossche, above n 13, 578–9.

[188] Gabrielle Marceau, 'The WTO in the Emerging Energy Governance Debate' (Paper presented at Global Challenges at the Intersection of Trade, Energy and Environment, Geneva, 23 October 2009) 3.

[189] Cottier et al, above n 172, 79.

[190] Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas,* Report of the Appellate Body, WTO Doc WT/DS27/AB/R (9 September 1997) quoted in Mitsuo Matsushita, Thomas J Schoenbaum and Petros C Mavroidis, *The World Trade Organization: Law, Practice and Policy* (Oxford University Press, 2nd ed, 2006) 610.

[191] This statement is in relation to the fact that the ESF provides free carbon units. The provision of cash payments will be a more obvious subsidy and therefore this paper will not analyse why the payments will be a financial contribution that confers a benefit.

[192] Appellate Body Report, *United States — Tax Treatment for Foreign Sales Corporations,* WTO Doc WT/DS108/AB/RW, AB-2001-8 (20 February 2000) [140].

[193] Panel Reports, *Canada — Certain Measures Affecting the Renewable Energy Generation Sector and Canada — Measures Relating to the Feed-In Tariff Program,* WTO Doc WT/

DS412/R WT/DS426/R (19 December 2012).

[194] Ibid [7.313], for the dissenting opinion see [9.5].

[195] Ibid [7.313]–[7.319].

[196] Clarke and Waschik, above n 50, 110.

[197] The *Agreement on Subsidies and Countervailing Measures* Article 1.2 states that once a subsidy is established it must be shown to be specific for Part III (Actionable Subsidies) to apply.

[198] *Clean Energy Act 2011* (Cth) s 168.

[199] *Agreement on Subsidies and Countervailing Measures* Article 5.

[200] Ibid.

[201] *National Greenhouse and Energy Reporting (Measurement) Determination 2008* Pt 2.14.

[202] Australian Energy Market Operator, 'An Introduction to Australia's National Electricity Market' (Report, AEMO, July 2010) 2.

[203] The expansion of this category in Footnote 45 also requires that the injury applies to another member's market.

[204] This is a non-violation nullification or impairment of *General Agreement on Tariffs and Trade 1994* Article XXIII:1.

[205] *Australia's Schedule of Concessions,* Schedule 1, Section II — Other Products.

[206] Bigdeli, above n 172, 187.

[207] Australian Energy Market Operator, 'An Introduction to Australia's National Electricity Market' (Report, AEMO, July 2010) 15.

[208] *General Agreement on Trade in Services 1994* Article XV.

[209] *Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS)* WTO Doc S/L/92 (28 March 2001).

[210] This does not mean that subsidies would need to be extended to services and service suppliers located in the territory of another member. Ibid 6[16].

[211] Matsushita, Schoenbaum and Mavroidis, above n 190, 661 do not accept the reasoning provided in the *Guidelines* and suggest that clarification is needed in this area.

[212] *Scheduling of Initial Commitments in Trade in Services: Explanatory Note,* WTO Doc MTN.GNS/W/164 (3 September 1993) (WTO Secretariat Note) quoted in Poretti, above n 10, 141.

[213] Poretti, above n 10, 142.

[214] *Services Sectoral Classification List* WTO Doc MTN. GNS/W/120 (10 July 1991).

[215] Draft Consolidated Schedule of Specific Commitments, WTO Doc S/DCS/W/AUS/Rev 1 (22 April 2003) (Revision) Australia, 14.