



European
University
Institute

ROBERT
SCHUMAN
CENTRE FOR
ADVANCED
STUDIES

WORKING PAPERS

RSCAS 2015/03
Robert Schuman Centre for Advanced Studies
Global Governance Programme-153

ASCM disciplines and recent WTO case law
developments: what space for 'green' subsidies?

Luca Rubini

European University Institute
Robert Schuman Centre for Advanced Studies
Global Governance Programme

ASCM disciplines and recent WTO case law developments: what space for 'green' subsidies?

Luca Rubini

EUI Working Paper **RSCAS** 2015/03

This text may be downloaded only for personal research purposes. Additional reproduction for other purposes, whether in hard copies or electronically, requires the consent of the author(s), editor(s). If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper, or other series, the year and the publisher.

ISSN 1028-3625

© Luca Rubini, 2015

Printed in Italy, January 2015

European University Institute

Badia Fiesolana

I – 50014 San Domenico di Fiesole (FI)

Italy

www.eui.eu/RSCAS/Publications/

www.eui.eu

cadmus.eui.eu

Robert Schuman Centre for Advanced Studies

The Robert Schuman Centre for Advanced Studies (RSCAS), created in 1992 and directed by Professor Brigid Laffan, aims to develop inter-disciplinary and comparative research on the major issues facing the process of European integration, European societies and Europe's place in 21st century global politics. .

The Centre is home to a large post-doctoral programme and hosts major research programmes, projects and data sets, in addition to a range of working groups and *ad hoc* initiatives. The research agenda is organised around a set of core themes and is continuously evolving, reflecting the changing agenda of European integration, the expanding membership of the European Union, developments in Europe's neighbourhood and the wider world.

Details of the research of the Centre can be found on:

<http://www.eui.eu/RSCAS/Research/>

Research publications take the form of Working Papers, Policy Papers, and e-books. Most of these are also available on the RSCAS website:

<http://www.eui.eu/RSCAS/Publications/>

The EUI and the RSCAS are not responsible for the opinions expressed by the author(s).

The Global Governance Programme at the EUI

The Global Governance Programme (GGP) is research turned into action. It provides a European setting to conduct research at the highest level and promote synergies between the worlds of research and policy-making, to generate ideas and identify creative and innovative solutions to global challenges.

The GGP comprises three core dimensions: research, policy and training. Diverse global governance issues are investigated in *research* strands and projects coordinated by senior scholars, both from the EUI and from other internationally recognized top institutions. The *policy* dimension is developed throughout the programme, but is highlighted in the GGP High-Level Policy Seminars, which bring together policy-makers and academics at the highest level to discuss issues of current global importance. The Academy of Global Governance (AGG) is a unique executive *training* programme where theory and “real world” experience meet. Young executives, policy makers, diplomats, officials, private sector professionals and junior academics, have the opportunity to meet, share views and debate with leading academics, top-level officials, heads of international organisations and senior executives, on topical issues relating to governance.

For more information:

<http://globalgovernanceprogramme.eui.eu>

Abstract

This paper highlights that the question of policy space with respect to public support to electricity cannot be answered by clinically isolating legal rules from their factual background – constituted of technological innovations, market developments and the broader political economy. Various stylized scenarios in the green economy are briefly assessed to determine the impact subsidy rules may have. A more general assessment of the SCM Agreement leads to the conclusion that WTO subsidy laws are uncertain and - inasmuch as they may not be fully in line with best green policy prescriptions - unsound. In the face of a prospect of more frictions and litigation, legal security must be positively reinstated. The case-law may contribute to clarify some issues but the more fundamental decisions determining what is, and what is not, legitimate are beyond its purview and competence. For this reason, the recent Appellate Body decision in the *Canada – Renewable Energy/ FIT* disputes, with its construction of the benefit analysis, is essentially wrong. The paper concludes by arguing that the only real option for a clear and legitimate recognition of green policy space resides with law reform. In this regard, acknowledging that reform is not only an outcome but first of all a process preparing for a negotiated outcome, various suggestions for the way forward are outlined.

Keywords

Subsidies – clean energy – WTO – SCM Agreement – law reform

1. Introduction: the goal of the paper*

Much has been written on this topic, especially lately. Many of the points I am making here are not new. Many scholars, including myself, have made them.¹ It is worth, however, to consolidate few ideas, build on them and reach further. Indeed the area is complex and is evolving fast, many issues – including legal ones – are still wide open, and thus need continuous analysis to find an answer.

This paper, in particular, attempts to highlight that the key question of policy space with respect to public support to electricity cannot be answered by clinically isolating legal rules from their factual background – constituted of technological innovations, market developments and the broader political economy. Viewed from this perspective, the legal analysis must start when the technological, commercial and political considerations expounded in the other contributions to this collection are fully internalized.

The second contribution of the paper is more conceptual and dwells on the analysis of two ideas that are considered very useful to visualize the question of (green) policy space and subsidy laws: the notions of point of balance and trade-off.

The factual and background dimension of the issue of green policy autonomy is analyzed in Section 2. Section 3 then examines what the law says about government policies in support of green energy and in particular electricity. Section 4 is the conceptual core of the paper, revolving around the said notions of point of balance and trade-off. Section 5 shifts the focus from the laws to the courts – as the prominent actors called to interpret and apply them. Reference is in particular made to the WTO Panels and the Appellate Body, and to the most recent jurisprudence with an impact on the issue of green policy space, ie the *Canada – Renewable Energy/FIT* dispute. Section 6 closes with few remarks on law reform.

2. Facts and law

This section provides an easy heuristic to understand the key determinants of the issue of green policy space.

The question of ‘policy space’ or autonomy for green subsidies is as much factual as it is legal. Good lawyers and judges are those that first of all master the facts. Making a step further, and quoting the Chicago sociologist Charles Henderson, Louis Brandeis famously held that a lawyer who has not studied sociology or economics is very apt to become a public enemy.² The claim of this paper does not go as far as requiring radical changes in law schools curricula or in legal training. But I want to immediately emphasize that the question of policy autonomy heavily depends on the factual – ie the *technology, market, political economy* conditions – that are or will be prevailing in the green electricity sector.

From the legal perspective, this is the main contribution that this World Trade Forum has brought to advance knowledge in the area. Explain to us lawyers what is and will soon be possible in terms of trade in electricity. This is the precondition for having scenarios where support to generation of

* I would like to thank the participants in the World Trade Forum 2014 (27 September 2014, Berne), and in particular Jesse Kreier, Rob Howse and Thomas Cottier, for useful comments to a preliminary version of this paper. The paper will be published in Thomas Cottier and Ilaria Espa (ed) *International Trade in Electricity and the Decarbonisation of the Economy. The World Trade Forum 2014*. Cambridge: Cambridge University Press, 2015). Any mistake is attributable to the author.

¹ See, eg, Luca Rubini, ‘Ain’t Wasting Time No More. Subsidies for Renewable Energy, the SCM Agreement, Policy Space and Law Reform’ (2012) *Journal of International Economic Law*, 525-579, id, ‘The Good, the Bad, and the Ugly. Lessons on Methodology in Legal Analysis from the Recent WTO Litigation on Renewable Energy Subsidies’ (2015) *World Trade Review* (forthcoming).

² Louis Brandeis, ‘The Living Law’ (1916) *Illinois Law Review*, p. 470.

electricity, which is then traded, can possibly give rise to causes of action. In what is certainly a very simplified chain, the technology comes first. When this exists, the focus then shifts to the market and the government as key actors, often partnering with each other to make the technology as broadly as possible available. If the public hand can sustain market possibilities, it can also cause distortions. In an internationally competitive market these distortions can raise diplomatic rows. Finally, if the right political conditions are there, these claims can trigger legal remedies and complaints. The arsenal used to fight these disputes is the prevailing regulatory framework. It is within this simplified, but certainly complex, background that one can ask and answer questions of the policy autonomy available to government wishing to support green electricity.

In sum, the key questions lawyers need to have progressively answered before making any final assessment on the degree of policy autonomy are the following:

- What is the technology with respect to the generation, storage transmission and distribution of electricity? What does it or will it permit?
- What type of cross-border trade can we think of?
- How fast will the markets respond to these technological possibilities?
- What role will public support play?
- Do we have the conditions for harm been done?
- Who will complain for subsidies granted to electricity (ie generation, storage, transmission and distribution)?
- What are the conditions for disputes to arise? Do we have them?

We can use few stylized scenarios to further elucidate the framework of this inquiry. In the following section, where we analyze the regulatory framework in some more detail, we will hint at the technical issues that may affect the viability or otherwise of a subsidy law claim.

Scenario 1. Subsidy to green technology

From the trade law perspective, this is the so far most common scenario. Public support to green technology (eg solar panels, wind turbines) has been significant. Since this technology, in the shape of final products or inputs, is extensively traded, public support can clearly impact international trade. This may lead to subsidy claims being filed with the WTO dispute settlement or to unilateral remedies (ie countervailing duties) being imposed in the affected jurisdictions. Most of the disputes that have triggered the recent ‘trade war’ regard this category of support.³

Scenario 2. Subsidy to green energy

Public support to green energy (in the form of, for example, support to R&D or production) raises two questions, again from a trade law perspective.

First, we need to know whether there is any international trade in the commodity. There is certainly trade in gas and fuels (including both bio- or fossil fuels). As the workshop made clear, the issue is still more open with respect to electricity. On the one hand, we certainly have cross-border trade at the regional level but, quite often, the commonality of the participants (think for example at intra-EU electricity trade) make challenges difficult. On the other hand, the idea of a ‘global grid’ is still very much speculation with different arguments (mainly technological viability vs investment magnitude) being confronted with each other. Due to the specificity of the electricity sector, we will deal with this as a separate scenario below.

³ For an overview of these cases, see, eg, Mark Wu and James Salzman, ‘The Next Generation of Trade and Environment Conflicts: The Rise of Green Industrial Policy’ (2014) *Northwestern University Law Review*, pp. 401-474. With specific respect to trade remedies (including countervailing duties) see the contribution of Edwin Vermulst to this book.

Secondly, one can have a trade law claims that is not necessarily targeting public support to the green generation of energy but rather other aspects or conditions of that policy of support which have an impact on other (green but not necessarily) markets. The main economic and political mischief of the Ontario FIT Programme, subject to review in the *Canada – Renewable Energy/FIT* case was not the feed-in tariff in itself but rather the various types of local-content requirements attached to it. This leads us back to the first scenario – ie subsidy to green *technology*.

This second consideration leads us to make an important point. At least in principle, we can have a trade law, and particularly as subsidy law, issue, *even if* there is no cross-border trade of a significant aspect of the policy. In the Ontario case, there was no trade in electricity but there was certainly trade in the inputs subject to the localization requirement.

Furthermore, since support can also be granted indirectly, one can also wonder whether, through the direct support to energy generation, one government is effectively (and indirectly) supporting also the producers of the equipment and inputs used to generate green energy. (The same consideration obviously applies to green *electricity*.) To put it another way, various markets (and obviously countries) can be affected by a subsidy.⁴ The law does reflect this economic reality through the doctrine of 'pass-through' of the benefit of the subsidy.

Scenario 3. Subsidy to green electricity

This can encompass trade to the generation of green electricity but also to its transmission and distribution, or storage. While, as we are about to see below, claims with respect to the transmission, distribution or storage are more difficult to visualize, one could certainly have claims focusing on one government's support to production. The key issues then become:

- Is there any cross-border trade in the generated electricity?
- Who will complain of the distorting measure of support?
- Competing conventional energy producers?
- Other (less-subsidized) competing green energy producers?⁵

Clearly, the answers to these questions are in the main not legal. We must interrogate the technological and market possibilities, as well as the political economy.

Scenario 4. Subsidy to support transmission, distribution (ie the grid) or storage

Governments may also invest in infrastructure, be it for the storage of electricity or for its long- or short-distance transportation. It is clear that in some cases, think of cross-border transmission, we have by definition a cross-border element. This should therefore not be an obstacle to the application of trade laws.

⁴ One key fact, which masterly shows the indirect and transnational impact of subsidization in the green sector, was often-repeated in the workshop. What created the Chinese green technology (eg solar panel) industry were German subsidies to promote green electricity generation.

⁵ Given the pervasive public support in the green energy sector, and the co-existence of various national support programmes, it is difficult to find one national industry completely 'clean' ('I have not received any support, but my foreign competitor did!'). The economic and competition issue is often one of 'net effects' ('My competitor is more aided than me!'). This is exactly what the United Steelworkers Union (USW), which filed a section 301 petition with the US government in September 2010, interestingly claimed. The American union complained that the Chinese producers had received 'more than twice as much as the U.S. spent in the sector'. See Keith Bradsher, 'Union Accuses China of Illegal Clean Energy Subsidies', *New York Times*, 9 September 2010. For a commentary see Scott Lincicome, 'USW to China: Subsidies for Me, but not for Thee', 9 September 2010, available at <http://lincicome.blogspot.it/2010/09/usw-to-china-green-subsidies-for-me-but.html> (last accessed 1 October 2014).

There is, however, another angle which represents, in our view, the key legal question to address. As we are about to explain, subsidies can be challenged under WTO subsidy laws, only inasmuch as they are determined to be specific to certain enterprises or sectors. General subsidies, ie subsidies available across the board, are not objectionable. Now, can we visualize a claim against electricity infrastructure? Is this infrastructure, which is provided (partly or fully) by the government, ‘general’ or ‘specific’? More to the point: can we build a claim of specificity vis-à-vis the electricity sector? Or, should rather the infrastructure be viewed as the physical vehicle to transmit and distribute electricity to all those that are connected to the network? What if a significant infrastructure is built in a remote region, where the predominant if not exclusive customer is a company engaged in international trade? Again – one can see that, at least at the level of speculation, it is possible to consider various factual scenarios. It looks like, however, that these type of claims, as, in general subsidy claims related to infrastructure provision, would be difficult to succeed.⁶

Scenario 5. Subsidy to for energy consumption

The last scenario is that where subsidies are not channelled to the energy producer but to the consumers. The first, important question to determine the applicability of subsidy laws is always that related to the existence of cross-border trade in the products/markets that can be affected by the subsidized demand. The second set of questions focus on the type of subsidy at issue. In particular, is this subsidy broadly available (for example, to all energy produced through clean sources) or is only targeted to certain sectors? To put it another way, is it technology-neutral or is it designed to spur a certain, comparatively disadvantaged, green source? As already noted, the more targeted and specific subsidies are the more likely it is they may have problems under subsidy laws. We will return to this key issue when discussing the law, and, in particular, the specificity requirement.

3. Green electricity support. What does the law say?

After a very brief overview of the regulatory framework coming out from the SCM Agreement,⁷ this section attempts to show that WTO subsidy disciplines are both seriously unclear and unsound.

The subsidy regulatory framework: a primer

It is immediately important to highlight that WTO law does not object to subsidies in themselves. Being a trade discipline, subsidies are objected to only if the subsidy causes some form of negative trade effects, as defined in the laws. This crucial element has already been repeatedly highlighted in the previous section.

In terms of legal analysis, there are three successive steps to make.

First, subsidy disciplines can only apply if one given measure is first defined as a subsidy under the requirements of Article 1 of the SCM Agreement. In particular, to be deemed as a subsidy, a measure:

- must be granted by a government (or a public body which is equaled to the government),
- it must confer one of the given forms of financial contribution (or alternatively constitute any form of income or price support),⁸ and

⁶ For two cases where infrastructure subsidies claims were tested see the *EC – Aircraft*, WT/DS316, and *US – Aircraft*, WT/DS353.

⁷ A more detailed account can be found in Luca Rubini, Juhi Sud, Edwin Vermulst, *Global Approach of State Aid Law - WTO Subsidy Law and EU Trade Defence instruments* (Oxford University Press, 2015, forthcoming).

⁸ According to Article 1.1(a)(1) of the SCM Agreement, ‘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

- it must be economically beneficial.

In addition, only subsidies that are specific to certain firms or industries are caught by the disciplines.⁹

Thirdly and finally, as already noted, specific subsidies are permitted unless they cause adverse effects in one of the forms defined by the SCM Agreement (see Articles 5 and 6), or unless they are conditional on exports or on the use of local inputs (see Article 3).

Each step of this legal analysis raises important legal issues which all contribute to determining the scope of autonomy of governments.

First claim: subsidy laws are uncertain

Subsidy laws are notoriously uncertain. The regulation of public support to electricity is no exception. One can think of two reasons why this is particularly so. First, the electricity sector and its market are complex. Secondly, when subsidy laws were conceived, trade in electricity was certainly not in the mind of the framers.

While not aiming at being exhaustive, the following is a brief list that sketches the main areas of uncertainty of subsidy laws which may have a specific impact on public support to electricity.

a) What does amount to a financial contribution? The various forms of financial contribution do still raise many questions (for example, can we have a cumulative application of more than one letter?) but the most relevant for support to electricity arguably focus on the interpretation of the requirements when a third-party is involved in the transfer of economic resources (see item (iv) of Article 1.1(a)(1) of the SCM Agreement). This depends on the distinct regulatory nature of many measures of support in this field, where the action of subsidization involves both public and private agents.

b) What is the status of tax incentives? The language of the 'otherwise due' clause has already caused headaches to adjudicators.¹⁰ But this is only the beginning. We have never had any dispute where energy or environmental taxes were under scrutiny.¹¹ This may require an interesting analysis of the 'objectives' of these tax measures and an interesting search for general rules and exceptions. EU State aid law offers good examples of the difficulties of this type of enquiry.¹²

c) What is the status of 'regulatory' measures? The status of regulatory measures under subsidy laws is a recurring issue and is still the true 'elusive frontier' of subsidy laws, in much the same way as it happens for EU State aid law. To stay in the field of green energy subsidies, one can think of the 2001 *PreussenElektra* decision where the European Court of Justice famously held that the German FIT was not a State aid. The *Canada – Renewable Energy/FIT* ruling in the WTO has given some

(Contd.) _____

incentives such as tax credits); (iii) a government provides goods or services other than general infrastructure, or purchases goods; (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments.' While the case-law on the financial contribution requirement, in its various forms is already rich, there is virtually no interpretation of the 'any form of income or price support' alternative which may have an important potential in the area of green energy support. It looks, in particular, very reasonable to conclude that certain measures such as feed-in tariffs or renewable portfolio standards may well amount to a form of 'price or income support'.

⁹ Article 2 of the SCM Agreement outlines the sophisticated tests to establish specificity. A subsidy will be deemed specific if it is specific in law or de facto. Crucially, subsidies that are granted according to 'objective criteria and conditions' are not held to be specific. We will delve into the important, and still open, legal issues arising out from these three tests below.

¹⁰ See, eg, the *US – FSC* (WT/DS 108) litigation. For an extensive analysis see Luca Rubini, *The Definition of Subsidy and State Aid – WTO and EC Law in Comparative Perspective* (Oxford University Press, 2009), Chapter 9.

¹¹ See the contribution of Kateryna Holzer, Ilaria Espa and Tetyana Payosova.

¹² For a review of this case-law, see Rubini, 'Ain't Wasting Time No More', n. 1, at pp. 535-537.

indications but many issues remain open and there is certainly no final statement of the law with respect to regulatory subsidies.

d) *What does ‘any form of income or price support’ actually mean?* One big issue is what role this language will play with respect to the scope of the definition of subsidy. The issue is particularly relevant with respect to regulatory measures which are pervasive in the green energy sector, like those at issue in the *Canada – Renewable Energy/FIT* case. We have good, and arguably sound, guidelines coming from the Panel Report in the *China – GOES* decision¹³ but the question of the coverage of this provision with respect to regulatory measure has not been addressed yet. (In the *Canada – Renewable Energy* case, the Panel, seconded by the Appellate Body, did exercise judicial economy on the relevant claim put forward by the complaining parties.)

e) What does ‘benefit’ mean?

Against the specific – and unclear – language of many of the other requirements of the definition of subsidy, as well as of the specificity and adverse effects tests (for the latter two, see immediately below), the requirement that any government measure may cause concerns under WTO subsidy laws only if it confers a ‘benefit’ is clearly open-ended. It is indeed the legal language that is more easily apt to being used to consider and balance positive goals and effects of the subsidy. This is what happened in the *Canada – Renewable Energy/FIT* case. For the reasons, expounded at length below, this interpretative approach is seriously wrong and potentially undermines seriously the effectiveness of subsidy control as well as transparency.

f) *Is the specificity test really ‘specific’?* Despite the length and sophistication of the legal language (and its three ‘principles’ under letters (a), (b) and (c) of Article 2.1 of the SCM Agreement), one is often left to wonder whether a given measure will be held to be specific or not.¹⁴ Better – against a clearly expansive approach in the interpretation of the test, one wonders when any measure will be held *not* to be specific.

The key interpretative issue – which is still open – is the relationship between de facto specificity (letter (c) of Article 2.1 of the SCM Agreement) and the relevance of the cases where the subsidy is not specific because it is granted according to ‘objective criteria and conditions’ (letter (b)).¹⁵ In particular: Does de facto specificity always prevail? What is the real relevance of the ‘neutral and objective conditions’? Can the latter – despite the specific and suggestive language of the law¹⁶ – ever discard a finding of predominant benefit of the subsidy to certain firms or sectors only? It is often noted that the answer to this last question may potentially open up interesting possibilities for policy autonomy.¹⁷

g) *How difficult is it to prove adverse effects?* If it is not automatically prohibited (because it directly impinges on exports or on localization), in order to be actionable, a subsidy needs to cause adverse effects. There are three types of adverse effects, under Article 5 of the SCM Agreement, i.e. nullification and impairment of benefits, in the form of frustration of tariff concessions, injury and one

¹³ Panel Report, *China – GOES*, WT/DS414/R, para. 7.86.

¹⁴ As the seasoned lawyer knows well, long and sophisticated language is often not the path to legal clarity, quite the contrary.

¹⁵ Which are defined as ‘criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as the number of employees or size of enterprises’.

¹⁶ The incipit of letter (c) reads: ‘If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered’

¹⁷ See, eg. Sadeq Bigdeli, ‘Resurrecting the Dead? The Expired Non-Actionable Subsidies and the Lingering Question of “Green Space”’ (2011) *Manchester Journal of International Economic Law*, p. 2-37, at pp. 22-23. See also Rob Howse, *Securing Policy Space for Clean Energy Under the SCM Agreement: Alternative Approaches*, E-15 ‘ThinkPiece’, Autumn 2013.

of the five forms of serious prejudice as outlined in Article 6. Now, all these 'trade-impact' standards present their own difficulties and uncertainties with the result that it may not be easy to prove adverse effects. As the analysis of the various factual scenarios in Section 2 has shown, to prove adverse effects in the electricity sector may be particularly challenging.

Equally, the vagaries of these standards and the relevant evidence do arguably mean that no government can be pretty sure that its subsidies will never be found to cause adverse effects. We do, therefore, believe that the statement that the system does already offer policy autonomy, if governments abstain from causing adverse effects, is partly fallacious (we will go back to this point below). It looks clear to us that the regulatory framework, both in theory and in practice, involves a significant amount of legal uncertainty.¹⁸ If one wants to offer a *definite and effective* degree of protection to certain desirable subsidies, this cannot rest on the lack of adverse effects, but needs a positive recognition.

One final gloss on the real meaning of legal uncertainty may be useful. Some may argue that the ambiguity in the law is positive because it means flexibility for governments. Various readings of the law are possible, satisfying the preferences and conduct of different Members. This may be true but only on one crucial negative condition. *To be positive, ambiguity must be permissive but not divisive.* If the legitimacy of different and *contrasting* readings of the law becomes an issue of contention, good flexibility turns into bad legal uncertainty. The next step is litigiousness and litigation.

Second claim: subsidy laws are not sound

What is referred to here is not a general critique about the economic soundness of WTO subsidy laws.¹⁹ The claim is more specific and centers on whether WTO subsidy laws, as they currently stand, are in line with what the best policy practice tell us with respect to good green subsidies. This is measured in terms of the goals and effectiveness of these measures in relation to these goals, in particular as they relate to environmental and security of supply considerations.²⁰ In other words, there may certain features and prescriptions of the law that are clear. The question in this case is: If the law is clear, is it also sound? Are these legal prescriptions in line with good policy indications and guidelines?

We return to these questions in the following section. Suffice underlining here that the question is only partly legal. It engages the 'factual' dimension of the issue of policy autonomy that we have stressed already at the beginning of the paper.²¹

Two final glosses are necessary. First, when we ask whether the laws are 'in line with' the policy prescriptions, we not only point towards the scenario where blanket bans or prohibitions are legally enforceable. Arguably, the assessment of the laws would not be equally positive if the regulatory framework de facto renders certain measures of support, which are deemed to be desirable, apt at being challenged. In other words, what matters is the actual misalignment between law and good

¹⁸ This claim is fully developed in Rubini, 'Ain't Wastin' Time No More', n. 1 above.

¹⁹ See Alan O. Sykes, 'The Questionable Case for Subsidies Regulation: A Comparative Perspective' (2010) *Journal of Legal Analysis*, pp. 473-523.

²⁰ Although extremely common as motive for support, it is difficult to consider job creation as relevant benchmark for assessing subsidy laws as they are, or indeed for suggesting law reform. In other words, it is a fact that investment in the green energy sector will often generate jobs – and local ones – and that this is the public discourse that invariably surrounds the measure of support at issue. That being said, trade laws are concerned with negative trade spillovers and may taken on board the pursuit of legitimate public policy goals which are essentially non-economic (eg health, safety, environment, public morals). Economic or socio-economic objectives are at times relevant when they are horizontal, such as innovation promotion or regional development.

²¹ We may simply add, at this stage, that there is a significant agreement in the scholarship that the current rules are not up to the job to face the challenges of the XXIst century. The most common example made is that of climate change subsidies. See n. 41 below for some references.

policy, and the probability and scope of over-inclusion. In sum, the issue is one of *degree of legal security*.

The second comment refers to the *coherency* of the system. Economics tells us that in some cases subsidies are first-best intervention. They are less trade-distorting than, for example, tariffs because they affect only one margin (the producer's) rather than two (the producer's and the consumer's). If this is the case, one would expect the law to reflect this difference. In the GATT legal framework, tariffs or quotas may be eventually justified under the general exceptions of Article XX, even if they cause trade distortions. This is not the case for subsidies, however. Pending the complex legal issue of the applicability of GATT Article XX to subsidies, if one looks at the SCM Agreement, no exceptions for legitimate subsidies can be found (the old shelter of 'non-actionable' subsidies expired at the end of 1999). Do we have double standards? Is this apparent difference in treatment correct?²² We will return to this claim of lack of coherency between the GATT and the SCM Agreement.²³

4. Conceptualizing policy autonomy in regulation: point of balance and trade-offs

The degree of policy space or autonomy is determined in two ways. If is first dictated by the scope of the definition of subsidy. It is intuitive that if a measure does not amount to a subsidy in the first place, it is out of the disciplines' scope. Other rules, maybe even stricter rules, may apply but there is no issue under subsidy laws. If the application of these other rules and subsidy rules is cumulative, it is clear that the fact that the latter are not applicable means we have, at least in principle, more policy space. Less regulation intuitively means more autonomy. If the above is correct, one can clearly understand why many legal battles in WTO subsidy cases turn on the seemingly neutral and preliminary issue of the definition.

Policy autonomy is also, and most importantly, determined by the actual content of the disciplines that are applicable to a measure that has been classified as a subsidy. The rules may expressly or, on construction, impliedly permit certain measures, or, rather, may prohibit them. We have seen the main tenets of current WTO subsidy laws.

Two concepts are key when it comes to actually assess the degree of autonomy WTO subsidy rules give to governments: the *point of balance* and the *idea of trade-off*.

Point of balance. The first attempts to identify the point of balance of the disciplines. Let's use an example to explain this idea. In our case, we are talking of subsidies that want to promote the generation and use of green electricity and this is definitely and mainly linked to an environmental goal. The WTO legal regime in general and WTO subsidy rules in particular are trade disciplines. They want to foster trade liberalization and remove trade obstacles. Traditionally, however, trade laws have also recognized other-than-trade values and accepted that in certain cases there may be clashes between trade interests and non-trade interests. Crucially, for example under the general exceptions of GATT Article XX, it is also accepted that, under certain conditions, non-trade values may trump trade liberalization. In other words, in some cases, it is WTO legal to adopt measures that, although breaching in principle even fundamental trade obligations (like non discrimination or the prohibition of quotas), also pursue legitimate objectives in a proportionate way and do not entail unjustified discrimination. Going back, now, to the idea of *point of balance*, it is clear that, in the original

²² This point is raised by Rob Howse, *Climate Change Mitigation Subsidies and the WTO Legal Framework: A Policy Analysis* (Winnipeg, Manitoba: International Institute for Sustainable Development, 2010).

²³ We can anticipate the main point made below, ie that there are various questions that need to be answered before concluding that one discipline is stricter/more generous than another and the mere fact that one includes exceptions or justifications is certainly not conclusive. Other relevant questions thus concern the relevant default rule and the allocation of the burden of proof.

regulatory framework of the GATT, in some cases this was tilted in favour of non-trade interests and values (and to the limited detriment of trade interests and values).

Now, the key question is: where is the point of balance of subsidy rules? Arguably, when the rules on non-actionability were in force, the SCM Agreement and the GATT were partly aligned. The ethos (and balance) was the same. Trade distorting measures are objected to. In some cases, certain measures, even if trade distorting, are justified and permitted. With the expiry of Articles 8 and 9 of the SCM Agreement, the point of balance has been tilted and is now clearly swinging towards the trade camp. In sum, green or environmental subsidies are certainly permitted but only if they do not cause adverse trade effects (as defined by the various standards of Article 5 of the SCM Agreement). If they do – they are actionable. At least in principle, if the non-actionability provisions were still in force, or if – as some have argued – the general GATT Article XX exceptions were applicable to subsidies, we could, in some cases, have more policy space and autonomy, inasmuch as certain trade-distorting measures would be acceptable (and could not be subject to legal challenge).

Let's elaborate a bit more on the comparison between the GATT, the original outline of the SCM Agreement (which we can call 'SCM 1.0') and the current version of the SCM Agreement ('SCM 2.0'), always through the angle of the point of balance.

Under the GATT, if a measure discriminates against (or between) foreign product(s), or if it operates as an obstacle to market access, it is banned. This means that the threshold of intervention is substantially low. Quoting a common statement, Article III and Article XI of the GATT (and also the non-violation nullification and impairment route under Article XXIII:1 of the GATT) protect 'expectations' and 'competitive conditions', not actual 'volumes of trade'. In a nutshell, there is no need to prove the actual trade impact produced by the measure. But, if the general standard of prohibition of the GATT is rigorous, at the same time there are, at least in principle, significant opportunities for justification, represented by the general exceptions of GATT Article XX.²⁴ Both prohibitions and possibilities for justification need to be accounted for when considering the point of balance of the GATT.

Under the SCM Agreement, only certain subsidies are prohibited. The proof of the key legal requirement of conditionality is demanding but, when present, the ban is a foregone conclusion. Again, there is no need to prove actual trade effects. Crucially, however, the scope of the ban is limited to export and local content requirement ('LCR') subsidies which, in the eyes of the negotiators, were undoubtedly characterized by discrimination / protectionism. Thus the ban does not touch on the, arguably more important and broader group of domestic subsidies, whose discipline is really defining of the point of balance of the SCM Agreement.

In brief, as we said already, subsidies are not prohibited in WTO subsidy disciplines. Apart from the case of export and LCR subsidies, there are no prohibitions in the SCM Agreement. Subsidies are simply actionable. And, as case-law shows, this is not easy to be proved. (Any data on WTO claims vs their success?). Crucially, it is worth recalling that the burden of proof is on the complainant.

Most importantly, for our discussion on where the point of balance of the disciplines is, it is the fact that the original version of the SCM Agreement – SCM 1.0 – also included specific provisions making certain R&D, environmental and regional development subsidies non-actionable under WTO dispute settlement and countervailing duty actions. Hence – no prohibitions and limited justifications.

What is the meaning of this extra-layer of protection? Arguably, the Uruguay Round negotiators wanted to be sure that certain (albeit limited) subsidies be granted the maximum possible degree of legal security. In other words, they do not consider the absence of prohibitions enough to ensure that certain measures be protected under subsidy laws. This also meant that, by granting the benefit of non-actionability, they were accepting that certain subsidies could be causing adverse effects and still be

²⁴ We say, in principle, because de facto this defense has so far not been very successful in the GATT/WTO jurisprudence.

legal. The limit of protection was defined by the precise scope of the exceptions, determined by their terms and conditions, and by a measure of proportionality, represented by the threshold of ‘serious adverse effects’.

This brief analysis shows that the SCM 1.0 was definitely more generous towards governments as compared to the GATT. First, because the default rule on subsidies is a no-ban one. These are allowed unless the complainant proves adverse effects.

Secondly, because the point of balance was de facto, at least in terms of inspiring idea, tipped in favour of certain good subsidies (despite the difficulty in proving that these subsidies were actionable they were nonetheless expressly made safe). These categories were, however, of limited scope, which, in a sense, significantly diminished the practical importance of the idea.²⁵

The comparison is more challenging if we consider the second, and current, version of the SCM Agreement – SCM 2.0. The intervening factor is the expiry of the category of non-actionability. In a word, the full legal security which this granted (up to the limit of serious adverse effects) is now gone.

Which set of rules – the GATT or the SCM 2.0 - is more generous towards government? The answer is not fully clear. On the one hand, the GATT still has more definite prohibitions than the SCM Agreement but these can in principle be justified if the defendant manages to rely on GATT XX. (It is, however, important to highlight that GATT Article XX general exceptions are for the defendant to be established and, as litigation shows, this has not been easy.) On the other hand, although the exceptions of non-actionability have gone, the default position is still that subsidies – whose simple legal existence is based on the proof of derogation/discrimination²⁶ are not per se prohibited. Their objection is based on the proof of adverse effects and it is for the claimant to prove that we have them.

This is what an analysis of the law is telling us. This analysis begs another crucial question – which is not legal but, once again, requests a ‘factual’ analysis. What does the best policy practice tell us about ‘good’ green energy or environmental subsidies? Can we think of measures of support which, in order to achieve their desired goals, need to cause adverse effects? How probable is this? Do we have a meaningful risk that some good green subsidies may in the process also distort trade? Can governments considering support measures design or implement them in such a way that these negative effects are minimized, if not eliminated? How much allowance should the regulatory framework make for the complexity, and sometimes experimental nature, of certain policies?

In a word, where do Members want the point of balance of the disciplines to be? What type of practical and symbolic signals do they want to give with respect to good and bad subsidies? What type of legal security do they aim to grant? What type of flexibility should governments have, especially considering that the fight of climate change is a complex one and the success and effects of the policies may be uncertain?²⁷

²⁵ We have also not considered in our assessment the presumptions of adverse effects under Article 6.1 of the SCM Agreement. These were ideally the counter-part of the exceptions of the non-actionability provision. The reason for not considering them is that their normative innovation – the inversion of the burden of proof in favour of the complainant in certain cases - did not touch on the extra-value of legal security granted by the justifications of Article 8.

²⁶ This is another line of comparison between, say, national treatment provisions and subsidy disciplines. The legal test of national treatment, which, if positive, triggers a prohibition, is based on a discrimination between like domestic and foreign products. Arguably, the core of the notion of subsidy is based on the conclusion that the measure at issue derogates from the otherwise prevailing market or regulatory benchmark. The essence of the two tests is similar, if not identical. But – and we come to the crucial point – proof of derogation or discrimination is not enough to object to a subsidy. You need to prove a specific trade impact to have them banned. See Luca Rubini, *The Definition of Subsidy and State Aid – WTO and EC Law in Comparative Perspective* (Oxford: Oxford University Press, 2009) at pp. 285-286.

²⁷ This is in essence what the Appellate Body Report, *Brazil – Tyres*. WT/DS332/AB/R, para. 151, seems to be hinting at when suggesting that certain environmental measures, like climate change measures, can be fully evaluated only with the benefit of time.

In conclusion, the question is not ultimately whether there is full coherence in the WTO system (although one would in principle expect this, unless there are specific reasons for divergences in treatment). The issue is whether the current point balance of subsidy laws is acceptable – in the light of the economic, political and legal circumstances of the XXIst century.

The fact that we have not had many challenges to energy subsidies may be good evidence that in the end Members have so far been happy with the status quo. Against mounting litigiousness and claims, and investment and competition etc, one wonders whether this scenario still reflect what is needed. This is – at the very least – a legitimate question to ask.

Trade-offs. The second idea, partly implied in the previous concept of balance, that explains the difficulty in determining the point of balance of subsidy disciplines, or indeed renegotiating it, is that of the trade-offs that are inherent in subsidization.

Subsidies are ambivalent also because they may cause various – positive and at the same time negative - effects. As we have noted elsewhere, what underlines any policy decision and any legal compromise is a trade-off.²⁸ Economic distortions are thus accepted if, in view of the preferences and choices of the granting government, it is expected that the benefits will be greater. There is no precision or inevitability in where the line is drawn (which reminds of the concept of point of balance above). The main difficulty, however, comes when negative and positive effects are produced in different countries, since it is not easy to make and to gain acceptance for transnational trade-offs. In these cases, the policy discourse clearly transcends the domestic and local level to reach the international and global one. Complex issues of settlement of conflicts of interests enter into play. This scenario may explain the stalemate Members are in when even thinking of changing WTO rules.

The recently suggest link of law reform discourse to the idea of 'public goods', which is particularly relevant when one talks of common challenges like the fight of climate change, may thus be a welcome move to break this stalemate.²⁹

5. The role and the limitations of the jurisprudence

It should be clear, by now, why subsidy laws are notoriously unclear. The ultimate reason for this is that Members have – and have always had – different views on subsidization.³⁰ And these views do change with time, and with the rise or demise of certain stakeholders. Ideologies also come and go. As repeatedly noted, technology develops, markets evolve, and the political economy alters. For these reasons, fundamental features of subsidy laws – such as the definition itself of what constitutes a subsidy or the conclusion that a certain subsidy is good or bad – have always been very controversial.

Law can be clarified by and through jurisprudence. This is - in the end – the most important contribution of courts to the administration of justice. But there is a limit to this possibility. If WTO Panels and the Appellate Body can – and must – provide clarification on certain issues, it is also equally clear that there is a line that cannot be trespassed. Courts are 'agents' and not 'principals'.³¹

²⁸ Luca Rubini, '*Ain't Wasting Time No More: Subsidies for Renewable Energy, the SCM Agreement, Policy Space, and Law Reform*' (2012) *Journal of International Economic Law*, pp. 525-579, at p. 532. See also Luca Rubini, n. 26 above, at pp. 54-56.

²⁹ Aaron Cosbey and Petros Mavroidis, 'A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO' (2014) *Journal of International Economic Law*, pp. 11-47, at p. XXX. See also Rubini, *The Definition of Subsidy*, n. 28 above, at p. 55.

³⁰ Gary Hufbauer and Joanna Shelton-Erb, *Subsidies in International Trade* (Cambridge, Massachusetts, MIT Press, 1984) early noted the confrontation between an 'injury-only' school and an 'anti-distortion' school.

³¹ Unless the legal system itself requires them to create law. Think of what has traditionally been the role of the judge in common law systems.

They cannot create law by filling gaps *and* making fundamental decisions on what is good and what is bad.

This is, according to the numerous and detailed commentaries to date, the main problem with the benefit interpretations of the Panel majority and the Appellate Body in the *Canada – Renewable Energy/FIT* disputes.

The WTO dispute settlement was called to decide whether Ontario's feed-in tariff ('FIT') system, which provides incentives to renewable energy producers and critically includes a local content requirement, was in line with WTO laws on national treatment and subsidies. After easily disposing of the local content requirement, which was patently in breach of the prohibition of non-discrimination, the Panel and the Appellate Body were both asked to establish whether the measure was also a prohibited subsidy. The determination whether the FIT was a subsidy was the preliminary step of this analysis. In this respect it was necessary to conclude that the incentive scheme was really providing a benefit to its recipients. Both courts rejected the claims, arguments and benchmarks put forward by the claimants, and concluded that they were not in a position to find for the existence of a benefit.

The Appellate Body's reasoning is particularly important, and has been subject of much analysis and discussion. In a nutshell, the World Trade Court introduced two innovations to its long-standing jurisprudence on the benefit analysis under Article 1 of the SCM Agreement. It first required that a full market definition be carried out.³² This exercise is functional to identify the universe within which the appropriate market benchmarks can be found. Crucially, the Appellate Body found that this analysis should not stop at the demand-side substitutability but should extend to consider the supply-side.³³ After concluding that the market at issue in the case was that of renewable energy only (as opposed to the broader energy market),³⁴ the Appellate Body introduced its second innovation. It distinguished two scenarios. Those where governments (simply) create markets and those where they intervene in already existing markets.³⁵ Importantly, the former is not 'in and of itself' a subsidy. It also transpires that, in the first scenario, the key requirement that government creative action should satisfy to profit from this shelter is that the action of support is proportionate and not excessive. In sum, if we have a new market and the creative act is simply conducive to bring this market into existence, WTO subsidy laws do not apply. It is clear that, through this interpretation, the Appellate Body managed to take certain forms of subsidization in the clean energy sector outside of subsidy control.

Our assessment of this decision is negative. In other writings we have severely criticized both the Panel (majority) and the Appellate Body.³⁶ The burning question was: How is it possible that what is almost a textbook example of subsidy has turned out not to be a subsidy at all?³⁷ More specifically, we are of the view that their interpretation of the notion of benefit amounts to a fundamental misconstruction of the law. The result is a limited but unwarranted carve-out for certain types of subsidies from subsidy disciplines. The potential implications of this exception are troublesome, especially for transparency and subsidy control at large. If our reading is correct, it is desirable that

³² See Appellate Body Report, paras. 5.167-5.179.

³³ Appellate Body Report, para. 5.171 et seq.

³⁴ Appellate Body Report, para. 5.178.

³⁵ Appellate Body Report, para. 5.188.

³⁶ Luca Rubini, 'The good, the bad, and the ugly'. Lessons on methodology in legal analysis from the recent WTO litigation on renewable energy subsidies' (2014) *Journal of World Trade*, pp. 895-938; Aaron Cosbey and Luca Rubini, *Does it FIT? An assessment of the effectiveness of renewable energy measures and of the implications of the Canada – Renewable Energy/FIT disputes*, E-15 'Think-Piece', Autumn 2013.

³⁷ See also the amicus curiae brief submitted to the Appellate Body on 13 March 2013.

future decisions limit the impact of this decision. In a recent analysis, we have speculated about this and have eventually concluded that this may not be possible.³⁸

Significantly, the large majority of the various commentaries on the case to date are in agreement with conclusion that the Appellate Body (and the Panel majority before it) went too far.³⁹

The *Canada – Renewable Energy/FIT* ruling is an excellent example of the difficulties in the interpretation of subsidy laws highlighted in the previous paragraph. It also exemplifies well the difficulties of delegating fundamental decisions to dispute settlement.⁴⁰

Now, if the law is uncertain and unsound, and case-law cannot really help in improving the situation and firmly tell us what type of government intervention is good and what is bad, what should be done?

6. The only real option

This final section simply sketches that, in our view, is the only way forward: law reform. The reader will only find few ideas. Our mandate – the definition of the current green space allowed by WTO subsidy laws with respect to support to electricity – has been fulfilled. Most crucially, space constraints do not allow us to develop this whole new line of analysis.

There is broad agreement in the scholarship that reform of subsidies rules is needed.⁴¹ By law reform, however, reference is normally made to *new substantive disciplines* specifically permitting

³⁸ See Luca Rubini, ‘The wide and the narrow gate’. Benchmarking in the SCM Agreement after the *Canada – Renewable Energy/FIT* ruling’, *World Trade Review* (forthcoming).

³⁹ See, eg, Amar Breckenridge, *FIT for Purpose? A review of the economics of a WTO Panel ruling on Feed-in tariffs and local content requirements*, Client Briefing, Frontier Economics, March 2013; id, *A matter of Definition – Commentary of aspects of the Appellate Body’s ruling on the Canada – Renewable Energy case in the WTO*, Client Briefing, Frontier Economics, October 2013; Liesbeth Casier and Tom Moerenhout, *WTO Members, Not the Appellate Body, Need to Clarify Boundaries in Renewable Energy Support*, IISD Commentary, July 2013; Aaron Cosbey and Petros Mavroidis, ‘A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO’ (2014) *Journal of International Economic Law*, pp. 11-47; Rajib Pal, ‘Has the Appellate Body’s Decision in *Canada – Renewable Energy / Canada – Feed-In Tariff Program* Opened the Door for Production Subsidies’, (2014) *Journal of International Economic Law*, pp. 125-137; Steve Charnovitz and Carolyn Fischer, ‘*Canada – Certain Measures Affecting the Renewable Energy Sector / Canada – Measures Relating to Feed-In Tariff Program*’ *World Trade Review* (forthcoming). We can also count pieces which viewed less negatively, or even positively, the case-law development. See, eg, Avidan Kent & Vyoma Jha, ‘Keeping Up with the Changing Climate: The WTO’s Evolutive Approach in Response to the Trade and Climate Conundrum’ (2014) *Journal of World Trade Investment and Trade*, pp. 245-271; Andrew Lang, *Governing ‘As If’: Global Subsidies Regulation and the Benchmark Problem*, LSE, Law, Society and Economy Working Papers 12/2014, August 2014; Rob Howse, n. 17 above.

⁴⁰ For a comprehensive analysis of these issues see Luca Rubini, ‘The Good, the bad and the ugly’, n. 36 above.

⁴¹ See, e.g., Howse, ‘Do the World Trade Organization Disciplines on Domestic Subsidies Make Sense? The Case for Legalizing Some Subsidies’, in Bagwell, Bermann and Mavroidis (eds.), *The Law and Economics of Contingent Protection in International Trade*, Cambridge, Cambridge University Press, 2010, p. 85; id., n. 22 above; Rubini, n.12 above; Horlick and Clarke, ‘WTO Subsidies Disciplines During and After the Crisis’ (2010) *Journal of International Economic Law*, p. 859; Aerni et al., ‘Climate Change, Human Rights and International Economic Law: Exploring the Linkages between Human Rights, Trade and Investment’ (2010) *German Yearbook of International Law*, p. 139; Bigdeli, n. 17 above; Debra Steger, ‘The Subsidies and Countervailing Measures Agreement: Ahead of its Time or Time for Reform?’ (2010) *Journal of World Trade*, p. 779. These calls for reform have been repeated after the *Canada – Renewable Energy/FIT litigation*. See, e.g., Liesbeth Casier and Tom Morenhout, ‘WTO Members, Not the Appellate Body, Need to Clarify Boundaries in Renewable Energy Support’, *International Institute for Sustainable Development*, July 2013; Cosbey and Mavroidis, n. 29 above; Rubini, *The Good, the Bad, and the Ugly*, n. 1 above.

certain good subsidies.⁴² While agreeing with most of what is said and proposed, we adopt a broader notion of ‘reform’, one that is ‘process-based’.

It is crucial to consider law reform for what it is, especially in the international arena. A process. This means that we should not think only, or immediately, at what the substantive disciplines should emerge from reform. This is the outcome of the process. The suggestion made in these few comments is that the focus and energy should be on how to start and design the process so that it creates the right conditions for possible, future negotiations.

As of now, the conditions for new hard, binding law on subsidies do not seem to be present.⁴³ For this reason, it is difficult to expect meaningful deliberations by Member representatives on subsidy issues. This is particularly true after the Appellate Body invested decisions taken with the Committees with the value of binding law.⁴⁴ Against this scenario, it is difficult to expect government representatives to make statements that could then be held against them in litigation.

There is another dimension to reform than actual deliberation, which is preliminary to actual negotiations and decisions, that of knowledge generation.

What is fundamental, if we accept that the current regulatory framework is not satisfactory and we are serious about the need for change, is to kick-in the process for reform and frame it in the right way. Reform – and their climax: negotiations – if they will ever come, must be duly prepared. You need to have discussions started, and for discussions to be meaningful and advance knowledge and understanding, it is necessary to rely as much as possible on facts and data and on their assessment. The exercise is finalized at assessing the subsidy practices of Members and evaluating their effects and effectiveness. This – it is hoped – could clarify the terms of the debate and facilitate diplomatic discussion and negotiations when the right political conditions are present. In this respect, the use of experts should also be welcomed. The right venues for this process of knowledge generation should be carefully chosen.

Use could be made of the mechanisms that are already ‘built-in’ the SCM Agreement, such as the Group of Experts or the creation of bodies ‘subsidiary’ to the Committee on Subsidies and Countervailing Measures,⁴⁵ or in the WTO at large, for example the Trade Policy Review Mechanism. It is again a matter of rendering devices negotiated and agreed on in the Uruguay Round operational. Alternatively, if it is believed appropriate because it would ensure better

In any event, the two key words should be pragmatism and imagination – the essence of the spirit of the GATT. What is sought for is not a revolution but a thought-of evolution of the system and its disciplines. This is the narrative that should prevail and should re-assure Members, and all relevant stakeholders, that they are in the driving-seat, and that no by-the-back-door coup is ventilated.

⁴² Reform could be achieved in various ways. Rob Howse, n. 17 above, put forward the idea of an interpretative understanding.

⁴³ It remains to be seen whether the recent developments (such as the Bali Ministerial package; Green Goods initiative) can be positive indications of a changing mood and appetite.

⁴⁴ Appellate Body Report, *US – Tuna II*, WT/DS381/AB/R, paras. 373-378.

⁴⁵ See Article 24.2 of the SCM Agreement.

Author contacts:

Luca Rubini

Birmingham Law School

University of Birmingham

Edgbaston

B15 2TT Birmingham, UK

Email: l.rubini@bham.ac.uk