

2014

## Heated Skirmishes in the Solar Sector: Do Solar-PV Feed-In Tariffs Constitute Trade-Related Investment Measures and Subsidies Prohibited under the WTO Regime?

Matthew D'Orsi

*American University Washington College of Law*

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/auilr>



Part of the [International Law Commons](#)

---

### Recommended Citation

D'Orsi, Matthew. "Heated Skirmishes in the Solar Sector: Do Solar-PV Feed-In Tariffs Constitute Trade-Related Investment Measures and Subsidies Prohibited under the WTO Regime?" *American University International Law Review* 29 no. 3 (2014): 673-716.

This Comment or Note is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *American University International Law Review* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact [fbrown@wcl.american.edu](mailto:fbrown@wcl.american.edu).

---

---

**HEATED SKIRMISHES IN THE SOLAR  
SECTOR: DO SOLAR-PV FEED-IN TARIFFS  
CONSTITUTE TRADE-RELATED  
INVESTMENT MEASURES AND SUBSIDIES  
PROHIBITED UNDER THE WTO REGIME?**

MATTHEW D'ORSI\*

I. INTRODUCTION.....	674
II. BACKGROUND .....	678
A. LEGISLATIVE UNDERPINNINGS OF THE ITALIAN FIT PROGRAM .....	679
1. Italian Legislative Decree on Renewable Sources .....	679
2. Fourth Energy Bill .....	682
3. Fifth Energy Bill.....	684
B. THE ONTARIO FIT PROGRAM IN <i>CANADA – MEASURES</i> .....	685
C. THE WTO AGREEMENTS.....	688
1. Articles 1, 2.1, and 2.2 of the TRIMs Agreement .....	688
2. Article III:8(a) of the GATT 1994.....	692
3. Article 1.1 of the SCM Agreement.....	693
4. Articles 3.1(b) and 3.2 of the SCM Agreement.....	695
III. ANALYSIS .....	696
A. TRIMs AGREEMENT AND GATT 1994.....	696
1. The DCR Within the Italian FIT Program Constitutes a TRIM Under Article 1 of the TRIMs Agreement.....	696
2. The DCR in the Italian FIT Program Does Not Qualify for the Exception in Article III:8(a) of the GATT 1994 .....	698
3. The DCR in the Italian FIT Program Is Inconsistent with Article 2.1 of the TRIMs Agreement .....	700
B. SCM AGREEMENT .....	703
1. The Italian FIT Program Satisfies Article 1.1(a)(1)(iii)	

---

\* Matthew is a 2014 J.D. candidate at the Washington College of Law.

of the SCM Agreement.....	703
2. The Italian FIT Program Does Not Satisfy Article	
1.1(b) of the SCM Agreement .....	705
IV. RECOMMENDATIONS .....	711
A. ITALY SHOULD APPEAL TO THE APPELLATE BODY THE	
OUTCOME OF THE PANEL DECISION.....	712
B. ITALY SHOULD ELIMINATE THE DCR COMPONENT OF ITS	
FIT PROGRAM TO ENSURE COMPLIANCE WITH ARTICLE	
III:4 OF THE GATT 1994 AND ARTICLE 2.1 OF THE TRIMs	
AGREEMENT .....	713
C. ITALY SHOULD DISCONTINUE ITS FIT PROGRAM AND	
IMPLEMENT ANOTHER RENEWABLE ENERGY PROGRAM.....	714
V. CONCLUSION.....	715

## I. INTRODUCTION

On November 5, 2012, the Chinese Ministry of Commerce (“China”) submitted a request for consultations (“complaint”) to the World Trade Organization (“WTO”) alleging that Italy’s feed-in-tariff program (“FIT Program” or “FIT”) is inconsistent with Italy’s obligations under three WTO Agreements.<sup>1</sup> First, China has alleged that the Italian FIT Program violates certain provisions of both the 1994 General Agreement on Tariffs and Trade (“GATT 1994”)<sup>2</sup> and the Agreement on Trade-Related Investment Measures (“TRIMs Agreement”) by providing solar-photovoltaic (“solar-PV”) generators and components made in the European Union with an advantage that is unavailable to solar-PV generators and components made outside of the European Union.<sup>3</sup> To substantiate this allegation,

---

1. See Request for Consultations by China, *European Union and Certain Member States – Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS452/1 at 1 (Nov. 5, 2012) [hereinafter Consultations].

2. See generally General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994] (establishing that no measure may impose less favorable treatment upon imported products than that granted to like products of domestic origin).

3. See Consultations, *supra* note 1, at 3 (claiming that the Italian FIT Program violates Article 2.1 of the TRIMs Agreement because those TRIMs provide an advantage to domestic goods unavailable to imported goods). See generally Agreement on Trade-Related Investment Measures, Apr. 15, 1994,

China has pointed to the Fourth and Fifth Italian Energy Bills, in which the Italian legislature agrees to grant ten percent subsidies on electricity produced by solar-PV generators so long as the generators consist of certain components made in the European Union.<sup>4</sup> Second, China has alleged that the Italian FIT Program violates certain provisions of the Agreement on Subsidies and Countervailing Measures (“SCM Agreement”) by providing a prohibited subsidy conditioned upon the use of domestic solar-PV components over imported components.<sup>5</sup> As evidence of this allegation, China has submitted that the Italian Government sets a price, guaranteed for twenty years, at which it purchases the electricity produced by Italian solar-PV generators.<sup>6</sup> China has claimed that Italy’s guaranteed purchase of solar-based electricity confers a “benefit” upon those solar-PV generators because the guaranteed purchase provides more

---

Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 I.L.M. 1153 [hereinafter TRIMs Agreement] (stating that measures requiring the purchase of products of domestic origin are inconsistent with Article III:4 of the GATT 1994). China also alleged that the Italian FIT Program violated the “most-favored-nation” principle enshrined in Article I of the GATT 1994, and the principle disfavoring protectionist measures in Article III:1 of the GATT 1994. Due to the lack of current case law analyzing these principles, however, this comment will focus solely upon the alleged violation of Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement.

4. See Decreto Ministeriale 5 luglio 2012, n. 143, in G.U. 10 luglio 2012, n. 159 (It.), arts. 4(5)(d), 5(2)(a) (stating that solar-PV units whose primary components were made in the European Union or the European Economic Area will receive some degree of priority in determining their eligibility to receive an extra (1) 20 €/MWh if in use by December 31, 2013; (2) 10 €/MWh if in use by December 31, 2014; or (3) 5 €/MWh if in use after December 31, 2014). Decreto Ministeriale 5 maggio 2011, n. 238, in G.U. 12 maggio 2011, n. 109 (It.), art. 14(1)(d) (raising the purchasing price for electricity from solar-PV units by ten percent if at least sixty percent of the total production cost derives from components made in the European Union).

5. See Consultations, *supra* note 1, at 3 (alleging that the Italian FIT Program is prohibited under Articles 3.1(b) and 3.2 of the SCM Agreement because it provides a benefit “contingent upon the use of domestic over imported goods”). See generally Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 I.L.M. 1153, arts. 3.1(b), 3.2 (1994) [hereinafter SCM Agreement] (prohibiting subsidies contingent upon the use of domestic over imported goods).

6. See Consultations, *supra* note 1, at 1 (noting that the issues which China would like to raise in the course of consultations include, but are not limited to, Italy’s Fifth and Fourth Energy Bills). Both the Fifth and Fourth Feed-in Schemes provide that incentives will apply for twenty years. See D.M. n. 143/2012, art. 5.4; D.M. n. 238/2011, art. 12.2.

than adequate remuneration for the electricity that the generators produce, which is prohibited under the SCM Agreement.<sup>7</sup> Italy had sixty days from the date of submission of China's complaint to respond to China's allegations; because the parties have failed to reach an agreement, China may now request that the WTO Dispute Settlement Body establish a panel to review its grievances.<sup>8</sup>

China's complaint to the WTO has important implications for the development of WTO jurisprudence. From a legal standpoint, the complaint raises the question of whether WTO Member States may use policy tools to pursue national human health and environmental initiatives if those initiatives conflict with the free-trade principles of the WTO.<sup>9</sup> A majority of EU Member States have already adopted FIT Programs in pursuit of similar national initiatives;<sup>10</sup> yet, despite the widespread use of FITs, to date, only one WTO case has addressed the consistency of the FIT with the WTO Agreements.<sup>11</sup>

---

7. See SCM Agreement art. 1.1(a)(1)(iii), (b) (establishing that a subsidy exists when a government purchases goods in such a way that confers a "benefit" on the seller).

8. See Understanding on Rules and Procedures Governing the Settlement of Disputes art. 4.7, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU] (stating that the complainant may request that the WTO establish a panel if the parties fail to settle a dispute following sixty-day consultations). See generally *European Union and Certain Member States – Certain Measures Affecting the Renewable Energy Generation Sector*, WTO, [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds452\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds452_e.htm) (last updated Dec. 18, 2012) (listing the dates of the requests for consultations).

9. See M.S. Srikar, *Renewable Energy Programmes in the European Union, Japan, and the United States* 10 (Ctr. for WTO Studies, Working Paper No. 200/4, 2012) (observing that state support of renewable energy policies inconsistent with WTO law represents a source of trade friction).

10. See Conference Report, *8th Workshop of the Int'l Feed-In Cooperation* (Nov. 18–19, 2010), [http://www.feed-in-cooperation.org/wDefault\\_7/content/8th-workshop/index.php](http://www.feed-in-cooperation.org/wDefault_7/content/8th-workshop/index.php) (follow "Conclusions" hyperlink) (stating that twenty-three of twenty-seven EU Member States use FIT programs to incentivize use of renewable energy sources and that nearly 100% of all new solar-PV units since 1997 have been installed in countries using FITs).

11. See Marie Wilke, *Feed-in Tariffs for Renewable Energy and WTO Subsidy Rules: An Initial Legal Review* 1 (Int'l Ctr. for Trade & Sustainable Dev. Programme on Trade and Env't., Issue Paper No. 4, 2011), available at <http://ictsd.org/i/publications/112508/?view=document/> (highlighting that the first complaint addressing the legality of FITs in the WTO was submitted in September 2010 and that the case focused primarily on the domestic content requirement and the subsidy nature of the FIT). See generally Panel Reports, *Canada – Certain*

As other WTO Member States adopt their own FIT Programs,<sup>12</sup> more complaints are likely to follow, and the demand for clear, instructive WTO jurisprudence will only grow.<sup>13</sup> For this reason, legal scholarship evaluating the legality of the FIT Program would provide much-needed direction to WTO Member States as they tailor their FITs to comply with the WTO covered agreements.<sup>14</sup>

Given the unclear legal status of the FIT Program, this comment evaluates and predicts the outcome of the current dispute before the WTO. It explores the manner in which the Italian FIT Program likely violates Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994 by mandating that solar-PV generators use a certain percentage of EU-made solar-PV components to be eligible for an increase in the sale price of the electricity that they produce. The same FIT Program, however, is unlikely to violate Articles 3.1(b) and 3.2 of the SCM Agreement because it may fail to confer a “benefit” upon solar-PV generators as required by Article 1.1(b), and therefore, it will not constitute a subsidy.

Part II of this comment begins by providing an overview of the tariff supplied within the Italian FIT Program through the Renewables Decree and the Fourth and Fifth Italian Energy Bills. This part also reviews *Canada – Measures*, the only case in which a WTO panel has assessed the consistency of a FIT with the WTO covered agreements. Lastly, Part II concludes by defining the

---

*Measures Affecting the Renewable Energy Sector*, WT/DS412/R; *Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS426/R (Dec. 19, 2012) [hereinafter *Canada – Measures* Panel Report], *rev'd in part*, Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*, ¶ 6.1, WT/DS412/AB/R; *Canada – Measures Relating to the Feed-in Tariff Program*, ¶ 6.1, WT/DS426/AB/R (May 6, 2013) [hereinafter *Canada – Measures* Appellate Body Report] (ruling that the Ontario FIT Program is inconsistent with the GATT 1994 and the TRIMs Agreement, but not the SCM Agreement).

12. See Wilke, *supra* note 11, at vi (observing that eighty countries have adopted various measures to support renewable energy production, the most common measure being the FIT).

13. See Srikar, *supra* note 9, at 25, 168–69 (positing that the success of FIT schemes around the world makes renewable-energy-incentive programs a “fertile ground” for WTO litigation by countries like India).

14. Cf. *WTO Rules Ontario Green Energy Tariff Unfair*, CBC NEWS, Nov. 19, 2012, <http://www.cbc.ca/news/canada/story/2012/11/19/wto-green-energy.html> (highlighting that the *Canada – Measures* case is viewed as a trial by governments to favor local producers who promote renewable energy projects).

obligations originating within the relevant articles of the GATT 1994, TRIMs Agreement, and SCM Agreement, which the Panel would apply in the instant dispute.

Part III begins by arguing that the Italian FIT Program likely violates the national treatment obligation of Article III:4 of the GATT 1994 within the scope of Articles 2.1 and 2.2 as well as the Illustrative List of the TRIMs Agreement. Part III also argues, however, that the Italian FIT Program may not confer a “benefit” as defined by Article 1.1(b) of the SCM Agreement because the Italian Government has pared down its FIT Program to provide increasingly less remuneration to solar-PV generation companies in the Italian market.

Part IV recommends that Italy (a) appeal any prospective WTO Panel Decision to the Appellate Body and prepare responses to China’s counterarguments; (b) remove the domestic content requirement from its FIT Program as requested by the WTO; or (c) seek to phase out its FIT Program altogether in search of less costly alternatives. Lastly, Part V concludes that Italy will continue to degress its tariff rates and pare down its FIT Program because of the burden of the FIT on taxpayers and Italy’s sovereign debt crisis.

## II. BACKGROUND

In 2011, Italy was the world’s second largest market for solar-PV energy,<sup>15</sup> behind only Germany.<sup>16</sup> Italy’s prominence in the solar-PV arena only continues to grow, especially now that Italian individuals increasingly purchase small-model solar-PV plants.<sup>17</sup> Italy’s increased production of solar-PV generators has promoted clean,

---

15. See *Photovoltaic Barometer*, EUROBSERV’ER 58 (2013), available at [http://www.energies-renouvelables.org/observ-er/stat\\_baro/observ/baro-jdp9.pdf](http://www.energies-renouvelables.org/observ-er/stat_baro/observ/baro-jdp9.pdf) (calculating that in 2011 Italy added 9303 MWp to its solar-PV capacity, more than any other EU Member State that year).

16. See *id.* at 59 (reporting Italy’s total solar-PV capacity at 12,783 MWp and 16,361 MWp in 2011 and 2012, respectively, with Germany’s capacity at 25,094 MWp and 32,698 MWp for the same years).

17. See *Rapporto Statistico 2011: Solare Fotovoltaico*, GESTORE DEI SERVIZI ENERGETICI 8 (2011), available at <http://www.gse.it/it/Statistiche/RapportiStatistici/Pagine/default.aspx> (follow “Solare Fotovoltaico - Rapporto Statistico 2011” hyperlink) [hereinafter *Italian Solar Generation*] (stating that units with less than 200 kW accounted for ninety-seven percent of total installations and one-third of Italy’s total solar-PV capacity).

renewable energy sources, while also serving to fill the void in electricity supply left by Italy's own rejection of nuclear energy.<sup>18</sup> As one of the largest national economies in the world to renounce nuclear power,<sup>19</sup> Italy has resorted to solar-PV energy through its FIT Program to produce enough electricity to meet its consumption needs.<sup>20</sup> Yet, because the FIT Program allegedly favors the use of domestic components over imported ones, China has argued that the FIT violates certain provisions of the GATT 1994, the TRIMs Agreement, and the SCM Agreement.<sup>21</sup> To grasp the range of China's arguments, this comment begins by establishing a basic understanding of the Italian FIT Program, its legislative and ministerial underpinnings, and its coherence within the framework of the WTO covered agreements.

#### A. LEGISLATIVE UNDERPINNINGS OF THE ITALIAN FIT PROGRAM

##### 1. Italian Legislative Decree on Renewable Sources

On March 3, 2011, the Italian Parliament published Legislative Decree No. 28/2011 ("Decree"),<sup>22</sup> which positioned Italy to reach its

---

18. See Craig Morris, *Italy Rejects Nuclear Power*, RENEWABLES INT'L (June 13, 2011), <http://www.renewablesinternational.net/italy-rejects-nuclear-power/150/537/31171> (reporting that Berlusconi acknowledged that Italy must turn to renewable energy after rejecting nuclear power).

19. See *id.* (reporting that, as of 2011, Italy was the world's largest national economy with a nuclear-free generating capacity and noting that Germany, Austria, and Switzerland are also phasing out nuclear power).

20. See *Statistical Report 2011: Renewable Power Plants in Italy*, GESTORE DEI SERVIZI ENERGETICI, 7 (2011), available at <http://www.gse.it/en/dataandfinancialstatement/Pages/default.aspx> (follow "Download Statistical Report 2011 (pdf)" hyperlink [hereinafter *GSE Report 2011*] (showing that in 2010 and 2011, Italy consumed 342,933 GWh and 346,368 GWh of electricity, respectively, while its actual solar-PV generation jumped from 1906 to 10,266 GWh—a 466.5% increase); see also Stefania Gorgoglione, *The New Italian Legislation on Renewable Energy*, 3 RENEWABLE ENERGY L. & POL'Y 205, 205 (2012) (observing that as of June 2010, Italy met its objective when renewable energy sources accounted for nearly twenty-six percent of total national electricity consumption).

21. Consultations, *supra* note 1, at 3.

22. See *The Renewables Decree: Introduction of a New System of Incentives for Renewable Energy Plants*, MCDERMOTT, WILL & EMERY (Mar. 29, 2011), <http://www.mwe.com/publications/uniEntity.aspx?xpST=PublicationDetail&pub=5468&PublicationTypes=d9093adb-e95d-4f19-819a-f0bb5170ab6d> (announcing that the Decree will replace the previous FIT structure and will take effect on

benchmark for use of renewable energy sources by 2020.<sup>23</sup> The Decree established several incentives to encourage increased production of electricity from solar-PV generators, including (1) a fixed price for the purchase of electricity, independent of market value, to provide owners of generators with a fair return on their investments; (2) twenty-year FIT contracts equal in duration to the lifetime of the generators, under which the Italian Government will purchase the solar-PV-based electricity; (3) a guarantee that the Italian Government will purchase electricity and feed it into the grid; and (4) long-term market stability for investors.<sup>24</sup>

Under the framework of the Decree, the Italian Government utilizes a number of public utilities to execute its FIT Program. Companies such as Italy's largest utility, ENEL S.p.A., and its subsidiary, ENEL Green Power, both of which are publicly owned,<sup>25</sup> develop the technologies and build the solar-PV generators that allow both households and businesses to produce electricity for national consumption.<sup>26</sup> In turn, the public utility company Gestore

---

January 1, 2013). *See generally* Decreto Legislativo 3 marzo 2011, n. 81/L, in G.U. 28 marzo 2011, n. 28 (It.) (implementing EU Directive 2009/28/CE to promote the use of renewable energy).

23. *See* Council Directive 2009/28, 99 Annex I.A, 2009 O.J. (L 140/16) Annex I (EC) (providing that Italy shall increase the share of its total electricity consumption produced by renewable energy sources from 5.2% in 2005 to 17% by 2020).

24. *See* Srikar, *supra* note 9, at 21–22 (detailing how renewable energy producers receive a long-term premium for the electricity they produce and that electric grid utilities are obligated to purchase the electricity to guarantee producers a reasonable return on their investment); *see also* Michael E. Streich, *Green Energy and Green Economy Act, 2009: A "Fit"-ing Policy for North America?*, 33 HOUS. J. INT'L L. 419, 425–26 (2011) (noting that utility companies pay generation companies more than the wholesale price of non-renewable energy to promote the social and environmental benefits of renewable energy and to defray initial investment costs with respect to developing renewable energy projects).

25. *See* *About Us*, ENEL, [http://www.enel.com/en-GB/group/about\\_us/](http://www.enel.com/en-GB/group/about_us/) (last updated June 30, 2013) [hereinafter *About Us*, ENEL] (stating that the Italian Ministry of Economy and Finance holds 31.24% of Enel's shares); *see also* Adam L. Freeman & Flavia Krause Jackson, *Cassa Depositi Given More Time to Sell Enel or Terna Stake*, BLOOMBERG NEWS, Mar. 12, 2009, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a1LMEGqQCUHI> (reporting that the Italian state-backed bank Cassa Depositi e Prestiti owns about ten percent of Enel).

26. *See* *Solar Power*, ENEL GREEN POWER, [http://www.enelgreenpower.com/en-GB/plants/renewable\\_energy/solar/index.aspx](http://www.enelgreenpower.com/en-GB/plants/renewable_energy/solar/index.aspx) (last visited Nov. 15, 2013)

Servizi Energetici (“GSE”)<sup>27</sup> purchases the electricity from the solar-PV generators at a set price per kilowatt hour (“kWh”).<sup>28</sup> ENEL distributes the electricity through an extensive network of transmission and distribution assets,<sup>29</sup> as does the publicly-owned electricity-transmission operator Terna Rete Italia,<sup>30</sup> which controls ninety-eight percent of the national power grid in Italy.<sup>31</sup>

In effect, the FIT Program acts as a purchasing guarantee, for both owners of solar-PV generators and investors.<sup>32</sup> Because GSE is required to purchase electricity generated from solar-PV energy,<sup>33</sup> and the prices that the government sets are generally high,<sup>34</sup> solar-PV

---

(describing how Enel S.p.A. promotes innovation in the field of PV technology, particularly through its subsidiary Enel Green Power Retail).

27. See Statuto del “Gestore dei Servizi Energetici – GSE S.p.A.”, art. 8 (adopted pursuant to Decreto Legislativo 16 marzo 1999, n. 79 (It.)), available at [http://www.gse.it/it/Azienda/GSE\\_Documenti/Azienda/Missione/Documenti/Modello%20organizzativo/Statuto\\_GSE2010.pdf](http://www.gse.it/it/Azienda/GSE_Documenti/Azienda/Missione/Documenti/Modello%20organizzativo/Statuto_GSE2010.pdf) [hereinafter GSE S.p.A.] (providing that the sole owner of GSE is the Ministry of Economy and Finance (“MEF”) and that the MEF exercises its shareholder rights jointly with the Ministry of Economic Development).

28. See *GSE Report 2011*, *supra* note 20, at 53 (stating that GSE purchases electricity from renewable energy sources and then trades and resells the electricity).

29. See *About Us*, ENEL, *supra* note 25 (stating that Enel distributes electricity through a network of 1.9 million km to serve approximately sixty-one million customers).

30. See *About Terna Rete Italia*, TERNA RETE ITALIA, [http://www.ternareteitalia.it/default\\_eng.html](http://www.ternareteitalia.it/default_eng.html) (last visited Nov. 15, 2013) (highlighting that, as a grid management and transmission operator, Terna Rete Italia manages the flow of electricity along 63,500 km of high-voltage lines of the Italian electricity system); see also *Transmitting Energy, Transmitting Values*, TERNA GROUP, <http://www.terna.it/default.aspx?tabid=1778> (last updated July 24, 2013) (reporting that Terna’s major shareholder is Cassa Depositi e Prestiti, with 29.85% of shares).

31. *Terna S.p.A. Company Information*, HOOVERS, [http://www.hoovers.com/company-information/cs/company-profile.Terna\\_SpA.614f1537e7f27283.html](http://www.hoovers.com/company-information/cs/company-profile.Terna_SpA.614f1537e7f27283.html) (last visited Mar. 10, 2013) [hereinafter *Terna S.p.A. Company Information*]; see also *About Terna Rete Italia*, *supra* note 30 (reporting that Terna also manages 468 transforming and switching stations in Italy).

32. See Wilke, *supra* note 11 (conceptualizing the FIT Program as a purchasing guarantee because the electric grid utilities are obligated to purchase electricity from the renewable energy producers, which guarantees the producers a return on their investment).

33. See Streich, *supra* note 24, at 425–26 (stating that FITs require utility companies to purchase electricity from renewable sources at a government-fixed “premium” rate for a guaranteed number of years).

34. See Paul Gipe, *New Italian Tariffs Complex and Robust*, RENEWABLE

generators are guaranteed to receive a return on their investment involving little or no risk.<sup>35</sup> Investors are also more likely to support renewable-energy-generation projects because they, too, will receive a return on their investments.<sup>36</sup> Thus, both generators and investors earn a return, and the Italian Government may further its own policy objectives.<sup>37</sup>

In light of the positive effect of the Decree's incentives on solar-PV generation, China has argued that the incentives play a pivotal role in the effectuation of the FIT Program within Italy.<sup>38</sup> According to Article 25(10), the Italian Government determines its FIT levels according to the incentives provided to solar-PV generators in other EU Member States.<sup>39</sup> China has raised this issue in light of the Decree's role in implementing the Fourth and Fifth Energy Bills.<sup>40</sup>

## 2. Fourth Energy Bill

On May 5, 2011, the Italian Ministry of Economic Development decreed the Fourth Energy Bill,<sup>41</sup> in which it instituted annual

---

ENERGY WORLD (July 9, 2011), <http://www.renewableenergyworld.com/rea/news/article/2011/07/new-italian-tariffs-complex-and-robust-2000-mw-may-be-installed-in-2011> [hereinafter Gipe, *New Italian Tariffs*] (emphasizing that despite reports that the new Italian FIT program dramatically cuts tariffs, the tariffs remain fifty to seventy percent higher than comparative tariffs when adjusted for high levels of sunshine).

35. See Srikar, *supra* note 9, at 23 (stating that guaranteed prices, network connections, and purchases lead to an "almost risk-free contract").

36. See *id.* at 22 (stating that the level and duration of guaranteed support has been crucial to attract investors and to increase exploitation of renewable energy sources).

37. See *id.* at 9 (noting that these objectives include (1) environmental protection; (2) reduction of greenhouse gas emissions and use of nuclear power; (3) enhanced energy supply security; (4) reduced dependence on fossil fuels; and (5) enhanced economic competition and job creation).

38. See Consultations, *supra* note 1, at 1 (alleging that the incentives created by the Decree directly relate to the implementation of the Feed-in Schemes in the Fourth and Fifth Energy Bills).

39. See D.Lgs. n. 28/2011, art. 25.10(b) (providing that a new Feed-in Scheme will determine tariff levels based on reductions in technology costs and the incentives applied by other EU Member States).

40. See Consultations, *supra* note 1, at 2 (advancing that the Renewables Decree incentivizes the production of electrical energy from solar-PV installations).

41. See *Italy Issues Fourth Conto Energia: New Feed-In Tariffs for Production of Photovoltaic Energy in 2011-2016*, MCDERMOTT, WILL & EMERY 7

reductions, or degressions, in the FITs for its new solar-PV generators.<sup>42</sup> The tariff degression provides incentives for technological improvements that lower production costs and minimize the oversupply of electricity fed into the grid.<sup>43</sup> Ultimately, degression allows renewable energy sources to achieve grid-parity with traditional energy sources, rendering future FIT support of renewable energy generators unnecessary.<sup>44</sup>

In terms of its WTO-consistency, however, China has taken issue with Article 14(1)(d) of the Fourth Energy Bill,<sup>45</sup> which states that solar-PV generators will receive a ten-percent increase in the price paid for the electricity they produce, so long as sixty percent of the components used to construct the generators is sourced within the European Union or the European Economic Area.<sup>46</sup> This type of provision, known as a domestic content requirement (“DCR”), supports local producers of solar-PV components.<sup>47</sup> The DCR

---

(2011), available at [www.mwe.com/info/news/wp0511a.pdf](http://www.mwe.com/info/news/wp0511a.pdf) [hereinafter *Italy Issues Fourth Conto Energia*] (indicating that one overall feed-in tariff will apply in the 2013 Fourth Feed-in Scheme, which combines the electricity base price and the premium). See generally D.M. n. 238/2011 (marking Italy’s response to EU Directive 2009/28/CE and to the Renewables Decree); see also *id.* arts. 11.2(a), 15.2(a), 17.2(a) (providing that the Fourth Bill Feed-in Scheme applies to units with a capacity of at least 1 kW commissioned between June 1, 2011 and December 31, 2016).

42. See Arne Klein et al., *Evaluation of Different Feed-in-Tariff Design Options – Best Practice Paper for the International Feed-In Cooperation*, ENERGY ECON. GRP., 40, 43 (2008), [http://www.feed-in-cooperation.org/wDefault\\_7/wDefault\\_7/download-files/research/best\\_practice\\_paper\\_2nd\\_edition\\_final.pdf](http://www.feed-in-cooperation.org/wDefault_7/wDefault_7/download-files/research/best_practice_paper_2nd_edition_final.pdf) (stating that, beginning in 2007, Italy reduced its FITs for electricity from new solar-PV units by two percent annually to balance public support levels and energy costs).

43. See *id.* at 40, 43 (adding that degression incorporates technological learning into renewable energy policy by leading to greater efficiency, transparency, and security for potential investors).

44. See Mark Fulton et al., *FiTs Adjust While Delivering Scale in 2010*, DEUTSCHE BANK CLIMATE CHANGE ADVISORS 2–3, [http://www.dbcca.com/dbcca/EN/\\_media/DBCCA\\_Fit\\_Update\\_20100727.pdf](http://www.dbcca.com/dbcca/EN/_media/DBCCA_Fit_Update_20100727.pdf) (arguing that an FIT with an established degression scheme should allow renewable energy to reach grid-parity with fossil fuels by reducing the cost of capital over time, lowering the price of energy in a transparent way, and easing barriers to entry).

45. See Consultations, *supra* note 1, at 1 (claiming that Article 14(1)(d) incentivizes the use of solar-PV components in contravention of the GATT 1994, the TRIMs Agreement, and the SCM Agreement).

46. See D.M. n. 238/2011, art. 14(1)(d).

47. Cf. Kenina Lee, *An Inherent Conflict Between WTO Law and a*

provides that solar-PV generators that use certain quantities or types of components manufactured in the European Union will qualify for an increase in the wholesale price of the electricity they produce.<sup>48</sup>

### 3. Fifth Energy Bill

On July 5, 2012, the Italian Minister of Economic Development passed the Fifth Energy Bill, which entered into force on August 27, 2012.<sup>49</sup> Like the Fourth Energy Bill, the Fifth Energy Bill instructs GSE to award premiums on top of FITs for generators whose modules and inverters have been manufactured in either the European Union or the European Economic Area.<sup>50</sup> Article 2(1)(v) of the Fifth Energy Bill and GSE's Implementing Rules to the Fifth Energy Bill<sup>51</sup> both specify that solar-PV generators must certify the EU/EEA origin of their components to qualify for the extra premium.<sup>52</sup>

---

*Sustainable Future? Evaluating the Consistency of Canadian and Chinese Renewable Energy Policies with WTO Trade Law*, 24 GEO. INT'L ENVTL. L. REV. 57, 66 (2012) (arguing that compliance with the DCR in the Ontario FIT Program provided manufacturers of solar-PV components with an advantage, such as a set price paid for the electricity that the projects generate).

48. *Italy Issues Fourth Conto Energia*, *supra* note 41, at 2.

49. See *Fifth Feed-In Scheme*, GESTORE SERVIZI ENERGETICI, <http://www.gse.it/en/feedintariff/Photovoltaic/FifthFeed-inScheme/Pages/default.aspx> (last updated Oct. 22, 2012) (stating that the Fifth Bill Feed-in Scheme went into effect on August 27, 2012, but that the Fourth Bill Feed-in Scheme will continue to apply for small solar-PV units commissioned before that date and for large units commissioned within seven months of the relevant ranking list). See generally D.M. n. 143/2012 (phasing out the Fourth Bill Feed-in Scheme and adding new incentives to the FIT).

50. See D.M. n. 143/2012, arts. 4(5)(d), 5(2)(a) (stating that solar-PV generators whose primary components were made in the European Union or European Economic Area will receive an extra (1) 20 €/MWh if in use by December 31, 2013; (2) 10 €/MWh if in use by December 31, 2014; and (3) 5 €/MWh if in use after December 31, 2014).

51. See *Regole Applicative per L'Iscrizione ai Registri e per L'Accesso alle Tariffe Incentivanti DM 5 Luglio 2012 (Quinto Conto Energia)*, GESTORE SERVIZI ENERGETICI, 34 (2012), available at [http://www.gse.it/it/Conto%20Energia/GSE\\_Documenti/Fotovoltaico/03%20Documenti/REGOLE%20APPLICATIVE\\_CE%205\\_07082012.pdf](http://www.gse.it/it/Conto%20Energia/GSE_Documenti/Fotovoltaico/03%20Documenti/REGOLE%20APPLICATIVE_CE%205_07082012.pdf) (noting that various types of modules and inverters used in solar-PV units must be certified using identification codes and serial numbers to determine whether they were manufactured within the European Union or European Economic Area).

52. See D.M. n. 143/2012, art. 2(1)(v) (indicating that the modules and conversion groups must have the typical characteristics of EU/EEA solar-PV

---

---

### B. THE ONTARIO FIT PROGRAM IN CANADA – MEASURES

To evaluate the legality of the Italian FIT Program, this comment applies to the present case the factual and analytical framework from *Canada – Certain Measures Affecting the Renewable Energy Sector* (“*Canada – Measures*”), the only case in which the WTO Dispute Settlement Body has evaluated the legality of an FIT Program.<sup>53</sup> Like the Italian FIT Program, the FIT Program at issue in *Canada – Measures* was a government-run program.<sup>54</sup> The Ontario Power Authority (“OPA”), as a publicly-directed utility,<sup>55</sup> set FIT rates and administered the FIT contracts and twenty-year guarantees for the sale price of electricity that the renewable energy generators produced.<sup>56</sup> The renewable energy generators then entered into a contractual relationship with several groups, including local distribution networks, to ensure that the generators were able to feed their electricity into Ontario’s electricity grid.<sup>57</sup> As a public company,<sup>58</sup> Hydro One then operated the distribution networks, worked with other local distribution companies to connect the generator to the network and manage the feed-in process, and sold the electricity to consumers.<sup>59</sup> Once the consumers received

---

modules and conversion groups).

53. See also Wilke, *supra* note 11, at vi (highlighting that the *Canada – Measures* case analyzes the legality of the DCR as a protectionist measure and the FIT Program as a subsidy).

54. See Streich, *supra* note 24, at 434–35 (stating that Ontario’s FIT Program standardizes rules, regulations, contractual provisions, and electricity prices to facilitate the development of renewable electricity generation).

55. See *Canada – Measures* Panel Report, *supra* note 11, ¶ 7.195 (stating that the OPA, acting under the authority of the Electricity Act and the Green Energy and Green Economy Act, launched the FIT Program at the direction of the Ontario Minister of Energy).

56. See *id.* ¶¶ 7.64–7.65 (finding that the OPA sets twenty or forty-year contracts and pays a set price per kWh of electricity fed into the Ontario electricity system); see also Wilke, *supra* note 11, at 3 (adding that the OPA handles the development and administration of the program, which includes price-setting and contract administration).

57. Wilke, *supra* note 11, at 4.

58. See *Canada – Measures* Panel Report, *supra* note 11, ¶ 7.34 (noting that Hydro One, a Crown Corporation owned one-hundred percent by the Ontario Government, holds and operates ninety-seven percent of the transmission and distribution systems).

59. See *id.* ¶¶ 7.147, 7.149 (establishing that Hydro One distributes the electricity to almost one-third of the consumers in Ontario and was designed by the Ontarian Government to make returns from its electricity transmission and

electricity, the Government of Ontario then paid the FIT rates to the generators on the basis of the contracts that the OPA established.<sup>60</sup>

On the Government's behalf, the OPA used the FIT Program to jumpstart green industries, reduce emissions, promote job creation, and create a diverse mix of energy supply—particularly as Ontarians had decided to close several coal-fired power generators.<sup>61</sup> To secure these objectives, the Government of Ontario instituted a “Minimum Required Domestic Content Level,”<sup>62</sup> a DCR that requires at least sixty percent of the components used in renewable-energy generators participating in the FIT to be sourced from Ontario.<sup>63</sup> The facilities that failed to meet the DCR defaulted on their contractual obligations and were no longer able to qualify for the FIT Program.<sup>64</sup>

When the panel ruled on the legality of the Ontario FIT Program, it found that the DCR violated Article 2.1 of the TRIMs Agreement, as well as the national treatment obligation in Article III:4 of the GATT 1994, by mandating that Ontarian generators use components sourced from Canada to gain the advantage associated with the FIT Program.<sup>65</sup> The panel also found that the Ontario FIT Program did not constitute a subsidy because the complainants failed to prove that the FIT Program conferred a “benefit” onto owners of solar-PV generators under Article 1.1(b) of the SCM Agreement.<sup>66</sup> On appeal,

---

distribution); *see also* Wilke, *supra* note 11, at 4 (stating that local distribution companies and transmission asset-owners work with electricity producers to connect to the network and manage the feed-in program).

60. *See* Wilke, *supra* note 11, at 3 (elaborating that the FIT premiums are paid on the basis of the supplier contract between OPA and the providers).

61. *Canada – Measures* Panel Report, *supra* note 11, ¶ 7.65.

62. *See id.* ¶ 7.161 (listing the various FIT and microFIT contracts and their respective domestic content requirements).

63. *Id.* ¶¶ 7.158–7.161 (providing an overview of the Japanese position on the DCR).

64. *See id.* ¶¶ 7.164–7.166 (determining that the “Minimum Required Domestic Content Level” is a “necessary condition and prerequisite” for an electricity producer to participate in the FIT Program and that failure to meet the required content level renders the producer in breach of its contractual obligations).

65. *See id.* ¶ 7.166 (finding that the “Minimum Required Domestic Content Level” violated Article 2.1 of the TRIMs Agreement and Article III:4 of GATT 1994 because (1) it involved the purchase or use of components from a domestic source, Canada, within the meaning of Paragraph 1(a) of the Illustrative List; and (2) compliance with the DCR was necessary to participate in the FIT Program, an advantage within the meaning of Paragraph 1(a)).

66. *See id.* ¶¶ 7.312, 7.328 (finding that the Ontario FIT Program did not

the Appellate Body upheld the panel's finding concerning the inconsistency of the DCR with the provisions of the GATT 1994 and the TRIMs Agreement<sup>67</sup> but overturned the panel's finding that the Ontario FIT did not confer a "benefit" under Article 1.1(b).<sup>68</sup> *Canada – Measures* is not binding upon future panels because the WTO does not adhere to *stare decisis*; nevertheless, the success of the WTO dispute settlement system hinges upon adherence to the provisions in the covered agreements as interpreted by prior panels and the Appellate Body.<sup>69</sup> Because of the unique nature of the panel's and Appellate Body's analysis in *Canada – Measures*,<sup>70</sup> this Comment uses the *Canada – Measures* dispute as a guide in evaluating whether the Italian FIT Program violates the WTO covered agreements. Like Japan and the European Union in *Canada – Measures*, China has challenged the FIT DCR under Article III:4 of GATT 1994 and Article 2.1 of the TRIMs Agreement,<sup>71</sup> as well as the FIT support

---

constitute a subsidy because it did not confer a "benefit" within the meaning of Article 1.1(b), particularly given the fundamental role of electricity in modern life, the failure of wholesale electricity markets to attract sufficient investment, and the below-market price for electricity produced from renewable energy sources).

67. *Canada – Measures* Appellate Body Report, *supra* note 11, ¶ 6.1(b)(v) (finding, with respect to the case of Japan, that the FIT Program is not covered by Article III:8(a) of the GATT 1994 and that, as a result, the panel's conclusion that the Minimum Required Domestic Content Levels prescribed under the FIT Program are inconsistent with Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994 stands).

68. *Id.* ¶¶ 5.219–5.220.

69. See Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 108–09, WT/DS58/AB/RW (Oct. 22, 2001) (explaining that panels and the Appellate Body are influenced—though not formally bound—by previous Dispute Settlement Body decisions); Panel Report, *Japan – Taxes on Alcoholic Beverages*, ¶ 6.10, WT/DS8/R (July 11, 1996) (acknowledging that GATT and WTO panel reports create legitimate expectations among WTO Members and, therefore, should be taken into account where they are relevant to any dispute); see also Panel Report, *United States – Continued Existence and Application of Zeroing Methodology*, ¶¶ 7.93, 7.175, WT/350/R (Oct. 1, 2008) (noting Norway's argument that even though panels are not bound by previous findings of the Appellate Body, predictability and stability require that rules be interpreted consistently to build on previous decisions and to avoid unconsidered departures from previous interpretations).

70. See *Canada – Measures* Panel Report, *supra* note 11, ¶ 7.122 (noting that *Canada – Measures* is the first case in which a panel has been asked to interpret and apply Article III:8(a) of the GATT 1994).

71. See Consultations, *supra* note 1, at 3 (arguing that, under Article III:4 of the GATT 1994, the FIT DCR grants less favorable treatment to like products of imported origin than to domestic origin, and that under Articles 2.1 and 2.2 of the

network for renewable energy sources under Articles 3.1(b) and 3.2 of the SCM Agreement.<sup>72</sup>

### C. THE WTO AGREEMENTS

#### *1. Articles 1, 2.1, and 2.2 of the TRIMs Agreement*

Under Article 1 of the TRIMs Agreement, the WTO defines TRIMs as “investment measures related to trade in goods only.”<sup>73</sup> For the Italian FIT DCR to constitute a TRIM, it would need to encourage investment in the production of solar-PV generation components<sup>74</sup> and favor the components sourced from the European Union or the European Economic Area over those imported from abroad.<sup>75</sup> Evidence of favorable treatment includes companies either moving to Italy and other EU/EEA Member States to take advantage of the DCR or remaining in Italy and renewing their focus in renewable energy generation.<sup>76</sup>

If the prospective WTO Panel determines that the Italian FIT DCR constitutes a TRIM, it will likely analyze Article 2.1 of the TRIMs Agreement in making its determination.<sup>77</sup> According to Article 2.1, no WTO Member may apply any TRIM that violates Article III of the GATT 1994.<sup>78</sup> Under the national treatment obligation of Article

---

TRIMs Agreement, the FIT DCR requires the purchase of domestic goods over imported goods to obtain an advantage).

72. *See id.* (arguing that under Articles 3.1(b) and 3.2 of the SCM Agreement, the Italian FIT Program constitutes a prohibited subsidy that favors the use of domestic over imported goods).

73. TRIMs Agreement art. 1.

74. *See Canada – Measures* Panel Report, *supra* note 11, ¶¶ 7.109–7.110 (noting that the Ontario FIT Program encouraged investment in the local production of renewable-energy-generation components and motivated manufacturers to build local facilities for the production of such components).

75. *See id.* (finding that the DCR in the Ontario FIT Program constituted a TRIM because it favored Ontario-made components over imported ones, and WTO jurisprudence has found that DCRs always favor the use of domestic products over imported products, thereby affecting trade).

76. *See id.* ¶ 7.110 (citing contract documents, movement of companies to Ontario, and prior WTO jurisprudence as evidence that the Ontario FIT DCR favored the use of domestic products over imported products).

77. *See id.* ¶ 7.112 (moving to an analysis of Articles 2.1 and 2.2 after concluding that the Ontario DCR constituted a TRIM).

78. TRIMs Agreement art. 2.1. *See generally* GATT 1994, art. III:4 (describing the national treatment obligation as the mandate that foreign products

III:4, a solar-PV component imported from abroad must receive treatment no less favorable than that accorded to “like [EU solar-PV-component] products” with respect to all available incentives.<sup>79</sup>

To support its analysis of Article 2.1, the prospective WTO Panel will likely evaluate Article 2.2 of the TRIMs Agreement to determine whether the Italian FIT DCR violates both the national treatment obligation in the GATT 1994 and the obligations within the TRIMs Agreement. Article 2.2 indicates that the Annex to the TRIMs Agreement provides an Illustrative List of TRIMs that also violate the national treatment obligation under Article III:4 of the GATT 1994.<sup>80</sup> Under Paragraph 1(a) of the Illustrative List, the TRIMs must require, *inter alia*, that an enterprise purchase or use products either of domestic origin or from a domestic source.<sup>81</sup> The chapeau to the Illustrative List also defines as violative of the national treatment obligation those TRIMs for which compliance “is necessary to obtain an advantage” or those TRIMs that “are mandatory or enforceable under domestic or administrative rulings.”<sup>82</sup>

Applying the relevant provisions in the Illustrative List to the facts in the present dispute, the Panel would have to determine whether the price advantage for solar-PV generators under the Italian FIT DCR is contingent upon sourcing components from the European Union or the European Economic Area. If the DCR maintains this sourcing requirement, then the Panel would likely find that the FIT DCR provides a preferential advantage to solar-PV component producers that violates both the national treatment obligation of Article III:4 of

---

be accorded “treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations, and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use”).

79. See Wilke, *supra* note 11, at 10 (recognizing the argument that “governmentally imposed FIT-linked local content requirements pose an incentive to purchase locally produced goods to profit from the programme,” thereby unfairly discriminating against domestic products).

80. TRIMs Agreement art. 2.2; see *Canada – Measures* Panel Report, *supra* note 11, ¶¶ 7.119–7.120 (stating that when a measure violates the national treatment obligation in Article III:4, and the measure has the traits described in Paragraph 1(a) of the Illustrative List in Annex 1 of the TRIMs Agreement, the same measure will violate both Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement).

81. TRIMs Agreement Annex, para. 1(a).

82. *Id.* Annex, para. 1.

the GATT 1994 and Article 2.1 of the TRIMs Agreement.<sup>83</sup> Under the national treatment obligation, the FIT DCR would provide less favorable treatment to imported components than to like components of European origin, and under the TRIMs Agreement, the FIT DCR would upset the competitive relationship between European components and imported components.<sup>84</sup>

In its complexity, the analysis that the Panel adopts from *Canada – Measures* goes beyond the traditional analysis undertaken in Article III:4 cases because it assesses violations of the national treatment obligation through the lens of the Illustrative List in Annex 1 to the TRIMs Agreement.<sup>85</sup> Normally, the Panel would need to determine whether domestic and imported products are “like products” in an analysis of Article III:4; however, as the panel recognized in *Canada – Measures*, domestic and imported products may be treated as “like products” where the origin of the products is the only differentiating factor.<sup>86</sup> Furthermore, through its Illustrative

---

83. Cf. Lee, *supra* note 47, at 62 (stating that Article III aims to protect the expectations of WTO Members in a competitive relationship between imported products and like products of national origin, and that incentives or advantages granted to like products of national origin would upset that competitive relationship).

84. See *Canada – Measures* Panel Report, *supra* note 11, ¶¶ 7.155–7.157 (stating that if the Ontario FIT Program’s “Minimum Required Domestic Content Level” requires electricity generators to use renewable energy generation components of Canadian origin and is necessary to obtain an advantage under the TRIMs Agreement, it will also violate Article III:4 of the GATT 1994).

85. Compare Srikar, *supra* note 9, at 41 (stating that in an analysis of a measure’s consistency with Article III:4, WTO panels have looked to (1) whether the imported products affected by the measure are “like” products of national origin; and (2) whether the regulatory distinction between the two products results in less favorable treatment of imports), and Lee, *supra* note 47, at 63 (endorsing the “like products” test as the proper methodology for determining whether the DCR of the Ontario FIT Program violated Article III:4 of the GATT 1994), with *Canada – Measures* Panel Report, *supra* note 11, ¶ 7.157 (resorting to the language of the Illustrative List to determine (i) whether the domestic content requirement applied under the FIT Program requires electricity generators using solar-PV and wind power technology to purchase or use renewable energy generation components sourced within Canada; and (ii) whether compliance with the domestic content requirement is necessary to obtain an “advantage”).

86. Lee, *supra* note 47, at 64 (citing Panel Report, *India - Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R (Dec. 21, 2001)); cf. Appellate Body Report, *European Communities – Measures Affecting Asbestos and Containing Asbestos*, ¶ 101, WT/DS135/AB/R (Mar. 12, 2001) (noting that several panels and the Appellate Body have outlined four general criteria to

List in Paragraph 1 of the Annex to the Agreement, the TRIMs Agreement provides a list of the types of measures that would provide less favorable treatment to imported products than to domestic products under Article III:4 of the GATT 1994.<sup>87</sup> As a result, panels have the discretion to determine that a separate analysis of the DCR under Article III:4 is unnecessary after initially examining Articles 2.1 and 2.2 of the TRIMs Agreement.<sup>88</sup>

consider in tandem when analyzing the “likeness” of domestic and imported products: the properties, nature, and quality of the products; the end-uses of the products; consumers’ tastes and habits; and, the tariff classification of the products).

87. See Panel Report, *India – Measures Affecting the Automotive Sector*, ¶ 7.157, WT/DS146/R (Dec. 21, 2001) [hereinafter *India Automotive Sector Panel Report*] (acknowledging that the TRIMs Agreement, through its Illustrative List, both provides additional guidance on the identification of certain measures deemed to be inconsistent with Article III:4 of the GATT 1994 and introduces rights and obligations that are specific to it, through its notification mechanism and related provisions); see also *Chapter 8: Trade-Related Investment Measures*, JAPANESE MINISTRY OF ECON., TRADE AND INDUS., available at <http://www.meti.go.jp/english/report/data/gCT9908e.html> (last visited Nov. 21, 2013) (noting that examples of TRIMs restrictions include local content requirements, manufacturing requirements, trade-balancing requirements, domestic-sales requirements, technology-transfer requirements, export-performance requirements, local equity restrictions, foreign exchange restrictions, remittance restrictions, licensing requirements, and employment restrictions).

88. See, e.g., *Canada – Measures* Appellate Body Report, *supra* note 11, ¶¶ 5.93–5.95 (finding that a secondary analysis under Article III:4 of the GATT 1994 would only be necessary where the panel provided a “partial resolution of the matter at issue,” or that an additional finding with respect to a stand-alone Article III:4 claim “is necessary so as to allow for prompt compliance” or would compel the panel to request different types of relief); Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, ¶ 14.93, WT/DS54/R (July 2, 1998) [hereinafter *Indonesia – Automobile Industry Panel Report*] (finding, pursuant to principles of judicial economy, that the Panel may address claims related to the local content requirement under the TRIMs Agreement without analyzing Article III:4 of the GATT 1994 because (1) any local content requirement that is inconsistent with the TRIMs Agreement would also violate the national treatment obligation of Article III:4 of the GATT 1994; (2) the TRIMs Agreement is more specific than Article III:4 of the GATT 1994 with respect to violations of local content requirements; and (3) any action taken to remedy the inconsistencies of the local content requirement under the TRIMs Agreement would also remedy its inconsistencies with Article III:4 of the GATT 1994). *But see, e.g.*, Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, ¶¶ 10.63–10.64, WT/DS139/R, WT/DS142/R (Feb. 11, 2000) (opting to examine under Article III:4 of the GATT 1994 a measure mandating that automobiles manufactured in Canada contain certain levels of Canadian value added after finding that the TRIMs Agreement is not more specific than Article III:4 regarding the claims of

Prior to addressing whether the DCR violates Article 2.1 of the TRIMs Agreement, the Panel must first address the exception provided in Article III:8(a) of GATT 1994.<sup>89</sup> If the DCR meets that exception, the WTO will likely excuse violations of Article III of the GATT 1994, and by extension, Article 2.1 of the TRIMs Agreement.<sup>90</sup>

## 2. Article III:8(a) of the GATT 1994

According to Article III:8(a), the provisions of Article III of the GATT 1994 do not apply to “laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.”<sup>91</sup> In *Canada – Measures*, the panel engaged in a three-step analysis of Article III:8(a) to determine whether a DCR in the Ontario FIT Program constituted government procurement, and it held that the program did not fall within the government-procurement exception.<sup>92</sup>

For the prospective WTO Panel to undertake the same analysis, it

---

discrimination asserted by complainants); India Automotive Sector Panel Report, *supra* note 87, ¶ 7.157 (choosing to apply Article III:4 of the GATT 1994 to the Indian trade-related investment measures after finding that the TRIMs Agreement was not necessarily more specific than Article III:4, as it may simply provide additional guidance as to which measures are inconsistent with Article III:4).

89. See *Canada – Measures* Panel Report, *supra* note 11, ¶¶ 7.114, 7.118 (noting that government procurement transactions covered by the terms of Article III:8(a) will be consistent with Article 2.1 of the TRIMs Agreement because Article 2.1 of the TRIMs Agreement refers to the “provisions of Article III,” which include Article III:8(a)).

90. See *id.* ¶ 7.118 (clarifying that any government procurement transactions covered by the terms of Article III:8(a) of the GATT 1994 will be excepted from the obligations set forth both in Article III, which includes Article III:4, and Article 2.1 of the TRIMs Agreement).

91. GATT 1994 art. III:8(a); *cf.* Wilke, *supra* note 11, at 12 (opining that governments may discriminate against WTO Members notwithstanding the TRIMs Agreement and Article III of GATT 1994 if FITs constitute “government procurement”).

92. See *Canada – Measures* Panel Report, *supra* note 11, ¶¶ 7.122–7.124, 7.129, 7.146–7.147 (asking whether (1) the DCR may be characterized as a measure governing procurement; (2) the challenged measure involved procurement by governmental agencies; and (3) the governmental agencies undertook the procurement for governmental purposes and not for commercial resale).

must first specify which products will be subject to government procurement and the nature of the market relationship between those products. In a case where the Panel compares two sets of products—namely solar-PV generation equipment and electricity—those products must have a competitive relationship in the relevant market.<sup>93</sup> Here, the solar-PV generation equipment is the product of foreign origin against which Italy has discriminated in its DCR, and electricity is the product that the Italian Government will attempt to procure.<sup>94</sup> Absent a competitive relationship between these two products, the discrimination against generation equipment contained in the FIT Program would not fall within the scope of Article III:8(a) of the GATT 1994.<sup>95</sup> In such a case, the Panel would return to an analysis of Article 2.1, Article 2.2, and Paragraph 1(a) of the Annex to the TRIMs Agreement.<sup>96</sup>

### 3. Article 1.1 of the SCM Agreement

In its complaint before the WTO, China also has alleged that the Italian FIT Program violates Articles 3.1(b) and 3.2 of the SCM Agreement as a prohibited subsidy.<sup>97</sup> Before China may resort to Articles 3.1(b) and 3.2, however, it must first establish the existence of a subsidy.<sup>98</sup> Article 1.1(a)(1) of the SCM Agreement provides that

---

93. See *Canada – Measures* Appellate Body Report, *supra* note 11, ¶¶ 5.76, 5.79 (emphasizing that the relationship between the product of foreign origin that is the target of discrimination (renewable energy generation equipment) and the product purchased by the Ontario Government (electricity) must be competitive, not merely close as the Panel Report suggested).

94. See *id.* ¶¶ 5.79–5.84 (noting the difference between the product subject to the Ontario DCR—the renewable energy generation equipment—and the product procured by the Ontario government—electricity).

95. See *id.* ¶¶ 5.78–5.84 (reversing the panel’s findings that a DCR is a law, regulation, or requirement governing the procurement by governmental agencies of electricity under Article III:8(a) because the product of foreign origin that is the subject of discrimination and the product purchased must have a competitive relationship).

96. See *Canada – Measures* Panel Report, *supra* note 11, ¶ 7.155 (moving to an analysis of the compatibility of the “Minimum Required Domestic Content Level” with Article III:4 of the GATT 1994 subject to the obligations in Articles 2.1 and 2.2 and the Illustrative List in the TRIMs Agreement after finding that the DCR failed to meet the criteria in Article III:8(a)).

97. See Consultations, *supra* note 1, at 3 (arguing that the FIT Program satisfies the definition of a subsidy under Article 1.1 of the SCM Agreement because it is contingent upon the use of domestic over imported goods).

98. See *id.* (claiming that the FIT measures that violate Articles 3.1(b) and 3.2

a subsidy exists where a government or public body makes a financial contribution within the territory of a Member State such that, *inter alia*, the government purchases goods.<sup>99</sup> Additionally, pursuant to Article 1.1(b), the financial contribution must also confer a “benefit” upon the recipient.<sup>100</sup> A “benefit” exists in the context of Article 1.1(b) when it provides an advantage to its recipient; the existence of any quantifiable advantage is determined by “comparing the position of the recipient in the marketplace with and without the financial contribution.”<sup>101</sup> To provide context for Article 1.1(b),<sup>102</sup> the Panel likely would look to Article 14(d) of the SCM Agreement, which provides that measures governing the purchase of goods do not constitute a “benefit” unless the purchase of the goods is made for more than adequate remuneration.<sup>103</sup> Indeed, previous WTO panels have determined that a financial contribution will confer a “benefit” only where the government provides it on more favorable terms than those available to the recipient in the market.<sup>104</sup>

---

of the SCM Agreement are subsidies within the meaning of Article 1.1). *See generally* SCM Agreement art. 1.1 (outlining the conditions in which a financial contribution constitutes a subsidy and confers a benefit).

99. SCM Agreement art. 1.1(a)(1)(iii) (stating that a subsidy is deemed to exist where the government, either in its own capacity or through another agency, purchases goods).

100. *Id.* art. 1.1(b).

101. *See Canada – Measures* Appellate Body Report, *supra* note 11, ¶ 5.148.

102. *See id.* ¶¶ 5.163, 5.165 (concurring with the panel’s choice to read Article 14(d) for useful context for the interpretation of “benefit” under Article 1.1(b), even though Article 14(d) is in Part V of the SCM Agreement).

103. SCM Agreement art. 14(d) (stating that the governmental purchase of goods does not confer a “benefit” unless the purchase is made for more than adequate remuneration, determined in light of marketability, prevailing market conditions for the good in the country, and price conditions); *see also Canada – Measures* Panel Report, *supra* note 11, ¶¶ 7.271–7.272 (explaining the legal significance of Article 14(d)).

104. *E.g.*, Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, ¶ 9.112, WT/DS70/R (Apr. 14, 1999) [hereinafter *Canada – Civilian Aircraft* Panel Report] (reasoning that a financial contribution confers a “benefit” only if provided on terms more advantageous than otherwise available in the open market); Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft – Second Complaint*, ¶ 7.475, WT/DS353/R (Mar. 31, 2011) (finding it “well-established” that to confer a “benefit” within the meaning of Article 1.1(b) of the SCM agreement, the terms of the financial contribution must be more favorable than those otherwise generally available).

#### 4. Articles 3.1(b) and 3.2 of the SCM Agreement

Provided that China can prove the existence of a subsidy, the WTO Panel would then turn to an analysis of Articles 3.1(b) and 3.2. Under Article 3.1(b), subsidies contingent upon the use of domestic over imported goods are strictly prohibited.<sup>105</sup> Article 3.2 simply reiterates this rule as a cornerstone of the SCM Agreement.<sup>106</sup> Under the force of these two articles, the SCM Agreement regulates subsidies to ensure that they do not create adverse effects in the markets of WTO Member States.<sup>107</sup> Indeed, previous panels have stated that the object and purpose of the SCM Agreement is to curtail specifically those subsidies that are designed to distort international trade.<sup>108</sup> Therefore, an FIT would likely constitute a subsidy program under Articles 1.1(b) and 14(d) if it provides for the sale of solar-based electricity terms that are more favorable than those present in the market.<sup>109</sup> To determine whether the terms granted in the FIT Program are more favorable, the Panel must find an appropriate benchmark within the market with which to compare the FIT Program.<sup>110</sup>

---

105. See SCM Agreement art. 3.1(b).

106. *Id.* art. 3.2 (stating that no Member shall grant or maintain prohibited subsidies).

107. *Id.* arts. 5–6; see also Wilke, *supra* note 11, at 9 (indicating that adverse effects exist for purposes of Article 5 of the SCM Agreement in the following scenarios: (i) injury to the domestic industry of a WTO Member State; (ii) nullification or impairment of benefits accruing directly or indirectly to other members; or (iii) serious prejudice to the interests of another member).

108. E.g., Panel Report, *United States – Measures Treating Export Restraints as Subsidies*, ¶ 8.63, WT/DS194/R (June 29, 2001); Panel Report, *Brazil – Export Financing Programme for Aircraft*, ¶ 7.26, WT/DS46/R (Apr. 14, 1999); *Canada – Civilian Aircraft* Panel Report, *supra* note 104, ¶ 9.119.

109. See Vidhi R. Shah, Comment, *The Allocation of Free Emissions Allowances by Germany to Its Steel Industry: A Possible Subsidy Claim Under the W.T.O. Agreement on Subsidies and Countervailing Measures*, 22 AM. U. INT'L L. REV. 445, 463–64 (2007) (noting that when a financial contribution provides a “benefit,” it distorts trade, and a panel will identify this distortion by determining whether the industry received the financial contribution on terms more favorable than those available to the recipient in the market).

110. *Id.* at 465 (citing Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, ¶¶ 149–61, WT/DS70/AB/R (Aug. 2, 1999)) (restating the Appellate Body’s view that “the marketplace provides an appropriate basis for comparison in determining whether a ‘benefit’ has been ‘conferred’”).

### III. ANALYSIS

If a WTO panel is established, it would likely find that the Italian FIT DCR violates the TRIMs Agreement because it requires that owners of solar-PV generators purchase or use components from the European Union or the European Economic Area to become eligible for an advantage that is otherwise unavailable to them.<sup>111</sup> Italy likely will claim that its FIT DCR qualifies as government procurement under Article III:8(a), but because the product procured (solar-based electricity) does not maintain a competitive relationship with the products subject to discrimination (solar-PV generation equipment), Article III:8(a) likely will not exempt the Italian FIT DCR from scrutiny under Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement.<sup>112</sup> Even though the Panel might find that the FIT DCR violates the provisions of the TRIMs Agreement and the GATT 1994, the Italian FIT Program may not violate the SCM Agreement because it does not necessarily confer a “benefit” upon solar-PV generators.<sup>113</sup>

#### A. TRIMs AGREEMENT AND GATT 1994

##### *1. The DCR Within the Italian FIT Program Constitutes a TRIM Under Article 1 of the TRIMs Agreement*

As stated previously, the WTO defines a TRIM as an investment measure related to trade in goods only.<sup>114</sup> When analyzing the DCR most analogous to that in the Italian FIT Program, the panel in *Canada – Measures* found that the Ontario FIT Program affected trade in the local production of renewable-energy-generation components by overtly favoring Ontario products over imported

---

111. See discussion *infra* Part III.A (explaining that the DCR within the FIT Program constitutes a regulation that solar-PV generation companies that purchase components manufactured in either the European Union or the European Economic Area will receive an increase in the sale price of electricity and, because this regulation does not extend to like imports, it provides an advantage to European-based components).

112. See discussion *infra* Part III.B.

113. See *id.* (postulating that, under Article 1.1(b) of the SCM Agreement, the Italian FIT Program may not confer a “benefit” upon solar-PV generators because tariff degression and other measures will bring solar-PV generators to grid-parity in the near future).

114. TRIMs Agreement art. 1.

ones.<sup>115</sup> To this extent, several companies either built or planned to build manufacturing plants in Ontario to take advantage of its FIT Program.<sup>116</sup>

Much like the Ontario FIT Program, the Italian FIT Program encourages significant investment in the local production of solar-PV generator components.<sup>117</sup> At least some manufacturers in Italy have renewed their focus on the production of renewable energy technologies,<sup>118</sup> and some have built generators, either in Italy or other EU Member States, to take advantage of the price increase available to manufacturers that source components domestically.<sup>119</sup> Because the Italian FIT DCR encourages investment in the local production of solar-PV components, it is also a TRIM under Article 1 of the TRIMs Agreement.<sup>120</sup>

---

115. See *Canada – Measures* Panel Report, *supra* note 11, ¶ 7.111 (recalling the Panel’s earlier decision in *Indonesia – Automobile Industry*, where it held that DCRs, by design and definition, always favor domestic products over imported products, which impacts trade); *cf.* Lee, *supra* note 47, at 59 (stating that the OPA included the DCR so that Ontario manufacturers would be able to participate in the economic benefits flowing from the program).

116. See *Canada – Measures* Panel Report, *supra* note 11, ¶ 7.110 (noting that Siemens has become a local manufacturer in Ontario and that ENERCON will build a manufacturing plant in Ontario).

117. See *Solar Power*, *supra* note 26 (announcing a venture between Enel Green Power, Sharp, and STMicroelectronics that includes the manufacture of solar-PV panels at the largest PV production plant at a national level, one of the largest of its kind in Europe); *cf.* *Indonesia – Automobile Industry* Panel Report, *supra* note 88, ¶ 6.4 (finding that Indonesian car programs constitute investment measures because they have plainly stated investment objectives aimed at encouraging the development of local manufacturing capability for completed motor vehicles, car parts, and car components in Indonesia, and have had a significant impact on investment in the automobile manufacturing sector).

118. See *Solar Power*, *supra* note 26 (reporting that Enel Green Power and Sharp Solar Energy have agreed to develop, build, and manage solar-PV plants in Europe using the panels manufactured in Catania, Italy).

119. See, e.g., *SunPower Builds Italy’s Largest Solar Power Plant in Montalto di Castro*, SUNPOWER, [http://us.sunpowercorp.com/power-plant/success-stories/development-approach/?relType=SP\\_Content\\_C&relID=1293430111928](http://us.sunpowercorp.com/power-plant/success-stories/development-approach/?relType=SP_Content_C&relID=1293430111928) (last visited Nov. 10, 2013) (announcing that SunRay constructed the largest solar-PV plant in Italy to date); *First Solar ‘Made in EU’ Stamp Comes with Discount*, CNET (Sept. 1, 2011), [http://news.cnet.com/8301-11128\\_3-20100430-54/first-solar-made-in-eu-stamp-comes-with-discount/](http://news.cnet.com/8301-11128_3-20100430-54/first-solar-made-in-eu-stamp-comes-with-discount/) (reporting that First Solar has received the right to use “Made in EU” or “Made in Europe” on its thin-film solar panels made in Germany).

120. See *Indonesia – Automobile Industry* Panel Report, *supra* note 88, ¶¶ 14.82–14.83 (stating that the local content requirements affect trade because local

Before proceeding to an analysis of Articles 2.1 and 2.2, however, the Panel will need to determine whether the DCR qualifies for the government-procurement exception under Article III:8(a) of the GATT 1994.<sup>121</sup>

*2. The DCR in the Italian FIT Program Does Not Qualify for the Exception in Article III:8(a) of the GATT 1994*

For the Italian FIT DCR to qualify for the exception in Article III:8(a), the Panel would have to find that the product of foreign origin against which the DCR discriminates (solar-PV generation equipment) maintains a competitive market relationship with the product procured by the Italian Government (solar-based electricity).<sup>122</sup> Without this competitive relationship, the DCR will not fall within the scope of Article III:8(a), and it likely will violate Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement.<sup>123</sup>

Like the generation equipment against which the Ontario DCR discriminated, the generation equipment against which the Italian DCR discriminates does not maintain a competitive relationship with the electricity procured by the Italian Government. In *Canada – Measures*, the panel found that the Ontario DCR was a “necessary condition and prerequisite” governing the procurement of electricity because the Ontario Government purchased the electricity, produced by renewable energy generators under the FIT Program, only if sixty percent of the components used in the generators were sourced from

---

content requirements, by definition, always affect trade and favor the use of domestic products over imported products).

121. See *Canada – Measures* Panel Report, *supra* note 11, ¶ 7.122 (undertaking an analysis of Article III:8(a) of GATT 1994 before reaching Articles 2.1 and 2.2 and Paragraph 1(a) of the Illustrative List of the TRIMs Agreement).

122. See *Canada – Measures* Appellate Body Report, *supra* note 11, ¶ 5.79 (“We have found above that the conditions for derogation under Article III:8(a) must be understood in relation to the obligation stipulated in the other paragraphs of Article III. This means that the product of foreign origin allegedly being discriminated against must be in a competitive relationship with the product purchased.”).

123. See *id.* (overturning panel findings that the Ontario DCR constitutes a law, regulation, or requirement governing the procurement by governmental agencies of electricity under Article III:8(a) of the GATT 1994 because the generation equipment receiving discrimination did not have a competitive relationship with the electricity procured by the Ontario Government).

Ontario.<sup>124</sup> The generation equipment was “needed and used” to produce the electricity, and consequently, the generation equipment subject to the DCR and the electricity procured by the Ontario Government had a close relationship, which the panel deemed necessary for the DCR to be considered a requirement that governed the procurement of electricity.<sup>125</sup>

Nevertheless, the Appellate Body overturned the panel’s finding and held that the Ontario FIT DCR did not constitute a law, regulation, or requirement “governing the procurement by governmental agencies’ of electricity within the meaning of Article III:8(a)” because the discrimination relating to generation equipment contained in the FIT Program was not covered under Article III:8(a).<sup>126</sup> The Appellate Body stressed that the Ontario FIT DCR discriminated against the generation equipment used to produce the electricity, not the electricity itself, which was the target of the Ontario Government’s procurement.<sup>127</sup> Given this distinction, the generation equipment against which the Ontario FIT DCR discriminated was required to have a competitive relationship—not simply a close relationship—with the electricity procured by the Ontario Government.<sup>128</sup> In *Canada – Measures*, the generation equipment subject to discrimination by the Ontario DCR did not have a competitive relationship with the electricity procured by the Ontario Government within the local market because the generation equipment and the electricity did not compete in the same market.<sup>129</sup> With no competitive relationship between the electricity and the generation equipment, the Ontario FIT DCR failed to qualify for the exception under Article III:8(a).

Unlike the Ontario DCR, the Italian DCR does not require that solar-PV generators use domestically-sourced renewable-energy-

---

124. *Canada – Measures* Panel Report, *supra* note 11, ¶ 7.165.

125. *See id.* ¶ 7.127 (stating that there is a close relationship between the products that are affected by the relevant “laws, regulations or requirements”—renewable energy generation equipment—and the product that is allegedly procured—electricity).

126. *Canada – Measures* Appellate Body Report, *supra* note 11, ¶ 5.79.

127. *Id.* (“In the case before us, the product being procured is electricity, whereas the product discriminated against for reason of its origin is generation equipment.”).

128. *Id.*

129. *Id.*

generation equipment to be involved in the FIT Program.<sup>130</sup> Instead, the Italian DCR requires simply that solar-PV generators use domestically-sourced equipment (from either the European Union or the European Economic Area) to qualify for an increase in the sale price of electricity that they produce.<sup>131</sup> Because the DCR is not a prerequisite for compliance with the FIT Program, the generation equipment that it targets certainly does not compete with the electricity procured, let alone hold a close relationship with that electricity. As a result, the Panel is even less likely to identify the Italian FIT DCR as a law, regulation, or requirement governing the procurement by governmental agencies of electricity within the meaning of Article III:8(a). The DCR will likely fail to meet the first prong of the analysis under Article III:8(a), and as a result, the Panel will likely continue with its analysis of Articles 2.1 and 2.2 of the TRIMs Agreement.

### *3. The DCR in the Italian FIT Program Is Inconsistent with Article 2.1 of the TRIMs Agreement*

If the Italian FIT DCR shares the traits elaborated in Paragraph 1(a) of the Illustrative List and the chapeau to the Paragraph, it also will be inconsistent with Article 2.1 of the TRIMs Agreement and the national treatment obligation under Article III:4 of the GATT 1994. The Panel would have to determine whether the DCR requires the purchase or use of products from a domestic source and whether compliance with the DCR is necessary to obtain an advantage.<sup>132</sup>

First, the Panel would likely find that the Italian FIT DCR requires the purchase or use of products from a domestic source.<sup>133</sup> In *Canada*

---

130. *Compare Canada – Measures* Panel Report, *supra* note 11, ¶¶ 7.158, 7.163 (stating that the solar-PV and wind-power generators must be comprised of a certain percentage of components sourced within Ontario to participate in the Ontario FIT Program), *with* D.M. n. 238/2011, art. 14(1)(d), *and* D.M. n. 143/2012, art. 4(5)(d) (establishing favorable purchase prices for solar-PV units with a certain percentage of parts sourced from within the European Union or the European Economic Area).

131. *E.g.*, D.M. n. 238/2011, art. 14(1)(d); D.M. n. 143/2012, art. 4(5)(d).

132. *Canada – Measures* Panel Report, *supra* note 11, ¶ 7.157.

133. *See id.* ¶ 7.163 (finding that the Ontario FIT DCR required the purchase or use of products sourced from Ontario to guarantee that electricity generated by solar-PV and wind plants would be purchased at the price guaranteed in the Ontario FIT Program).

– *Measures*, the panel determined that solar-PV generators must source sixty percent of their components from Ontario to satisfy the DCR within the Ontario FIT Program.<sup>134</sup> Because the Ontario FIT Program mandated that renewable energy generators purchase or use a certain percentage of renewable-energy-generation components sourced from Ontario, the Ontario FIT Program required the use of components from a domestic source as described in Paragraph 1(a) of the Illustrative List.<sup>135</sup>

Like the Ontario FIT DCR, the Italian FIT DCR requires the purchase or use of products from a domestic source, namely Italy or another EU/EEA Member State.<sup>136</sup> The Fourth Energy Bill mandates that solar-PV generators meet a sixty-percent threshold of EU/EEA-sourced components to earn a ten-percent increase in the sale price of electricity,<sup>137</sup> while the Fifth Energy Bill requires that the modules or inverters within the generators be manufactured within the European Union or European Economic Area to earn the price increase.<sup>138</sup> Because the Fourth and Fifth Energy Bills both require the use of components from domestic sources, the Italian FIT DCR satisfies the first element of Paragraph 1(a) of the TRIMs Agreement.

Next, the Panel likely would find that compliance with the DCR in the Italian FIT Program is necessary to obtain an advantage.<sup>139</sup> In *Canada – Measures*, the panel found that compliance with the Ontario FIT DCR guaranteed that solar-PV and wind-power

---

134. See *id.* ¶ 7.158 (listing the content requirements for solar-PV FIT generators and solar-PV microFIT generators).

135. See *Canada – Measures* Panel Report, *supra* note 11, ¶¶ 7.164–7.165 (finding that because the generators must use at least some components from Ontario to be eligible for the FIT Program, the DCR requires use of components from a domestic source). See generally TRIMs Agreement Annex, para. 1(a) (stating that TRIMs are inconsistent with the national treatment obligation in Article III:4 of the GATT 1994 if they require purchase or use by an enterprise of products of a domestic origin or source).

136. See, e.g., D.M. n. 238/2011, art. 14(1)(d); D.M. n. 143/2012, art. 4(5)(d).

137. D.M. n. 238/2011, art. 14(1)(d).

138. D.M. n. 143/2012, arts. 2(1)(v), 4(5)(d), 5(2)(a).

139. See *Canada – Measures* Panel Report, *supra* note 11, ¶ 7.165 (finding that compliance with the DCR was necessary to qualify for the guaranteed FIT rate in the Ontario FIT Program). See generally TRIMs Agreement Annex, para. 1(a) (stating that TRIMs are also inconsistent with the obligation of national treatment in Article III:4 of the GATT 1994 if compliance with the TRIM is necessary to obtain an advantage).

generators would receive a fixed price for any electricity they produced.<sup>140</sup> In turn, the sale of electricity at the guaranteed price generated a healthy return on investment in generators using components sourced from Ontario.<sup>141</sup> Moreover, failure to comply with the terms of the Ontario FIT DCR placed FIT generators in default of their contractual obligations.<sup>142</sup> Because compliance with the DCR guaranteed participation in the Ontario FIT Program, it provided an advantage as stated in Paragraph 1(a) of the Illustrative List.

The Italian FIT DCR likely provides solar-PV generators with an advantage because it grants a price increase to those generators that use domestically-sourced components over components sourced from abroad.<sup>143</sup> This price increase constitutes a preferential advantage because generators that fail to meet the DCR threshold will not be able to sell their solar-PV-based electricity at comparable prices.<sup>144</sup> As a result, the DCR impedes the sale of like solar-PV components from non-EU Member States in the Italian market and disrupts their competitive relationship in the solar-PV-component market.<sup>145</sup> The DCR meets the requirements set forth in Paragraph

---

140. See *Canada – Measures* Panel Report, *supra* note 11, ¶ 7.165 (finding that compliance with the DCR was a precondition for electricity generators to participate in the FIT Program).

141. *Id.*; see Lee, *supra* note 47, at 59 (explaining that the FIT rates were designed to cover the capital and operating costs of a project while providing a reasonable rate of return on a project developer's investment over the twenty-year term).

142. See *Canada – Measures* Panel Report, *supra* note 11, ¶ 7.165 (stating that if a failure to comply with a contractual obligation nullifies the contract, the fulfillment of that obligation is a necessary condition to receive the benefit).

143. See Lee, *supra* note 47, at 67 (“The Panel in *Canada – Autos* found that such a measure, which provides that an advantage can be obtained by using domestic products but not by using imported products, had an ‘impact on the conditions of competition between imported and domestic products,’ thus the measure ‘affected’ the sale of the imported products.”).

144. See, e.g., D.M. n. 238/2011, art. 14(1)(d); D.M. n. 143/2012, art. 4(5)(d) (increasing the sale price of electricity in the Italian market so long as a certain percentage of components used in solar-PV generators are EU/EEA sourced).

145. Cf. Panel Report, *Italian Discrimination Against Imported Agricultural Machinery*, ¶¶ 5, 22, 25, L/833 – 7S/60 (July 15, 1958), GATT B.I.S.D. (35th Supp.) at 2, 5–6 (1958) (providing that a measure granting more favorable terms and credit facilities to purchases of Italian goods than to purchases of non-Italian goods influenced purchasers to buy Italian goods, which resulted in a violation of Article III:4 of GATT 1994).

1(a) of the Illustrative List and the chapeau to the Paragraph, and as a result, violates both Article 2.1 of the TRIMs Agreement and the national treatment obligation under Article III:4 of the GATT 1994.

## B. SCM AGREEMENT

Despite the finding that the FIT Program constitutes a financial contribution to Italian solar-PV generators, the Panel may not find that the Italian FIT Program constitutes a subsidy under Article 1.1 of the SCM Agreement. With its public utilities, the Italian Government provides a financial contribution to solar-PV generators by procuring the electricity that the generators produce,<sup>146</sup> an arrangement that constitutes the purchase of a good under Article 1.1(a)(1)(iii).<sup>147</sup> Nevertheless, the Italian FIT Program may not confer a “benefit” upon the recipients of the financial contribution in the context of Article 1.1(b),<sup>148</sup> despite generous tariffs and high levels of insolation, which have allowed the solar-PV sector to grow significantly.<sup>149</sup> As this comment demonstrates, tariff degression continues to pare down the costs of the FIT significantly, and the Italian government is downsizing its FIT Program now that it nearly has reached grid-parity with fossil-fuel resources.<sup>150</sup>

### *1. The Italian FIT Program Satisfies Article 1.1(a)(1)(iii) of the SCM Agreement*

In order for the Panel to find that the Italian FIT Program constitutes a prohibited subsidy, it must first determine whether, under Article 1.1(a)(1)(iii) of the SCM Agreement, the FIT Program

---

146. See Simone Monesi, *Italy*, in THE ENERGY REGULATION AND MARKETS REVIEW 146, 149 (David L. Schwartz ed., 2012) (identifying ENEL, Terna SpA, ENEL Distribuzione, and GME—all publicly-owned Italian companies—as the parties responsible for generating electricity, dispatching it to transmission grids, operating grids, selling electricity, and managing trades in the market, respectively).

147. See generally SCM Agreement art. 1.1(a)(1)(iii) (providing that a subsidy exists if a government or public body provides a financial contribution, *inter alia*, by purchasing goods).

148. See *id.* art. 1.1(b).

149. See Gipe, *New Italian Tariffs*, *supra* note 34 (emphasizing that Italian tariffs remain fifty to seventy percent higher than comparative tariffs with Italy’s high levels of sunshine).

150. See Fulton et al., *supra* note 44 (identifying grid-parity as a realizable goal given the gradual and transparent nature of degression).

provides a financial contribution to solar-PV generators via the Italian public utility, GSE, which purchases solar-based electricity.<sup>151</sup> A government or public body provides a financial contribution when, *inter alia*, it purchases and obtains possession of goods.<sup>152</sup>

In both the Ontario and Italian FIT Programs, procurement of electricity fits the definition of a purchase of a good by a governmental agent. The Panel in *Canada – Measures* found that Hydro One, the publicly-owned electricity retailer, ably met the description of a governmental agent, as the Government of Ontario had imposed a duty on Hydro One both to operate generation facilities and distribution systems and to dispatch electricity to communities within Ontario.<sup>153</sup> As the OPA supplied electricity into the grid,<sup>154</sup> Hydro One transmitted and distributed that electricity to retail customers under the direction of the FIT Program.<sup>155</sup> For these

---

151. See Statuto del “Gestore dei Servizi Energetici – GSE S.p.A.” (adopted pursuant to Decreto Legislativo 16 marzo 1999, n. 79 (It.)), available at [http://www.gse.it/it/Azienda/GSE\\_Documenti/Azienda/Missione/Documenti/Modello%20organizzativo/Statuto\\_GSE2010.pdf](http://www.gse.it/it/Azienda/GSE_Documenti/Azienda/Missione/Documenti/Modello%20organizzativo/Statuto_GSE2010.pdf) (identifying the roles and responsibilities of GSE in the Italian FIT Program); see also *RainChief Energy Business Summary*, RAINCHIEF RENEWABLE ENERGY 1 (Dec. 2010), <http://stocksjournal.com/wordpress/wp-content/uploads/2011/12/RCFEF.pdf> [hereinafter *RainChief Energy Business Summary*] (stating that GSE, as the Italian Government’s national power authority, establishes FIT rates and pays the rates on the basis of kW hours of electricity power delivered into the grid).

152. See *Canada – Measures* Panel Report, *supra* note 11, ¶ 7.233 (citing Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, ¶¶ 317–18, WT/DS379/AB/R (Mar. 11, 2011) [hereinafter *US – AD/CVD (China)*] (stating that where a statute or other legal instrument fails to vest authority in the entity concerned, that entity constitutes a “public body” if it is vested with governmental authority and exercises governmental functions). See generally SCM Agreement art. 1.1(a)(1)(iii) (stating that a financial contribution is deemed to exist when a government purchases goods).

153. See *Canada – Measures* Panel Report, *supra* note 11, ¶¶ 7.234–7.235 (finding that the Government of Ontario had meaningful control over Hydro One, as the utility (1) was established by the government; (2) remained accountable to the government; (3) had its delegates appointed by the government; (4) has had authority assigned to it; and (5) had several arrangements as a Crown Corporation of the Government of Ontario).

154. See *id.* ¶ 7.239 (highlighting that the OPA paid the FIT rates while Hydro One controlled the flow of electricity through the grid).

155. See *id.* (noting that Hydro One owns and operates ninety-seven percent of the transmission lines and distributes electricity to 1.3 million customers, suggesting that the Government of Ontario purchases the electricity delivered into the grid under the FIT Program).

reasons, the Panel found that, through its FIT Program, the Government of Ontario purchased electricity as required for a subsidy under Article 1.1(a)(1)(iii) of the SCM Agreement.

In the present case, all of the Italian utilities at issue—the utility company (GSE), the electricity retailer (Enel Green Power), and the Italian grid operator (Terna Rete Italia)—are publicly-owned entities.<sup>156</sup> Like the OPA, GSE purchases electricity from renewable-energy-generation plants and trades that electricity on the market.<sup>157</sup> Moreover, in the same way that Hydro One distributed electricity in the interest of the Ontario Government, Enel and Terna operate generation facilities and distribute electricity, respectively, in the interest of the Italian Government.<sup>158</sup> As a result, the Panel likely will find that the Italian Government, through its FIT Program, purchases electricity as required for a subsidy under Article 1.1(a)(1)(iii) of the SCM Agreement.

## *2. The Italian FIT Program Does Not Satisfy Article 1.1(b) of the SCM Agreement*

After determining that the Italian FIT Program constitutes a financial contribution in which the government purchases goods, the Panel may not find that the purchase guarantee in the Italian FIT Program confers a “benefit” to solar-PV generators under Article 1.1(b) of the SCM Agreement. In its analysis of Article 1.1(b), the Panel would likely resort to Article 14(d), which states that a government’s purchase of goods shall not confer a “benefit” unless made for more than adequate remuneration.<sup>159</sup>

---

156. See *About Us*, ENEL, *supra* note 25 (stating that the Italian Ministry of Economy and Finance holds 31.24% of Enel’s shares); see also *About Terna Rete Italia*, *supra* note 30; GSE S.p.A, *supra* note 27 (providing that the sole owner of GSE is the Ministry of Economy and Finance (“MEF”) and that the MEF exercises its shareholder rights jointly with the Ministry of Economic Development). *But see US – AD/CVD (China)*, *supra* note 152, ¶¶ 317–18 (ruling that, absent additional indicia that an entity is controlled by the government, the fact that a government is the majority shareholder of an entity does not allow for an inference that the entity is exercising governmental authority, and therefore, is a public body).

157. *RainChief Energy Business Summary*, *supra* note 151, at 1.

158. See Nela Lazarevic, *The Big Three: Terna, CGES and Enel*, BALKAN INSIGHT (Nov. 7, 2011), <http://www.balkaninsight.com/en/article/terna-cges-enel> (providing that the Italian Government controls Terna through its major shareholder, Cassa Depositi e Prestiti).

159. See *Canada – Measures* Panel Report, *supra* note 11, ¶¶ 7.271–7.278

Notably, while the Appellate Body reversed the panel's finding in *Canada – Measures* that the Ontario FIT Program did not confer a “benefit” under Article 1.1(b) of the SCM Agreement, it was unable to complete the panel's analysis and make its own affirmative determination as to whether the Ontario FIT Program conferred a “benefit” upon renewable energy generation companies.<sup>160</sup> This issue is a particularly close one and likely will be revisited in future FIT disputes. Therefore, this comment will explore Italy's and China's prospective arguments in more detail and will review the likely impact of the *Canada – Measures* decision on the Panel's deliberations in the case at bar.

Initially, Italy may argue that its FIT Program does not confer a “benefit” upon solar-PV generation companies because the Italian wholesale electricity market fails to secure the reliable, long-term supply of solar-PV-generated electricity necessary for the functioning of any economy. In what the panel in *Canada – Measures* referred to as the “missing money problem,” private investors in Ontario refused to finance construction of new renewable energy generators when the price of electricity was low; as a result, the wholesale electricity market in Ontario failed to create the level of competition that would have attracted diverse types of energy and allowed the market to meet future demand.<sup>161</sup> In failing to meet future demand, the Ontario Government also failed to meet the consumption needs of its citizens, due not only to the generation capacity lost from aging nuclear power plants,<sup>162</sup> but also to record-high summer temperatures that had exhausted Ontario's supply of

---

(stating that the Panel will likely measure such remuneration according to wholesale market conditions). See generally SCM Agreement art. 14(d) (establishing that adequate remuneration includes the market conditions for the sale of the good, marketability, transportation, and market demand).

160. In the case at bar, publicly available data from out-of-country solar-PV generation markets is scarce, which makes it difficult to establish a comparative market benchmark. See *Canada – Measures* Appellate Body Report, *supra* note 11, ¶¶ 5.220, 5.224–5.228, 5.246 (finding that the Appellate Body could not complete its legal analysis with respect to benefit benchmark comparisons between the appropriate wind-generated electricity prices because the panel record did not contain sufficient factual findings and uncontested evidence).

161. See *Canada – Measures* Panel Report, *supra* note 11, ¶¶ 7.279, 7.283, 7.308 (noting that the “missing money problem” affects electricity produced from all types of sources, not just renewable energy sources).

162. See *id.* ¶¶ 7.280, 7.286.

electricity.<sup>163</sup> In light of this recurring problem, the panel in *Canada – Measures* stated that sovereign governments must be allowed to provide incentives to secure a sustainable energy supply in new electricity generation.<sup>164</sup>

Like the Ontario wholesale electricity market, the Italian wholesale electricity market has failed to incentivize the mix of energy sources needed (1) to create a reliable electricity system, (2) to cover generation costs, and (3) to pursue human health and environmental objectives.<sup>165</sup> Italy demonstrates a significant need to diversify its energy sources given both the size of its market and its decision to phase out the use of nuclear power in the production of electricity.<sup>166</sup> As Ontario suffered an energy shortage in its reliance upon outdated coal-powered plants,<sup>167</sup> Italy must develop alternate energy resources to replace its nuclear power plants.<sup>168</sup>

Despite Italy's pursuit of laudable policy objectives, the prospective Panel likely would proceed with its analysis of whether the Italian FIT Program confers a "benefit" upon solar-PV generators. Though the Italian Government would be justified in following its human health and environmental policy objectives in its production of electricity, the Appellate Body in *Canada – Measures*

---

163. See *id.* ¶¶ 7.287–7.288.

164. See *id.* ¶ 7.283 (recommending alternative mechanisms to wholesale spot markets, such as power purchase agreements and capacity payments).

165. Cf. *id.* ¶ 7.280 (noting that a diverse mix of generation technology is necessary to secure a reliable, clean electricity system and to serve technical, economic, and environmental objectives); Fulton et al., *supra* note 44, at 2 (stating that well-constructed FIT policies should incentivize renewable technologies to reach the grid-parity target).

166. See Morris, *supra* note 18 (reporting that Italy is one of the largest national economies to have rejected the use of nuclear power in the production of electricity, demonstrating the great need to secure a diversified, reliable supply of electricity).

167. See *Canada – Measures* Panel Report, *supra* note 11, ¶¶ 7.65, 7.216, 7.223 (finding that the anticipated closure of coal-fired plants made Ontario increase supply of electricity produced from renewable sources to diversify its supply-mix and help replace the coal-fired facilities).

168. See Morris, *supra* note 18 (referencing a referendum where over fifty percent of eligible Italian voters opposed construction of new nuclear power plants, plans to privatize water supplies, and provision of amnesty to politicians such as Berlusconi); see also *Photovoltaic Barometer*, *supra* note 15, at 59–61 (opining that the country must develop its renewable energy resources now that Italians have agreed to prevent new nuclear power plant reactors in a national referendum).

held that such objectives ought not to preclude a market-based analysis in the determination of “benefit.”<sup>169</sup> Indeed, the Appellate Body in *Canada – Measures* noted that such an interpretation would “read an exception into Article 1.1(b) based on the rationale of the subsidy that has no textual basis in the [SCM] Agreement.”<sup>170</sup> Article 14(d) of the SCM Agreement states that a purchase of goods confers a “benefit” if “the purchase is made for more than adequate remuneration,” which would be analyzed according to “prevailing market conditions.”<sup>171</sup> The latter language suggests that the determination of a “benefit” under Article 1.1(b) requires a competitive market benchmark, for which the Panel may resort to a second-country benchmark so long as it makes adjustments to replicate competitive market conditions.<sup>172</sup> Ideally, the proper benchmark would comprise the Italian Government’s definition of the energy supply mix, which would include solar-PV-generated electricity, as well as a comparison of renewable-energy market conditions in Italy and third-market countries.<sup>173</sup>

Given the stated need for a comparative market benchmark, China might argue that the Italian solar-PV energy market, when compared to surrounding markets, receives more than adequate remuneration from its government for purchases of electricity. Indeed, the high levels of insolation and the above-average base tariff rates in Italy seem to indicate that the Italian solar-PV market receives more than adequate remuneration for the electricity it produces.<sup>174</sup> A FIT

---

169. See *Canada – Measures* Appellate Body Report, *supra* note 11, ¶¶ 5.182, 5.185–5.186 (noting that the panel’s definition of “the relevant market for a benefit comparison as a single market for electricity generated from all sources of energy” as a result of policy choices should not “prevent a market-based approach to the determination of benefit” even though governments may reasonably intervene to pursue policy goals and to ensure that there is “a continuous supply-demand balance between generators and consumers”).

170. *Id.* ¶ 5.182.

171. SCM Agreement art. 14(d).

172. See *Canada – Measures* Appellate Body Report, *supra* note 11, ¶ 5.184 (referencing the Appellate Body’s determination in *US – Softwood Lumber IV* that investigating authorities may use the price of the same or similar goods in a market outside of the country—taking into account prevailing market conditions in the country of provision with price, quality, and other indicators—where private prices for particular government-provided goods are distorted because of the government’s role in providing the goods).

173. *Id.* ¶ 5.204.

174. See Gipe, *New Italian Tariffs*, *supra* note 34 (emphasizing that, as of 2011,

structure arguably allows Italy to harness its insolation, and consequently, the FIT would confer even more of a “benefit” for the Italian solar-PV market than the Ontario FIT does for the Ontario solar-PV market. Moreover, the Italian FIT covers costs of capital and provides solar-PV generators with reasonable rates of return for any electricity produced, creating a nearly risk-free environment for solar-PV generators.<sup>175</sup>

Nevertheless, China’s argument concerning the high levels of insolation and the above-market-value prices of electricity produced by Italian solar-PV generators, by itself, may not convince the Panel that the FIT provides a “benefit” to solar-PV generators if the Panel takes into account the consistent downsizing of the Italian FIT Program. Like the FIT rates in Ontario, the Italian FIT rates are higher than average, though Italy has taken significant steps to reduce its FITs such that the Italian Government is purchasing solar-PV-based electricity at a tariff rate that increasingly approaches market-level remuneration.<sup>176</sup> In 2011, Italy’s Ministry of Industry passed proposals that allowed the Italian Government to reduce FIT rates by an average of eighteen percent.<sup>177</sup> As solar-PV generation in Italy grows rapidly and generation costs decline, the Italian Government is increasingly adjusting regulation to moderate cost inefficiencies and to account for oversupplies in electricity.<sup>178</sup> The oversupply of solar-PV-generated electricity has caused prices to fall significantly in the Italian wholesale electricity market, resulting in

---

the tariffs remain fifty to seventy percent higher than comparative tariffs when adjusted for Italy’s higher levels of solar energy).

175. *See id.* (noting that, as of July 9, 2011, Italy’s new tariffs were at least fifty percent greater than the current tariffs in Germany); *see also* Paul Gipe, *Italy Abandons RPS, Adopts System of Feed-In Tariffs*, RENEWABLE ENERGY WORLD (Dec. 6, 2012), <http://www.renewableenergyworld.com/rea/news/article/2012/12/italy-abandons-rps-adopts-system-of-feed-in-tariffs> (noting that, despite the rapid cuts in payment for solar-PV generation, the installation rate remains high).

176. *See* Fulton et al., *supra* note 44, at 8, 18 (updating proposals to reduce the subsidies for FITs by approximately six percent per four-month period).

177. *See id.* at 18 (adding that the decline would be spread out across four-month periods, with six percent FIT declines in each period, translating to 2011 subsidies of €0.28/kWh for large-scale projects and €0.38/kWh for small-scale applications).

178. *See id.* at 4 (stating that the Italian Government might adjust the tariff rates as prices fall).

significantly less profit for generators.<sup>179</sup> Experts even indicate that renewable energy sources in Italy are close to grid-parity with fossil-fuel sources, positing that large-scale investments in solar-PV-generated electricity are becoming increasingly unnecessary.<sup>180</sup> As the Italian wholesale electricity market continues to evolve, investors are looking toward smaller, more affordable solar-PV generators, which are more efficient and less costly than ground-mounted, large-scale generators.<sup>181</sup> Ideally, the smaller, more efficient solar-PV generators should drive down the base tariff rate at which solar-based electricity is purchased in the wholesale market.

Italy recognizes the trajectory of its solar-PV energy market, and in accordance with that trajectory, it is lowering its tariff rates through various mechanisms to render its FIT Program more efficient and much less remunerative in the marketplace. Prices continue to fall for newly-installed solar-PV generators,<sup>182</sup> and even though generators already in operation will not be affected by price depressions,<sup>183</sup> the Italian Government has pared down its financial

---

179. See Christian Roselund, *2012 Solar PV Year in Review: A Complex Picture of a Changing Market*, SOLARSERVER (Jan. 20, 2013), <http://www.solarserver.com/solar-magazine/solar-report/solar-report/2012-solar-pv-year-in-review-a-complex-picture-of-a-changing-market.html> (reporting that continuing global oversupply of solar-PV energy induced a collapse in PV prices, leading to negative profit margins).

180. See Becky Stuart, *The Rules of the Game*, PV MAGAZINE (Mar. 2012), [http://www.pv-magazine.com/archive/articles/beitrag/the-rules-of-the-game-\\_100005931/86/?tx\\_ttnews%5BbackCat%5D=196&cHash=cf2f8c76afe0f61deacc7e9b0b8622c2](http://www.pv-magazine.com/archive/articles/beitrag/the-rules-of-the-game-_100005931/86/?tx_ttnews%5BbackCat%5D=196&cHash=cf2f8c76afe0f61deacc7e9b0b8622c2) (stating that Italy—particularly southern Italy—may reach grid-parity by 2013 because of lower component and procurement costs).

181. See *id.* (noting that the large-scale, ground-mounted plants are less of a target for investment than rooftop systems in the retail and domestic markets because of the potential return on investment); see also *Italian Solar Generation*, *supra* note 17 (indicating that, in 2011, “one-third of Italy’s total solar capacity was installed by homeowners, farmers, and small businesses,” and ninety-seven percent of solar-PV systems used in Italy are less than 200 kW in size).

182. See Mario Ragwitz et al., *Recent Developments of Feed-In Systems in the EU: A Research Paper for the International Feed-In Cooperation*, INT’L FEED-IN COOPERATION 1, 9–10 (Jan. 2012), available at [http://www.feed-in-cooperation.org/wDefault\\_7/content/research/index.php](http://www.feed-in-cooperation.org/wDefault_7/content/research/index.php) (explaining that tariff depressions can provide incentives for technology improvements and for cost reductions); see also Klein et al., *supra* note 42, at 43 (stating that, in 2007, tariff depression for Italian FITs for solar-PV plants amounted to reductions of two percent annually).

183. See Ragwitz et al., *supra* note 182, at 9–10 (noting that price depressions only affect newly-constructed solar-PV generators).

support for renewable energy generation significantly as it tackles its sovereign debt crisis.<sup>184</sup> Seeking an alternative to its FIT Program, Italy has instituted a net-metering program that allows its solar-PV generators to consume at least some of the electricity that the generators produce instead of feeding all of the electricity into the grid, which reduces the base tariff according to the portion of electricity that the generators consume.<sup>185</sup> Recognizing that Italy will invest less in renewable energy, some utility companies have moved to implement projects in developing countries.<sup>186</sup>

Considering the shift in the Italian market toward smaller solar-PV generators, the steps taken by the Italian Government to degress its FITs, and the net-metering program that Italy has instituted, the Panel may not find that the Italian FIT Program provides solar-PV generators with more than adequate remuneration for their costs of capital. As a result, the FIT Program would not confer a “benefit” under Article 1.1(b) of the SCM Agreement, and it would not constitute a subsidy under the SCM Agreement.

#### IV. RECOMMENDATIONS

If the prospective WTO Panel finds that the Italian FIT DCR is inconsistent with the obligations set forth in the TRIMs Agreement and the GATT 1994, Italy should respond by using the avenues established in the WTO Dispute Settlement Understanding. First, Italy should appeal the Panel’s adverse ruling to the Appellate Body, which may overrule the Panel and find that the FIT DCR qualifies

---

184. See Mark Scott, *In Europe, Green Energy Takes a Hit From Debt Crisis*, N.Y. TIMES, Nov. 13, 2012, [http://www.nytimes.com/2012/11/14/business/energy-environment/in-europe-green-energy-takes-a-hit-from-debt-crisis.html?\\_r=1&](http://www.nytimes.com/2012/11/14/business/energy-environment/in-europe-green-energy-takes-a-hit-from-debt-crisis.html?_r=1&) (reporting that leading utilities and independent energy projects seek markets abroad for renewable energy projects as European governments, overwhelmed by debts, have cut subsidies from six billion euros in 2012 to five hundred million euros in 2013).

185. See Ragwitz et al., *supra* note 182, at 11 (explaining that under the Italian net-metering scheme, producers do not receive direct remuneration for excess electricity fed into the grid, but rather an exchange of the value of electricity already consumed); see also Gipe, *New Italian Tariffs*, *supra* note 34 (explaining that, in 2013, under the Fourth Conto Energia, any portion of the electricity that is used to offset on-site consumption receives a reduced “net-metering” tariff).

186. See Scott, *supra* note 184 (noting that Enel Green Power has shifted its focus to new markets in the developing world—like Brazil and South Africa—after paring back its anticipated renewable energy projects in Europe).

for the exception provided in Article III:8(a) of the GATT 1994. Second, if the Appellate Body affirms the Panel Decision, Italy should eliminate the DCR from its FIT Program to comply with its obligations under the TRIMs Agreement and the GATT 1994. Last, Italy should consider discontinuing its FIT Program altogether and implementing another renewable energy program given Italy's current economic downturn and the weight of sovereign debt on Italy's budget.

A. ITALY SHOULD APPEAL TO THE APPELLATE BODY THE  
OUTCOME OF THE PANEL DECISION

Under Articles 16.4, 17.4, and 17.6 of the Dispute Settlement Understanding, parties to an original dispute may appeal to an Appellate Body concerning the issues of law arising out of a Panel Decision.<sup>187</sup> As such, the Appellate Body may adopt the Panel's reasoning or strike it down as misapplied<sup>188</sup> within at least two to three months.<sup>189</sup> Italy may wish to appeal its Panel Decision to the Appellate Body; if it does, it will likely need to refute arguments made by China that the FIT Program confers a "benefit" under Article 1.1(b) of the SCM Agreement. Given that *Canada – Measures* is the first case in which either the panel or the Appellate Body has interpreted Article III:8(a),<sup>190</sup> Italy should request that the Appellate Body support its interpretation of the term "products" and the need for a competitive relationship between the products at issue, as this interpretation is not grounded in any other portion of the GATT 1994 or previous Panel or Appellate Body Reports. Italy also should request that the Panel complete the three-step analysis required as part of Article III:8(a) of the GATT 1994.<sup>191</sup>

---

187. See DSU arts. 16.4, 17.4, 17.6 (providing parties the right to appeal the Panel Decision within sixty days but limiting the appeal to the legal issues covered by the panel).

188. See *id.* art. 17.13 (establishing that the Appellate Body may uphold, modify, or reverse the conclusions of the panel).

189. See *id.* art. 17.5 (providing that, as a general rule, the proceedings shall not exceed sixty days unless the Appellate Body requires more time).

190. *Canada – Measures* Appellate Body Report, *supra* note 11, ¶ 5.54.

191. See *Canada – Measures* Panel Report, *supra* note 11, ¶¶ 7.122–7.124, 7.129, 7.146–7.147 (asking whether (1) the DCR may be characterized as "laws, regulations, or requirements governing procurement;" (2) the "challenged measure involve[d] procurement by governmental agencies;" and (3) the governmental agencies undertook the procurement "for governmental purposes and not with a

Likely, Italy also would need to refute China's argument that the above-average prices of solar-based electricity in the Italian wholesale market signify that the electricity is being sold for more than adequate remuneration.<sup>192</sup> Italy would need to verify that its steps to regress its FITs and to downsize its FIT Program have reduced remuneration back to market level.<sup>193</sup> If the Appellate Body finds that the measures taken to reduce the price of solar-based electricity in the Italian wholesale market have not reduced remuneration to market level, it may overturn the Panel's ruling and find that the Italian FIT Program conferred a "benefit" to Italian solar-PV generation companies under Article 1.1(b) of the SCM Agreement.

B. ITALY SHOULD ELIMINATE THE DCR COMPONENT OF ITS FIT PROGRAM TO ENSURE COMPLIANCE WITH ARTICLE III:4 OF THE GATT 1994 AND ARTICLE 2.1 OF THE TRIMS AGREEMENT

In the event that the Appellate Body affirms the Panel Decision, the WTO Dispute Settlement Body likely will request that Italy remove the DCR from its FIT Program.<sup>194</sup> At a Dispute Settlement Board ("Board") meeting thirty days after the date of adoption of the Panel Decision, the Respondent likely will inform the Board of its intention to implement any recommendations.<sup>195</sup>

Notably, if Italy disregards the recommendations made by the Panel, China may decide to suspend concessions and raise barriers to entry against imports from the European Union.<sup>196</sup> China may also

---

view to *commercial resale* or with a view to use in the production of goods for commercial sale").

192. See discussion *infra* Part III.B.2.

193. But see Gipe, *New Italian Tariffs*, *supra* note 34 (emphasizing that, despite reports that the new Italian FIT program dramatically cuts tariffs, as of 2011 the tariffs remained fifty to seventy percent higher than comparative tariffs when adjusted for high levels of solar radiation energy).

194. See DSU arts. 8, 19(1) (explaining that the Appellate Body will recommend that the Respondent bring the measure into conformity with the covered agreements and will suggest ways to do so).

195. See *id.* art. 21(3) (adding that the Board will provide the party whose measure is in violation of the agreements with a reasonable amount of time in which to come into compliance).

196. See *id.* art. 22(2) (allowing the injured party to request to suspend its concessions only after rounds of negotiations with the Respondent have failed); *cf.* *WTO Rules Ontario Green Energy Tariff Unfair*, *supra* note 14 (reporting that

request that a second panel be established to measure Italy's compliance with the Dispute Settlement Body's recommendations, and if the panel finds that Italy has failed to comply with the recommendations, China may request money damages from Italy.<sup>197</sup> Noncompliance should not be an option for Italy, however, as it may spark a trade war between two major trade partners—namely the European Union and China—who likely wish to maintain amicable trade relations with one another.<sup>198</sup>

### C. ITALY SHOULD DISCONTINUE ITS FIT PROGRAM AND IMPLEMENT ANOTHER RENEWABLE ENERGY PROGRAM

Because of the current economic downturn, Italy may choose to discontinue its FIT Program altogether and implement another renewable energy program. As electricity produced from solar-PV energy becomes more self-sustaining and grows closer to reaching grid-parity with fossil-fuel energy, Italy may conclude that FIT support is either unnecessary or unsustainable.<sup>199</sup> Italy's FIT Program has increased substantially the level of solar-PV energy in the Italian market,<sup>200</sup> but the costs of the Program have become burdensome for the Italian budget.<sup>201</sup>

---

even though a WTO ruling is non-binding against the party in violation of WTO rules, the complainant may implement tariffs against the party in violation).

197. See DSU art. 21(5) ("Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel.").

198. See David J. Unger, *While Solar Booms, a Trade Row Intensifies*, CHRISTIAN SCI. MONITOR, Nov. 10, 2012, <http://www.csmonitor.com/Environment/Energy-Voices/2012/1110/While-solar-booms-a-trade-row-intensifies> (reporting that "tit-for-tat escalations" over solar panels are not helping to avoid a full-blown trade war).

199. See Michael Ruoff et al., *European Solar Markets: There Is Life After Feed-in Tariffs*, MCDERMOTT, WILL & EMERY, INT'L NEWS: FOCUS ON ENERGY, no. 2, 2012, at 8, available at <http://viewer.zmags.com/publication/1aa3ab69#/1aa3ab69/8> (acknowledging that grid-parity is close in European countries with high insolation and high electricity prices).

200. See *Did Italy Install Two or Seven GW in 2010?*, RENEWABLES INT'L (Jan. 26, 2011), <http://www.renewablesinternational.net/did-italy-install-two-or-seven-gw-in-2010/150/510/30021/> (noting that while Germany had installed a record seven to eight gigawatts ("GW") of photovoltaics in 2009, Italy also may have installed close to that number of gigawatts).

201. See Ruoff et al., *supra* note 199, at 9 (noting that because the price for the

If, as experts claim, renewable energy sources are reaching grid-parity with traditional energy sources, then certain EU Member States may no longer need FITs as a high-level incentive.<sup>202</sup> As an alternative, solar-PV generation companies may enter into power-purchase agreements in which large utilities and industrial customers are prepared to agree on power prices that are higher than current electricity prices.<sup>203</sup> In this light, Italy may gradually phase out its FIT Program by continuing to pare down tariffs to more sustainable levels.<sup>204</sup>

## V. CONCLUSION

A ruling by the prospective WTO Panel that Italy's DCR violates the national treatment obligation under Article III:4 of the GATT 1994 and Articles 2.1 and 2.2 of the TRIMS Agreement would be consistent with WTO jurisprudence.<sup>205</sup> Yet, a ruling that the FIT Program itself does not constitute a subsidy under Article 1.1 of the SCM Agreement would reshape WTO jurisprudence.<sup>206</sup> If the FIT Program remains consistent with the WTO covered agreements and continues to encourage the growth of solar-PV generation, it may

---

sale of electricity in Italy grew from ninety euros to one hundred euros in 2011, and the price will only rise in the future, the FIT has become less relevant and less viable than self-consumption or direct sale); *cf.* Scott, *supra* note 184 (discussing Italy's drastic cuts in public subsidies).

202. See "We No Longer Need Feed-in Tariffs", RENEWABLES INT'L (Jan. 21, 2013), <http://www.renewablesinternational.net/we-no-longer-need-feed-in-tariffs/150/510/59834/> (opining that because Europe has reached grid-parity with nuclear and coal power, the PV industry no longer needs feed-in tariffs).

203. See Ruoff et al., *supra* note 199, at 9; "We No Longer Need Feed-in Tariffs", *supra* note 202 (hypothesizing that, starting in 2013, solar markets will focus less on feed-in tariffs and more on direct consumption and power trading).

204. See *Italian PV Market Set for Disaster as New Incentive Budget Could Be Blown*, PV MARKET RESEARCH (July 23, 2012), [http://www.pvmarketresearch.com/press-release/Italian\\_PV\\_Market\\_Set\\_for\\_Disaster\\_as\\_New\\_Incentive\\_Budget\\_Could\\_be\\_Blow/5](http://www.pvmarketresearch.com/press-release/Italian_PV_Market_Set_for_Disaster_as_New_Incentive_Budget_Could_be_Blow/5) (reporting that the three GW of installations completed through the Fifth Energy Bill raised the annual cost of incentives and reduced the budget for plants).

205. See Wilke, *supra* note 11, at 24 (noting that a finding by the WTO Panel that the "Buy-Ontario" clause is illegal under WTO law "would not be news to trade law experts").

206. See *id.* (highlighting that a ruling on the subsidy question would clarify outstanding legal questions and introduce greater legal certainty).

allow Italy to reach its renewable energy goal by 2020<sup>207</sup> and reduce its FIT rates even more drastically than the current degressions have allowed.<sup>208</sup> Italy need only decide whether it will continue to rely upon FITs as an important policy tool and to what extent it will fund FITs in the future.<sup>209</sup>

---

207. *Cf. Italy to Cut Renewable Energy Subsidies*, UNITED PRESS INT'L (April 2, 2012, 6:30AM), [http://www.upi.com/Business\\_News/EnergyResources/2012/04/02/Italy-to-cut-renewable-energy-subsidies/UPI-52381333362600/](http://www.upi.com/Business_News/EnergyResources/2012/04/02/Italy-to-cut-renewable-energy-subsidies/UPI-52381333362600/) (stating that because Italy produces forty-one GW of electricity from solar-PV energy and has 360,000 active plants, it could reach its goal of 29.4%).

208. *See id.* (reporting that FITs have generated a burden on taxpayers and, with the boom, the Italian Government will likely cut FIT tariffs because it would have to pay out \$59 billion over the next twenty years).

209. *Cf. Roselund, supra* note 179 (“Falling prices mean that PV energy is becoming cost-competitive without subsidies.”).