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'Fossil Fueling the Apocalypse': Australian Coal Subsidies and the Agreement on Subsidies and Countervailing Measures

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Abstract: Global fossil fuel subsidies are substantial and contribute to climate change. They also undermine the ambitions of the Paris Agreement. However, under the WTO, the international community's foremost economic institution, it is renewable energy subsidies, not fossil fuel subsidies, that have been subjected to litigation. To date, no fossil fuel subsidy has ever been brought before the WTO's Dispute Settlement Body (DSB). This paper makes a unique contribution to the literature on energy subsidies by applying the WTO covered Agreement on Subsidies and Countervailing Measures (1994) (SCM Agreement) to a specific government measure designed to support the coal export industry in Australia: namely, the proposed concessional loan for the construction of a rail line between the Carmichael coal mine and Abbot Point coal port by the Northern Australia Infrastructure Facility (NAIF). In finding that this measure is in breach of the SCM Agreement, this paper foreshadows future litigation and provides guidance to non-government organizations (NGOs) seeking to identify other unlawful fossil fuel subsidies.

1. Introduction

The WTO plays a central role in governing economic relations between its Members and also, to some extent, their domestic policies. The latter statement is clearly the case with respect to climate change mitigation policies, such as renewable energy subsidies, which have regularly come into conflict with WTO disciplines. So far, nine cases have been brought to the WTO's DSB, challenging the legality of renewable energy programs (Meyer, 2017), while *none* has been initiated against fossil fuel subsidies. This is self-evidently problematic given that fossil fuel subsidies will need to be restrained if the international community is to meet its Paris Agreement[1] ambition of limiting global temperature rise to less than 2°C.

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1 Paris Agreement, opened for signature 22 April 2016, UN Doc. FCCC/CP/2015/10/Add.1, 29 January 2016 (entered into force 4 November 2016).

This paper takes up the challenge of identifying a fossil fuel subsidy that is unlawful under the SCM Agreement.[2] Specifically, the measure concerns the Australian Government's proposal to provide an approximately AU$1 billion low-interest loan for the purpose of constructing a rail line that will be used exclusively for exporting coal from the Galilee Basin, in northern Queensland, Australia.[3] The paper is divided into a further six substantive sections. Section 2 provides background information on the environmental and economic consequences of fossil fuel subsidies, as well as an overview of their global magnitude. Section 3 identifies the relevant international legal frameworks for disciplining subsidies. Section 4 discusses the history of subsidy litigation. Section 5 outlines the factual circumstances of Australia's proposed loan and Section 6 applies the SCM Agreement to them. Finally, Section 7 discusses the importance of finding that this measure is in violation of the SCM Agreement.

In light of the growing international momentum to reform fossil fuel subsidies, this paper is a significant contribution to the literature as it demonstrates that a detailed analysis of specific fossil fuel support policies can reveal vulnerabilities to trade law. It also highlights the political circumstances under which such policies may develop and thus aids future attempts at litigation.

2. Context

2.1 Climate change

Decarbonizing the global economic system to limit climate change is the foremost challenge of this century. If GHG emissions growth continues unabated, a global average surface temperature increase of 3–5°C and sea level rise of 0.5–1.0 m is likely by 2100.[4] The consequences of this altered climate will include increased human mortality from extreme weather events and vector-borne diseases, water and food shortages, mass coral bleaching, and risks to coastal infrastructure and low-lying ecosystems.[5] People in developing countries are particularly vulnerable to these impacts, and many will be displaced by future climate-related disasters, increasing the flow of refugees to the developed world (Yonetani *et al.*, 2015). It

2 Agreement on Subsidies and Countervailing Measures (SCM Agreement), opened for signature 15 April 1994, 1869 UNTS 14 (entered into force 1 January 1995).

3 In December 2017, the re-elected Queensland State Government exercised its legal right to veto the loan. This was an election commitment by the Premier and became a central issue of the 2017 state election campaign. The State Government had previously indicated strong support for the project and loan scheme. See Queensland Government Office of the Treasurer. Letter to Senator the Honourable Matthew Canavan, Minister for Resources and Northern Australia, 2017, https://naif-gov-au.industry.slicedtech.com.au/wp-content/uploads/2017/12/12-12-2017_Letter.pdf.

4 IPCC, Climate Change 2014 Synthesis Report, Contribution of Working Groups I, II, and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, IPCC, Geneva, 2015, http://ar5-syr.ipcc.ch/ipcc/ipcc/resources/pdf/IPCC_SynthesisReport.pdf, p. 11.

5 Ibid., p. 14.

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is 'virtually certain' (i.e. with 95–100% probability) that observed changes in the climate since the industrial revolution have been caused by humans.[6] CO_2 released from fossil fuel combustion and industrial processes amount to approximately 33 GtCO2-e (65%) of annual anthropogenic GHG emissions.[7] Thus, to avoid a 2°C average temperature rise, most of the world's fossil fuels will need to remain unburned.[8] Public financial support for the fossil fuel industry contradicts efforts to mitigate climate change by encouraging consumption of the very fuel sources that are largely responsible for it. It also diminishes the need to explore and invest in alternative, low-carbon, energy sources such as wind and solar (Coady *et al.*, 2015; IEA, 2014). Therefore, eliminating fossil fuel subsidies is a 'no-brainer' in mitigating climate change (Rockström *et al.*, 2017).

2.2 *Fossil fuel subsidies*

There is no consensus among international economic organizations as to how energy subsidies should be defined.[9] Moreover, methodology selection among these organizations is influenced by political considerations and their bureaucratic characteristics (Skovgaard, 2017). Nevertheless, whatever assessment method is used, there is general agreement that government support for the fossil fuel industry is substantial, comes in many forms (Steenblik, 2008), and favours consumption-based, rather than production-based,[10] subsidies. The largest estimate of fossil fuel energy subsidies is provided by the International Monetary Fund (IMF), which estimates global fossil fuel subsidies at $4.9 trillion for 2013 (6.5% of global GDP), using a hybrid methodology incorporating macroeconomic analysis and taxonomic classification (Coady *et al.*, 2015). This IMF's estimate includes the cost of market externalities produced by climate change and local environmental pollution, arguably making it more comprehensive

6 Ibid., pp. 4–5.

7 Ibid., p. 5.

8 Ibid., p. 63.

9 There are two main methodologies for calculating the scale of energy subsidies, covering macroeconomic analysis (the 'price-gap approach') and taxonomic classification (the 'inventory approach'). The most common methodology is the price-gap approach, which quantifies the difference between the reference price and the actual sale price of energy. The main benefit of this approach is its simplicity, as it does not require an exhaustive examination of domestic policy instruments. However, its theoretical simplicity is deceptive. Measurement challenges (e.g. identifying world reference prices not subject to market distortions) reduce the accuracy of the analysis and the macroeconomic focus of the methodology misses many subsidies that do not affect energy prices for consumers. The inventory approach relies upon identifying and quantifying legal instruments that governments use to intervene in energy markets. In theory, these measures could include direct financial transfers and tax expenditures, intermediate input subsidies (i.e. measures that reduce the costs of inputs, labour, or capital, or shift investment risk to the state), complementary goods subsidies (e.g. infrastructure construction), and unpriced externalities. See McKitrick (2017), Kojima and Koplow (2015), Koplow (2009).

10 Consumption side measures – support measures to energy consumption relating to specific transfers of income to certain groups of energy consumers (e.g. tax exemptions or allowed special deductions) (Alberici *et al.*, 2014: xi). Production side measures – support measures on the production side aimed at stimulating production of energy (Ibid., xii).

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than alternative assessments. A more modest estimate is provided by the International Energy Agency (IEA, 2014), which estimates the value of global fossil fuel subsidies at US$548 billion in 2013 (IEA, 2014). The smallest estimate is given by the Organization for Economic Co-operation and Development (OECD), which estimate the government support among its members for fossil fuels at US$55–90 billion per year between 2005 and 2011 (OECD, 2013). The OECD's more limited approximation is explained by its narrow selection of measures and geographic scope, which extended only to the 34 OECD member countries (OECD, 2013).

Aside from the environmental necessity of curbing fossil fuel subsidies, there are sound economic reasons for their elimination. First, fossil fuel subsidies counteract other government attempts to lower the price of renewable energy by simultaneously deflating the price of fossil fuel energy. Second, fossil fuel subsidies redirect public spending away from productive purposes and play a part in producing government budget deficits in developing countries (Coady *et al*., 2006). Finally, fossil fuel subsidies are a poorly targeted mechanism for reducing the impact of fuel price rises on low-income households, which is one of the principal justifications provided by governments (Ellis, 2010). Although fossil fuel consumption subsidies do alleviate some of the effects of high-energy prices on low-income households, wealthier households accrue the majority of benefits due to their higher levels of consumption (Coady *et al*., 2006). Accordingly, government spending could be more efficiently targeted through programs that specifically insulate low-income households from fuel price rises, such as strengthening existing social safety nets (Coady *et al*., 2006). In these circumstances, the removal of fossil fuel subsidies would be a 'win-win' for climate change mitigation and economic policy (Brewer, 2003).

3. International law

3.1 Relevant institutions

Subsidy reform sits at the nexus of a myriad of IEOs, such as the G20, WTO, IEA, Organization of the Petroleum Exporting Countries (OPEC), World Bank, IMF, United Nations Environment Programme (UNEP), Asia-Pacific Economic Cooperation (APEC), the International Renewable Energy Agency (IRENA), Global Subsidies Initiative, and the Friends of Fossil Fuel Subsidy Reform. These institutions have varying and overlapping roles to play in reforming fossil fuel subsidies, including multilateral decision-making, information sharing and analysis, lobbying, investment and program operations. For its part, the G20 first addressed the issue of fossil fuel subsidies in 2009, when world leaders agreed to 'phase out and rationalise over the medium term inefficient fossil fuel subsidies'.[11] In 2016, the

11 'G20 Leaders Statement: The Pittsburgh Summit', G20 Information Centre, last modified 29 November 2011, www.g20.utoronto.ca/2009/2009communique0925.html.

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G7 leaders placed a timeline on this pledge, committing to 'the elimination of inefficient fossil fuel subsidies … by 2025'.[12] Yet despite this rhetoric, no negotiations have commenced on a multilateral framework to eliminate fossil fuel subsidies. Further, although IEA estimates of fossil fuel subsidies have fallen from $500 billion in 2014 to $325 billion in 2015, much of this can be attributed to declining energy prices, rather than active efforts by governments to remove financial support (IEA, 2016b). Thus, there is an ongoing need to reach international agreement on eliminating fossil fuel subsidies as quickly as possible, perhaps drawing upon the lessons of fishery subsidy reform, where consensus is now emerging on the need to discipline subsidies that contribute to ecologically harmful fishing practices (Young, 2017). Admittedly, this may be difficult, as fossil fuel subsidies encourage consumptive and growth-oriented capitalism, which makes their removal unpalatable (Harris and Lee, 2017).

3.2 Climate change law

In the absence of a binding multilateral agreement that specifically addresses fossil fuel subsidies, the relevance of other international legal instruments should be considered. Underpinning the international climate change law regime is the United Nations Framework Convention on Climate Change (UNFCCC),[13] beneath which sit the Kyoto Protocol[14] and the Paris Agreement. The UNFCCC itself does not refer to subsidies. The absence of any explicit condemnation can be explained for a number of reasons, including the resistance of members to relinquish sovereignty over their natural resources, the unwillingness of developing countries to limit their options for economic development, and the disruptive influence of oil-producing members (Van Asselt and Kulovesi, 2017).

In comparison, the Kyoto Protocol explicitly identifies fossil fuel subsidies in Article 2:1(a), which states that Annex I parties (i.e. developed countries) shall 'implement and/or further elaborate policies and measures … such as: (v) Progressive reduction or phasing out of market imperfections, fiscal incentives, tax and duty exemptions and subsidies in all greenhouse gas emitting sectors that run counter to the objective of the Convention and application of market instruments'. Further, Article 2:3 states that Annex I parties 'shall strive to implement policies and measures under this Article in such a way as to minimize adverse effects, including the adverse effects of climate change, effects on international trade, and social, environmental and economic impacts on other Parties'.

12 Ministry of Foreign Affairs of Japan, G7 Ise-Shima Leaders' Declaration, G7 Ise-Shima Summit, last modified 27 May 2016, www.mofa.go.jp/files/000160266.pdf.

13 United Nations Framework Convention on Climate Change, opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994).

14 Kyoto Protocol, opened for signature 16 March 1998, UN Doc. FCCC/CP/1997/7/Add.1, 10 December 1997 (entered into force 16 February 2005).

The strong language of the Kyoto Protocol was not, however, adopted in the Paris Agreement, which, like the UNFCCC, omitted any explicit reference to energy subsidies. Nevertheless, although the text of the Paris Agreement does not on its face deal with subsidy reform, its architecture allows for it through mechanisms such as 'voluntary reporting on subsidies and their reform, putting forward subsidy reform as a nationally appropriate mitigation action, its inclusion in nationally determined contributions and discussing experiences in the context of technical expert meetings' (Van Asselt and Kulovesi, 2017: 367).

Thus, although the fossil fuel subsidy reform under the climate change law regime is not impossible, it is unlikely to occur in the immediate future; the first revision of nationally determined contributions under the Paris Agreement is not due until 2022.[15] The development of a normative international climate change mitigation response that includes fossil fuel subsidies would also require a dramatic shift in the current approach of most countries. If a legal tool for compelling action that is more urgent is to be found, it must be located outside of the climate change law regime.

3.3 Trade law

International trade law has direct implications for climate change and fossil fuel subsidies. The linkage between trade and the environment is acknowledged in the preamble to the Marrakesh Agreement,[16] which states that the ambitions of the WTO parties should be achieved 'in accordance with the objective of sustainable development'. More specifically, the WTO covered agreements with the most direct relevance for climate change governance and energy subsidy reform are the General Agreement on Tariffs and Trade (GATT)[17] and the SCM Agreement. The GATT principles of non-discrimination have been used to discipline a number of renewable energy subsidy programs. However, the GATT has never been invoked in order to challenge fossil fuel subsidies. The precise legal elements of the SCM Agreement are set out in greater detail in Section 6 of this paper. For now, it is sufficient to observe that, like the GATT, the SCM Agreement can only be invoked when a subsidy results in a trade-related market distortion. Subsidies with a purely domestic orientation will not be captured. It adopts a cascading 'traffic light' scale of prohibited ('red-light'), actionable ('amber-light') and non-actionable ('green-light') subsidies. The green-light classification originally shielded all non-specific and certain other subsidies from discipline, even if they would have otherwise breached the SCM Agreement.[18] However, the provision

15 Paris Agreement 2016, Article 4(9).

16 Marrakesh Agreement establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 154 (entered into force 1 January 1995).

17 General Agreement on Tariffs and Trade (GATT), opened for signature 30 October 1947, 55 UNTS 187 (entered into force 1 January 1948).

18 SCM Agreement 1994, Articles 8.1, 8.2(a)–(c).

was time-limited and expired on 1 January 2000.[19] Repeated attempts to revive it have been unsuccessful.[20] The SCM Agreement has been used to discipline renewable energy subsidies, but not fossil fuel subsidies.

Not only is the international trade law regime more legally relevant to energy subsidies, it also presents greater opportunities for tangible outcomes. The Paris Agreement's enforcement approach is 'facilitative, non-adversarial, and non-punitive', in keeping with the 'bottom-up', voluntary character of the rest of the Agreement (Doelle, 2016: 16). In contrast, the WTO DSB's 'system of compulsory third-party adjudication' is a 'rarity in international relations' (Mavroidis, 2012: 840), and has been held out to be the 'jewel in the crown of the WTO'.[21] It also enjoys high rates of participation and compliance (Leitner and Lester, 2015). In this context, the WTO makes sense as the forum for international climate litigation because it is the most promising avenue for legal remedies.

4. WTO subsidies litigation

4.1 Renewable energy

As of May 2017, nine disputes had been initiated through the DSB against renewable energy programs (Meyer, 2017). These programs were challenged under the GATT and SCM Agreement rules regarding national treatment, antidumping, and subsidies (Meyer, 2017). Five of these disputes initially based their claims on violations of the SCM Agreement (Meyer, 2017). However, the only case where a Panel was actually established to adjudicate an SCM Agreement claim against a renewable energy program was in *Canada–Renewable Energy*.[22] In that case, the Appellate Body, in a much criticized ruling (Genest, 2015; Rubini, 2015), declined to rule on whether the scheme was in breach of the SCM Agreement.[23] Instead, the scheme was found to violate Canada's national treatment obligations under the GATT.[24] It could be concluded that the complete absence of SCM Agreement specific cases indicates that the Agreement is less problematic for renewable energy programs than first thought. However, while the GATT has been the instrument of choice for claimants, this is likely the result of tactical decisions during litigation, namely the relative simplicity of legal argument under the GATT compared with the SCM Agreement (Birhanu Asmelash, 2015). Under

19 Ibid., Article 31.

20 An excellent summary of the genesis of the traffic light classification scale and subsequent negotiations regarding the green light is available in Bougette and Charlier (2015).

21 World Trade Organization, 'WTO Disputes Reach 400 Mark', Press release, 6 November 2009, www.wto.org/english/news_e/pres09_e/pr578_e.htm.

22 Appellate Body Report, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* (*Canada–Renewable Energy*), WT/DS412/AB/R (6 May 2013).

23 Ibid., para. 5.246.

24 Ibid., para. 5.85.

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the GATT, renewable energy programs that attach domestic content requirements (e.g. Canada's feed-in-tariff scheme) are a 'straightforward' violation of the national treatment obligation, which is designed to avoid protectionist economic policies (Meyer, 2015). In *India–Solar Cells*, the United States' decision to withdraw its claim under the SCM Agreement claim but persist with the GATT provides further evidence that claimants are satisfied that the GATT alone is sufficient to successfully challenge renewable energy programs (Birhanu Asmelash, 2015).

Nevertheless, while the GATT may be the subject of more litigation than the SCM Agreement, that does not diminish the legal relevance of the SCM Agreement for renewable energy subsidies. In fact, as well as breaching GATT national treatment obligations, subsidies that are contingent upon the use of domestic over imported goods also violate the SCM Agreement.[25] Further, unlike fossil fuel subsidies, many renewable energy subsidies are provided to energy producers rather than consumers as these subsidies encourage the international competitiveness of domestic firms (Birhanu Asmelash, 2015). These subsidies are vulnerable to the SCM Agreement as specificity under Article 2 is usually more obvious in the case of production subsidies (Marhold, 2017). Moreover, *de facto* specificity will arise if the subsidy is specific to a certain industry that captures many programs that explicitly provide incentives to renewable energy manufacturers (Birhanu Asmelash, 2015). Finally, several other energy programs that are likely in breach of the SCM Agreement have been identified, including Italy's feed-in-tariff program (D'Orsi, 2014) and Germany's allocation of free emissions allowances under the European Union's carbon trading scheme (Shah, 2007). This suggests that many renewable energy subsidies will fall under the red or amber-light classifications in the SCM Agreement, and that the Agreement remains relevant for renewable energy subsidies, despite its lack of litigation.

Work to protect renewable energy subsidies has focused on ways to strengthen the GATT and SCM Agreement to ensure that climate change mitigation efforts are not hindered by international economic law. As a starting point, the SCM Agreement contains no GATT Article XX equivalent, which would allow for public policy purposes to be accounted for in assessing the legality of a measure (Shadikhodjaev, 2015). However, Article XX is also unlikely to be read into the SCM Agreement, without the adoption of a new instrument explicitly endorsing its application in other WTO covered agreements (Waltman, 2016; Shadikhodjaev, 2015). On the other hand, invoking Article XX exceptions may prove unhelpful, as they currently do not provide protection for domestic content requirements (Shadikhodjaev, 2015). In order to ensure that the Article XX exceptions are available for domestic content requirements, Meyer proposes the introduction of a three-limb 'political necessity' test, which incorporates an

25 SCM Agreement 1994, Article 3.1(b).

assessment of the measure's contribution to net global welfare (Meyer, 2015). Other suggested improvements to the trade law regime include removing the domestic content restriction specifically for renewable energy or other climate change mitigation policies (Waltman, 2016), amending the actionability criteria in the SCM Agreement Articles 6.3 and 15.7 to allow mitigation policies to usurp trade liberalization and providing specific exceptions for mitigation or renewable energy policies (Waltman, 2016).

4.2 Fossil fuels

Fossil fuel subsidies have never been litigated under the WTO. That is not because these subsidies *cannot* be litigated, merely that a number of their features generally preclude them from the application of the GATT and SCM Agreement. First, most fossil fuel subsidies are targeted at energy consumption (IEA *et al*., 2011). As a result, it is rare for such subsidies to be caught by the exhaustive definitional list contained in SCM Agreement,[26] which applies more directly to production-based subsidies. Second, the definition of a subsidy contained in the SCM Agreement does not extend to 'regulatory subsidies', which stem from government decisions to omit the cost of negative externalities, such as local and global environmental pollution, in the price of goods (Birhanu Asmelash, 2015). This precludes WTO Members from being held to account for regulatory failures to price the externalities of fossil fuels. Second, consumption-based subsidies are usually provided economy-wide and therefore many fail to meet the test of specificity under the SCM Agreement (Birhanu Asmelash, 2015). Third, fossil fuel exports are less commonly subsidized; export taxes and restrictions are far more common (Birhanu Asmelash, 2015). The only specific example of a trade-oriented fossil fuel subsidy to receive significant academic attention is dual pricing, which is not covered by WTO rules (Marhold, 2017).

On the other hand, a specific analysis of fossil fuel subsidies can reveal surprising vulnerabilities under the SCM Agreement. For example, contrary to the perception that renewable energy programs are the sole beneficiaries of local content requirements, Tordo *et al*. (2013) demonstrate that these policies are also popular amongst countries that have recently started developing their oil and gas resources. This links to the central purpose of this paper, which is to show that fossil fuel subsidies are not immune from the features disciplined by international trade law. However, as Verkuijl *et al*. (2017) note, the lack of official data on fossil fuel subsidies necessitates that any analysis occurs on a case-by-case basis, thus overcoming the information gaps presented by generalized analysis. This paper therefore advances the literature on fossil fuel subsidies by analysing in detail a specific example of government support for the coal industry.

26 SCM Agreement 1994, Article 1.1(a)(1).

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5. Factual circumstances of Australia's proposed loan for the North Galilee Rail Line

5.1 Northern Australia Infrastructure Facility

The Northern Australia Infrastructure Facility (NAIF) is an investment agency, established by the Australian Government through the Northern Australia Infrastructure Facility Act 2016 (NAIF Act).[27] The NAIF Act is a 'major initiative' of the Australian Government's White Paper on Developing Northern Australia (Our North, Our Future),[28] which describes Northern Australia as the 'trade gateway for all of Australia'.[29] The functions of the NAIF are, *inter alia*, 'to grant financial assistance to States and Territories for the construction of Northern Australia economic infrastructure'.[30] The NAIF is governed by an independent board, whose investment decision-making power is guided by Ministerial directions contained in the Northern Australia Infrastructure Facility Investment Mandate Direction 2016 (NAIF Investment Mandate).[31]

The NAIF Investment Mandate[32] specifies seven mandatory criteria that projects must meet in order to be eligible for financial assistance, including, relevantly, that the proposed project: 'involves construction or enhancement of economic infrastructure'; 'will be of public benefit'; 'is unlikely to proceed, or will only proceed at a much later date, or with a limited scope, without financial assistance', and; 'is located in, or will have a significant benefit for, Northern Australia'.[33] In performing its duties, the NAIF is supported by Infrastructure Australia[34] and the Export Financing Insurance Corporation (Efic).[35]

Financial records indicate that NAIF will spend approximately AU$3 million per annum outsourcing operations to Efic (Swann, 2017), which will provide 'all of the assessment and the grunt work to support [NAIF's] CEO and the board'.[36] NAIF is supported by AU$5 billion in Australian Government funding,[37] which it has the power to spend until 30 June 2021.[38] The default mechanism for financial

27 Northern Australia Infrastructure Facility Act (NAIF) 2016 (Cth), Section 6.

28 Commonwealth of Australia, Explanatory Statement, NAIF Northern Australia Infrastructure Facility Act 2016 (Cth).

29 Australian Government, 'Our North, Our Future: White Paper on Developing Northern Australia' (White Paper, Australian Government, 2015), 2.

30 Northern Australia Infrastructure Facility Act 2016 (Cth), Section 7(1)(a).

31 Ibid., Section 9(1).

32 Northern Australia Infrastructure Facility Investment Mandate Direction 2016 (Cth).

33 Ibid., Schedule 1.

34 Ibid., Section 14(1).

35 Export Finance and Insurance Corporation Act 1991 (Cth), Section 7(1)(da).

36 Commonwealth, *Parliamentary Debates*, Senate Estimates (Economics Legislation Committee), 20 October 2016, 178 (Glenys Beauchamp).

37 NAIF Act 2016, Section 41.

38 Ibid., Section 8(1).

support under the NAIF is a concessional loan,[39] but the Board is not prohibited from utilizing alternative financing mechanisms, other than providing equity.[40]

5.2 North Galilee Rail Line

The North Galilee Rail Line (the NGRL) is a 311.6 km rail line in north-central Queensland, Australia, with an estimated capital investment cost of AU$2.2 billion and a peak operating capacity of 100 million tonnes per annum (Mtpa) of coal.[41] The NGRL connects the Abbot Point international coal port with the proposed Carmichael coalmine and Galilee Basin, satisfying the Queensland Government's 'pit-to-port' development policy.[42] At peak operating capacity, the Carmichael coalmine will supply 60 Mtpa of thermal coal, while the remaining 40 Mtpa will be provided by other coalmines in the Galilee Basin, six of which are currently awaiting approval.[43] In December 2016, media sources indicated that an Adani Group company had tendered for a AU$900 million loan from the NAIF to fund the NGRL (Viellaris, 2016; Burke and Clark, 2016; Robertson, 2016; Koziol and Wroe, 2016). In March 2017, it was reported that the rail freight company Aurizon Holdings Ltd (Aurizon) (formerly Queensland Rail) launched a competing AU$1.25 billion bid (Stevens, 2017; Norris, 2017). The NAIF board is currently considering these proposals.

6. Legal analysis of Australia's proposed loan via the Agreement on Subsidies and Countervailing Measures

This section considers provisions of the SCM Agreement that are relevant for analysing the Australian Government's loan, via the NAIF, for the NGRL. It sets out the legal tests that must be satisfied in order for a contravention of the SCM Agreement to be found. Provisions of the SCM Agreement that are extraneous to this purpose (including standing and remedies) have not been included. Specific application of the SCM Agreement to the potential NAIF loan is considered in Section 4.3.

In order for a measure to be disciplined by the SCM Agreement, it must first meet the definition of a 'subsidy' under Article 1. If the measure constitutes a subsidy as defined by the SCM Agreement, it may then be classified as either a 'prohibited'

39 Ibid., Section 10(1).

40 NAIF Investment Mandate 2016, Section 11(5).

41 Queensland Coordinator-General, North Galilee Basin Rail Project: Coordinator-General's Evaluation Report on the Environmental Impact, Queensland Government, Brisbane, 2014, http://statedevelopment.qld.gov.au/resources/project/north-galilee-basin-rail/ngbr-cg-eis-evaluation-report.pdf, p. vii.

42 Ibid., p. 5.

43 Australian Government, *Bioregional Assessments: Galilee Subregion* (8 April 2016), Bioregional Assessments, www.bioregionalassessments.gov.au/assessments/12-resource-assessment-galilee-subregion/1231-coal.

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subsidy (Article 3) or an 'actionable' subsidy (Article 5), depending on the circumstances. Prohibited subsidies are outright unlawful under the SCM Agreement and do not need to meet the test of specificity. Actionable subsidies are subsidies that meet the tests of specificity under Article 2, and actionability under Article 5.

6.1 *Subsidy*

Under the SCM Agreement, a subsidy will exist where the elements of Articles 1.1 (a) and (b) are satisfied: i.e. a 'financial contribution' and a 'benefit' are conferred. The Appellate Body has confirmed that these are the two separate legal elements 'which together determine whether a subsidy exists'.[44]

The concessional loan provided by the NAIF to fund the Abbot Point rail-link likely constitutes a subsidy under the SCM Agreement.

6.2 *Subsidy – financial contribution*

Article 1.1(a)(1) lists four circumstances where a financial contribution will exist. This is an exhaustive list,[45] including, *inter alia*, 'a direct transfer of funds', foregoing government revenue, the provision of goods or services, and making payments to a 'funding mechanism' to carry out the aforementioned functions.[46] The existence of any one of these factors is sufficient to meet the required legal standard.

The NAIF loan constitutes a financial contribution in the form of a direct transfer of funds.[47] The NAIF is authorized to 'grant financial assistance to States and Territories';[48] practically, this assistance flows to the proponent.[49] Thus, while the Queensland State Government may act as an intermediary for the loan, it is uncontroversial that the Commonwealth Government is making a direct financial contribution to the proponent. The default financing mechanism for investments by the NAIF is a loan.[50] The SCM Agreement explicitly includes 'loans' as an example of a 'direct transfer of funds'.[51]

44 Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R (2 August 1999), para. 157.

45 Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft – 2nd Complaint*, WT/DS353/R (31 March 2011), para. 7.955.

46 SCM Agreement 1994, Articles 1.1(a)(1)(i)–(iv).

47 Ibid., Article 1.1(a)(1)(i))

48 NAIF Act 2016, Section 7(1)(a).

49 Northern Australia Infrastructure Facility, Submission to the Senate Economic Reference Committee Inquiry into the Operation and Governance of the Northern Australia Infrastructure Facility, Cairns: NAIF, 2017, www.aph.gov.au/DocumentStore.ashx?id=8b5d6463-c858-4d12-92a8-8e226e7a42c6&subId=514844, p. 33.

50 Investment Mandate 2016, Section 10(1).

51 SCM Agreement 1994., Article 1.1(a)(1)(i).

The financial contribution must also be provided 'by a government or any public body'.[52] A public body 'must be an entity that possesses, exercises or is vested with governmental authority'.[53] When a 'statute or other legal instrument expressly vests authority in the entity', this analysis will be straightforward.[54]

The NAIF is clearly a public body. The NAIF Act vests executive government decision-making power in the agency, with oversight from the relevant Minister. [55]

6.3 *Subsidy – benefit*

On its face, the text of SCM Agreement Article 1.1(b) does not define when a benefit will be provided. The Appellate Body has held that the legal test for establishing the existence of a benefit is 'whether the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market'.[56] The Appellate Body has highlighted that in order to perform this comparison, it is necessary to define the relevant market considering the demand *and* supply sides.[57] Shadikhodjaev (2015) notes that the Appellate Body's reasoning on this point 'suggests that government action towards the creation of a new market does not, in itself, amount to a subsidy'. This appears to be an important distinction; fossil fuel subsidies are designed almost exclusively to support existing energy markets rather than facilitate the creation of new ones.

With reference to the NAIF loan, it is clear that the subsidy would confer a benefit. The NAIF is explicitly authorized to provide loans on terms that are 'concessions' on those offered by the relevant market ('commercial financiers'), including, *inter alia*, 'longer loan tenor', 'lower interest rates', 'extended periods of capitalization of interest', and 'deferral of loan repayments'.[58] To use the language of the Appellate Body, the NAIF loan constitutes 'government interventions in support of certain players in markets that already exist'.[59] The existence of any one of these concessional terms would thus be sufficient to constitute the conferral of a benefit.

6.4 *Subsidy-specific*

If a measure is found to be a subsidy, as defined by Article 1, it will not fall within the ambit of the SCM Agreement unless it is 'specific'. Prohibited subsidies are

52 Ibid., Article 1.1(a)(1).

53 Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (*US – Anti-Dumping and Countervailing Duties (China)*), WT/DS379/AB/R (11 March 2011), para. 317.

54 Ibid., para. 318.

55 NAIF Act 2016, Sections 6–9, 11–12, 14.

56 Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft* (*Canada–Aircraft*), WT/DS70/AB/R (2 August 1999), para. 157.

57 Appellate Body Report, *Canada–Renewable Energy* (2013), paras. 5.169–72.

58 NAIF Investment Mandate 2016, Section 10(2).

59 Appellate Body Report, *Canada–Renewable Energy* (2013), para. 5.188.

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specific by default as specified in Article 2.3, whereas actionable subsidies must satisfy the criteria of specificity set out in Article 2. Under the now defunct green-light protections, specific subsidies that provided assistance to disadvantaged regions were protected. However, specific subsidies are still lawful under the SCM Agreement, provided they are not prohibited or actionable. Given the emphasis of these classifications on preventing trade distortions, most regional subsidies that are not export oriented are likely to be permitted.

A subsidy may be specific if it is 'limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority'.[60] In *EC and Certain Member States – Large Civil Aircraft*, the Panel concluded that 'a subsidy available in a designated region within the territory of the granting authority is specific, even if it is available to all enterprises in that designated region'.[61] The same conclusion was reached by the Panel in *US–Anti-Dumping and Countervailing Duties (China)*.[62] There is also no requirement for the geographic region to be drawn with reference to any existing or proposed political or economic boundaries; it 'can encompass any identified tract of land within the jurisdiction of a granting authority'.[63] The Panel's analysis of Article 2.2 outlined above was not challenged by any party on appeal to the Appellate Body.

Any financial contribution provided by the NAIF is likely specific within the meaning of SCM Agreement Article 2.2. The mandatory criteria for eligibility include that 'the project is located in, or will have a significant benefit for, Northern Australia'.[64] Northern Australia is defined as a geographic area that includes large swathes of Australia that are north of the Tropic of Capricorn, as well as some smaller sub-regions that are below this line.[65] Australia may argue that the constraint set out in the eligibility criteria is not strictly based on geography, as projects that 'produce significant benefits to Northern Australia' may also be funded.[66] However, the surrounding text of the enabling legislation,[67] the Minister's introductory speech to Parliament,[68] and the relevant White Paper on Developing Northern Australia[69] reveal a clear bias in the way funding will

60 SCM Agreement 1994, Article 2.2.

61 Panel Report, *European Communities – Measures Affecting Trade in Large Civil Aircraft* (*EC and Certain Member States – Large Civil Aircraft*), WT/DS316/R (18 May 2011), para. 7.1223.

62 Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (*US – Anti-Dumping and Countervailing Duties (China)*), WT/DS379/R (22 October 2010), para. 9.135.

63 Ibid., para. 9.144.

64 NAIF Investment Mandate 2016, Schedule 1, Criteria 4.

65 NAIF Act 2016, Section 5.

66 NAIF Investment Mandate 2016, Schedule 1, Criteria 4.

67 NAIF Act 2016, NAIF Investment Mandate 2016.

68 Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 17 March 2016, 3441–3 (Josh Frydenberg).

69 Australian Government, 'Our North, Our Future: White Paper on Developing Northern Australia' (White Paper, Australian Government, 2015).

be channeled towards projects in Northern Australia. This is underscored by the observation that of the 96 subsidies NAIF is actively considering, all are based in Northern Australia.[70]

6.5 *Prohibited subsidies*

There are two types of subsidies that are prohibited outright by the SCM Agreement: 'subsidies contingent, in law or in fact … upon export performance' and 'subsidies contingent, whether solely or as one of several other conditions upon the use of domestic over imported goods'.[71] The blanket ban on these subsidies is justified on the principle that their *raison d'être* is to affect trade and that they are therefore likely to adversely affect the interests of other members (Van den Bossche and Zdouc, 2013).

The text of Article 3.1(a) provides that subsidies may be *de jure* or *de facto* contingent upon export performance. As the Appellate Body noted in *Canada–Autos*,[72] a subsidy that is *de jure* contingent upon export performance can be revealed by the explicit or implicit meaning 'of the very words of the relevant legislation, regulation or other legal instrument constituting the measure'.[73] Where the legal instrument lays out a requirement for export contingency on its face, it will be relatively straightforward to demonstrate that the measure is in violation of Article 3.[74]

The standard of *de facto* contingency is more complex, but will be met 'if the facts demonstrate that the subsidy is in fact tied to actual or anticipated exportation or export earnings'.[75] In *Canada–Aircraft*, the Appellate Body observed that there are three distinct substantive elements to the test of *de facto* contingency contained in footnote four: (1) the '*granting* of a subsidy', (2) that 'is … *tied* to', and (3) 'actual or anticipated exportation or export earnings'.[76] No single fact will be decisive,[77] and footnote 4, second sentence of the SCM Agreement, expressly precludes using the 'mere fact that a subsidy is granted to enterprises which export' to justify a conclusion of contingency. Accordingly, *de facto* export contingency must be 'inferred from the total configuration of facts constituting and surrounding a

70 Northern Australia Infrastructure Facility, Pipeline Information, Australian Government, 2018, http://naif.gov.au/application-process/pipeline-information/.

71 SCM Agreement, Article 3.1(a)–(b).

72 Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry* (*Canada–Autos*), WT/DS139/AB/R (31 May 2000).

73 Ibid., para. 100.

74 Ibid., paras. 100, 104; Appellate Body Report, *Canada–Aircraft*, para. 9.230.

75 SCM Agreement 1994, Footnote 4; Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather* (*Australia–Automotive Leather II*), WT/DS126/R (25 May 1999), para. 9.55.

76 Appellate Body Report, *Canada–Aircraft*, para. 169.

77 Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft* (*Canada–Aircraft*), WT/DS70/R (14 April 1999).

subsidy'.[78] The test is objective,[79] and factors that may be considered include: a Member's awareness that its own domestic industry is too small to absorb domestic production of a subsidized product,[80] the export orientation of the recipient,[81] the level of a particular company's exports,[82] the terms of any loan contract,[83] if a subsidy brings a product closer (e.g. faster or more likely to be manufactured) to sale on the export market,[84] statements by government ministers, members of parliament, and government officials,[85] and any other fact that demonstrates the export contingency of the subsidy.[86] With respect to the volume of exports produced by a subsidy, the DSB has given no indication as to what level the increase must take before it will fall foul of the SCM Agreement. There is no hard limit; this factor will be weighed alongside others in determining whether a subsidy is *de facto* export contingent.

A NAIF loan for the NGRL cannot be challenged on the basis of *de jure* contingency on export performance. However, it is vulnerable to a finding of *de facto* contingency under Article 3.1(a) for the following reasons:

(a) Regarding the scale of Australia's domestic industry, it is evident that Australia does not require new coalmines for domestic consumption. Domestic demand for coal has ceased growing and is met by current on-shore production.[87] In *Australia–Automotive Leather II*, the Panel was persuaded that the Australian Government's support for domestic hide production facilities was conditioned on sales targets that could only be met from exports.[88] In the case of the NGRL, it is obvious that the loan will solely facilitate export trade and not domestic consumption.

(b) The scale of exports from the Galilee Basin is likely to be significant. The most recent estimate of Economic Demonstrated Resources in the Galilee is 5340 Mt,

78 Appellate Body Report, *Canada–Aircraft*, para. 167.

79 Appellate Body Report, *European Communities – Measures Affecting Trade in Large Civil Aircraft*, (*EC and Certain Member States – Large Civil Aircraft*), WT/DS316/AB/R (18 May 2011), para. 1051–2.

80 Panel Report, *Australia–Automotive Leather II*, para. 9.67.

81 Appellate Body Report, *Canada–Aircraft*, paras. 48, 51.

82 Panel Report, *Australia–Automotive Leather II*, para. 9.56.

83 Ibid., para. 9.75.

84 Panel Report, *Canada–Aircraft*, para. 9.339.

85 Appellate Body Report, *Canada–Aircraft*, para. 207.

86 Panel Report, *Australia–Automotive Leather II*, para. 9.56.

87 Between 2004/5 and 2014/15, demand for coal has fallen by 2% per year: Australian Government, Office of the Chief Economist, 'Australian Energy Update 2016', Department of Industry, Innovation and Science, 2016, https://industry.gov.au/Office-of-the-Chief-Economist/Publications/Documents/aes/2016-australian-energy-statistics.pdf, p. 7 (Table 3.1).

88 Panel Report, *Australia–Automotive Leather II*, para. 7.251.

while inferred estimates place the volume of reserves at 23843 Mt.[89] The NGRL will provide access to the Abbot Point international coal export port for the Galilee Basin, with a peak operating capacity of 100 Mtpa.[90] In 2014/15, Australia's coal exports were 392 Mt.[91] Thus, the NGRL has the potential to increase Australia's coal export capacity by more than 25%. Assuming current market volumes, the operating capacity of the NGRL also represents about 10% of the current world trade in steam coal (IEA, 2016a).

(c) The subsidy for the NGRL brings the sale of products from the Galilee Basin substantially closer to export. Under the NAIF Investment Mandate, a mandatory eligibility criterion is that 'the proposed project is unlikely to proceed, or will only proceed at a much later date, or with a limited scope, without financial assistance'.[92] As a result, the construction of the NGRL, and its attendant impact on Australia's coal export capacity, can be causally attributed to the provision of finance by the NAIF.

(d) Statements by government ministers have repeatedly emphasized the export orientation of the loan (Bennett, 2017; Killoran and McCarthy, 2016).

(e) The *White Paper* underpinning the NAIF Act makes it clear that the development of Northern Australia means 'unlocking new investment' through exports and international trade.[93]

The existence of any one of these factors alone would likely be insufficient to allow a finding of export contingency. However, the aggregation of factors in this case study is unique in WTO jurisprudence. The significant scale of exports produced by this subsidy and the weight of other evidence in this matter points strongly towards a finding of *de facto* export contingency.

6.6 *Actionable subsidies*

Actionable subsidies are not a *prima facie* violation of the SCM Agreement. However, they are open to challenge should they cause 'adverse effects' to the

89 Geoscience Australia, 'Coal', Australian Energy Resources Assessment, last modified 2016, www.ga.gov.au/aera/coal.

90 Queensland Coordinator-General, 'North Galilee Basin Rail Project: Coordinator-General's Evaluation Report on the Environmental Impact', Queensland Government, Brisbane, 2014, http://statedevelopment.qld.gov.au/resources/project/north-galilee-basin-rail/ngbr-cg-eis-evaluation-report.pdf, p. vii.

91 Australian Government, Office of the Chief Economist, 'Australian Energy Update 2016', Department of Industry, Innovation and Science, 2016, https://industry.gov.au/Office-of-the-Chief-Economist/Publications/Documents/aes/2016-australian-energy-statistics.pdf p. 21, Figure 5.1.

92 NAIF Investment Mandate 2016, Schedule 1, Criteria 4.

93 Australian Government, 'Our North, Our Future: White Paper on Developing Northern Australia', 2015, pp. 57, 62–63, 162.

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interests of other Members.[94] As a first step, an actionable subsidy must satisfy the definition of a subsidy[95] and meet the requirement of specificity.[96] Adverse effects may then be established through, *inter alia*, 'serious prejudice to the interests of another Member'.[97]

6.7 *Serious prejudice*

Serious prejudice is concerned with 'negative effects on a Member's *trade interests*' including 'lost … export volume or market share'.[98] Accordingly, serious prejudice to the interests of another Member includes the circumstance where 'the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market'.[99] In *US–Upland Cotton*,[100] the Panel ruled that 'prejudice' occurs when 'a detrimental impact on a complaining Member's production of, and/or trade in, the product concerned' can be shown. The threshold level of 'serious' is met where the effect is 'important, not slight or negligible, or meaningful'.[101] The test of seriousness cannot be analysed prospectively, as observations must be made by a 'reference period'.[102]

The NAIF loan is highly likely to result in serious prejudice to the interests of another Member, through the displacement of the Member's trade in coal. While any of India's coal trading partners could be considered (e.g. Russia), Indonesia is the party likely to be most severely affected by an influx of Australian coal onto international energy markets. The NGRL will have an operating capacity of 100 Mtpa, the majority of which is expected to be exported to India. This is about 74% of Indonesia's current steam coal exports to India (IEA, 2016a), and would represent a substantial displacement of existing exports.[103] Therefore, the scale of exports from the Galilee Basin is likely to meet the test of seriousness.

6.8 *Like product*

In order to prove serious prejudice to Indonesia, it must be demonstrated that Indonesian and Australian coal are 'like products'.[104] The phrase 'like products' is defined in footnote 46, which provides that, '[t]hroughout this Agreement the

94 SCM Agreement 1994, Article 5.
95 Ibid., Article 1.
96 Ibid., Article 2.
97 Ibid., Article 5(c).
98 Ibid., Article 5(c).
99 SCM Agreement 1994, Article 6.3(b).
100 Panel Report, *United States – Subsidies on Upland Cotton* (*US–Upland Cotton*), WT/DS267/R (8 September 2004), para. 7.1392.
101 Ibid., para. 7.1393.
102 Panel Report, *EC and Certain Member States–Large Civil Aircraft*, para. 7.1693–4.
103 Note that were this case to be determined by the DSB, the parties would likely present economic modelling that would go beyond the complexity presented in this paper.
104 SCM Agreement 1994, Article 6.3(b).

term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.'

The Panel in *Indonesia–Autos* referred with approval to the Appellate Body Report in *Korea–Alcoholic Beverages* (1999), which determined that under the GATT, 'the issue of "like product" must be considered on a case-by-case basis'.[105] In applying the likeness test under the SCM Agreement, the Panel then looked closely at the physical characteristics of the two products, but noted that it was not precluded from considering other criteria.[106] As such, it appears that while the physical characteristics are an important feature of the test for likeness under the SCM Agreement, the other elements highlighted by the Working Group on Border Tax Adjustments ought to also be considered, specifically: 'the product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the product's properties, nature and quality'.[107] Nevertheless, it is important to acknowledge that the precise extent of the like product analysis under the SCM Agreement has not been identified by a Panel or the Appellate Body.

In terms of end-uses, coal from Australia and Indonesia is currently used in India for identical purposes: electricity generation.[108] Coal from the Galilee Basin would also be used for the same purpose.[109] The consumer taste and habits criteria is less relevant for analysing coal as a product, and may be collapsed into the consideration of a product's quality, which is usually the differentiating factor for electricity producers.[110]

Two important factors determining the quality of coal products in India are energy and ash content.[111] Indonesian export coal is typically 2–12% ash content (Ewart, Vaughn and Marston & Marston Inc., 2009), whereas coal from the proposed Carmichael Coal Mine, in the Galilee Basin, is expected to be about 26%.[112] In terms of calorific content, Indonesia export coal is typically 5 300-6 700 kCal/kg (Ewart, Vaughn and Marston & Marston Inc., 2009), whereas the Carmichael

105 Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry* (*Indonesia–Autos*), WT/DS54/R (2 July 1998), para. 14.174.

106 Ibid., para. 14.173.

107 Appellate Body Report, *Japan – Taxes on Alcoholic Beverages (Japan–Alcoholic Beverages II)*, WT/DS8/AB/R (4 October 1996), p. 20.

108 Australian Government, *Coal in India 2015*, Canberra: Office of the Chief Economist, 2015, www.industry.gov.au/Office-of-the-Chief-Economist/Publications/Documents/Coal-in-India.pdf, pp. 52–53.

109 Ibid.

110 Ibid.

111 Government of India, 'Coal Grades', Ministry of Coal, last modified 24 September 2014, www.coal.nic.in/content/coal-grades.

112 *Adani Mining Pty Ltd* v. *Land Services of Coast and Country Inc & Ors* [2015] QLC 48, para [477].

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Coal Mine expects to export coal with 4 950 kCal/kg.[113] Although the quality of the two coals is slightly different, both can be used at the same power stations in India.

Finally, although tariff classifications will not be determinative,[114] it is relevant to note that the Indonesian and Australia's schedule of concessions delineates between 'anthracite', 'bituminous coal', and 'coal (excluding anthracite and bituminous)'.[115] Simply put, these classifications distinguish between different types of coal, used for distinct purposes. Relevantly, almost all thermal coal is classed as bituminous,[116] indicating that Indonesia and Australia regard coal used for electricity production as 'like products', despite its varying quality. Accordingly, while there are subtle differences between Australian and Indonesian coal, it is highly likely that the products would be found to be like.

6.8 Like product: renewable energy

Although electricity produced by fossil fuels and renewable energy are often in direct competition, this does not allow renewable energy exporters to claim serious prejudice as a result of subsidized Australian coal products. First, Australia is exporting raw coal, not electricity. Thus, even if electricity produced by fossil fuel and renewable sources are like products, this finding is irrelevant to the matter at hand. Rather, for renewable energy exporters to claim serious prejudice, they must demonstrate that renewable energy products (e.g. solar panels and wind turbines) are like coal. This is highly unlikely under the current test for likeness (Wold *et al.*, 2012).

7. Discussion

The existing literature on fossil fuel subsidies suggests that many, if not most, are unlikely to violate WTO rules. However, this paper finds that under the right conditions, disciplinable fossil fuel subsidies can be found. Notably, the factual circumstances that likely make Australia's proposed subsidy subject to WTO rules are those that have also been found in renewable energy subsidies. First, the NAIF loan is expressly targeted at energy production, rather than consumption. Second, the subsidy is designed to benefit firms that are engaged in international trade. Third, the subsidy is specific. Fourth, the subsidy is in the form of a straightforward financial contribution. This finding suggests that although the majority of

113 Ibid.

114 Panel Report, *Japan – Taxes on Alcoholic Beverages (Japan–Alcoholic Beverages II)*, WT/DS8/R (11 July 1996), para. 6.21.

115 World Trade Organization (2017), 'Harmonised System sub-headings 270111, 270112, 270119 in Indonesia and Australia's Schedules of Concessions in Goods', World Trade Organization. 2017 https://www.wto.org/english/tratop_e/schedules_e/goods_schedules_table_e.htm (accessed 9 August 2017).

116 Australian Government, *Coal in India 2015,* pp. 52–53.

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fossil fuel subsidies may indeed be consumption oriented, that does not preclude the existence of prohibited or actionable production-based fossil fuel subsidies. Rather, such subsidies are likely to be found in countries where fossil fuel exploration and development is present, and where fossil fuels are an important export commodity.

Another factor playing a key role is Australia's domestic political environment, where climate change policy has been a fraught issue for at least a decade. It has contributed to the demise of several major party leaders and at least one government (Chubb, 2014). Recently, energy policy has also become a symbolic issue. The current federal Coalition Government, comprised of the centre-right Liberal and National Parties, has tethered its views on energy policy to 'clean coal' technology (Turnbull, 2017). The Minister for Energy has also claimed that coal mining has a 'strong moral case' to alleviate poverty in the developing world (Aston, 2015). This suggests that where government support for the fossil fuel industry can be connected with domestic politics, subsidies that violate the WTO Agreements may be found. Beyond Australia, the Trump Administration's support for coal mining exhibits similar warning signs, through President Trump's campaign promise to 'put [coal] miners back to work' (Fears, 2017) and his decision to withdraw from the Paris Agreement (ABC News, 2017). These similarities suggest that the United States' support for fossil fuel subsidies may be a fruitful environment for NGOs wishing to identify other policies that are disciplinable under the WTO. In the absence of self-reporting by WTO Members, Casier *et al.* (2014) suggest that NGOs can contribute to the notification of SCM Agreement subsidies. This paper suggests that Australia and the United States are political environments where subsidies for the coal industry that violate the SCM Agreement are likely to be found.

Finally, the DSU's rules on standing offer the potential for WTO Members who will be severely affected by climate change to bring claims, even where their trade interests are not directly infringed. Strategically, one group of countries that might consider such an action is low-lying Pacific Island states, who are already experiencing damage from rising sea levels. Of these countries, six are WTO Members (Maldives, Mauritius, Samoa, Seychelles, Tonga, and Vanuatu). Any one of them could initiate an action against Australia. Another group of countries who may be amenable to such an action is the Friends of Fossil Fuel Subsidy Reform (FFFSR). The founding members are Costa Rica, Denmark, Ethiopia, Finland, New Zealand, Norway, Sweden, Switzerland, and Uruguay.[117] A further 42 countries have listed their support for the FFFSR communiqué.[118] Admittedly, few of these countries have significant coal export industries, and not all are WTO Members.

117 Friends of Fossil Fuel Subsidy Reform. 'Supporters of the Communiqué', Friends of Fossil Fuel Subsidy Reform, last updated 2018, http://fffsr.org/communique/supporters/ (accessed 9 August 2017).

118 Ibid.

https://doi.org/10.1017/S1474745618000022 Published online by Cambridge University Press

8. Conclusion

This paper highlights that scrutiny of specific fossil fuel subsidies may be fruitful in efforts to achieve fossil fuel subsidy reform. It identifies one subsidy that violates the SCM Agreement: Australia's proposed concessional loan for the NGRL. This subsidy is likely to be a prohibited subsidy on the basis of export contingency, as well as an actionable subsidy, on the basis of it causing serious prejudice to the interests of another Member. This finding is a unique breakthrough in the fight against fossil fuel subsidies, as it suggests that such subsidies can be litigated. This might cause some governments to reconsider their decision to provide financial support to the fossil fuel industry. The paper also identifies several features of Australia's domestic political environment that make the NAIF loan vulnerable to legal challenge. These features, particularly ideological support for fossil fuels, appear to be present in the United States under President Trump. As a result, NGOs and researchers who wish to find other challengeable fossil fuel subsidies ought to look to this jurisdiction as a starting point.

References

ABC News (2017), 'Donald Trump Announces US Withdrawing from Paris Climate Deal', 2 June 2017, www.abc.net.au/news/2017-06-02/donald-trump-announces-us-withdrawing-from-paris-climate-deal/8580980.

Alberici, Sacha *et al.* (2014), *Subsidies and Costs of EU Energy*, European Commission, https://ec.europa.eu/energy/sites/ener/files/documents/ECOFYS%202014%20Subsidies%20and%20costs%20of%20EU%20energy_11_Nov.pdf.

Aston, H. (2015), 'Moral Imperative in Australia's Biggest Coal Mine, Says Resources Minister Josh Frydenberg', *The Sydney Morning Herald*, 18 October 2015, www.smh.com.au/federal-politics/political-news/moral-imperative-in-australias-biggest-coal-mine-says-resources-minister-josh-frydenberg-20151017-gkbu0s.html.

Bennett, J. (2017), 'Adani: Prime Minister Malcolm Turnbull meets with Chairman, Reiterates Support for Mine', *ABC News*, 11 April 2017, www.abc.net.au/news/2017-04-11/turnbull-meets-with-adani-chairman-during-india-visit/8432938.

Birhanu Asmelash, H. (2015), 'Energy Subsidies and WTO Dispute Settlement: Why Only Renewable Energy Subsidies Are Challenged', *Journal of International Economic Law*, **18**(2): 261–285.

Bougette, P. and C. Charlier (2015), 'Renewable Energy, Subsidies, and the WTO: Where Has the "Green" Gone?', *Energy Economics*, **51** (September): 407–416.

Brewer, T. L. (2003), 'The Trade Regime and the Climate Regime: Institutional Evolution and Adaptation', *Climate Policy*, **3**(4): 329–341.

Burke, G. and D. Clark (2016), 'Adani's $2 Billion Carmichael Rail Line in Queensland Closer to Federal Loan', *ABC News*, 3 December 2016, www.abc.net.au/news/2016-12-03/adani-carmichael-rail-line-closer-to-federal-loan/8089790.

Casier, L., R. Fraser, M. Halle, and R. Wolfe (2014), 'Shining a Light on Fossil Fuel Subsidies at the WTO: How NGOs Can Contribute to WTO Notification and Surveillance', *World Trade Review*, **13**(4): 603–632.

Chubb, P. (2014), *Power Failure: The Inside Story of Climate Politics under Rudd and Gillard*, Collingwood: Black Inc.

Coady, D., I. Parry, L. Sears, and B. Shang (2015), *How Large Are Global Energy Subsidies? Working Paper no. 15/105*, International Monetary Fund, www.imf.org/en/Publications/WP/Issues/2016/12/31/How-Large-Are-Global-Energy-Subsidies-42940.

https://doi.org/10.1017/S1474745618000022 Published online by Cambridge University Press

Coady, D., M. El-Said, R. Gillingham, P. Medas, and D. Newhouse (2006), *The Magnitude and Distribution of Fuel Subsidies: Evidence from Bolivia, Ghana, Jordan, Mali, and Sri Lanka*, Working Paper no. 06/247, International Monetary Fund, www.imf.org/external/pubs/ft/wp/2006/wp06247.pdf.

D'Orsi, M. (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?', *American University International Law Review*, **29**(3): 673–716.

Doelle, M. (2016), 'The Paris Agreement: Historic Breakthrough or High Stakes Experiment?', *Climate Law*, **6**(1/2): 1–20.

Ellis, J. (2010), *The Effects of Fossil-Fuel Subsidy Reform: A Review of Modelling and Empirical Studies*, Geneva: Global Subsidies Initiative, www.iisd.org/gsi/sites/default/files/effects_ffs.pdf.

Ewart, D. L., R. Vaughn, and Marston & Marston Inc. (2009), 'Indonesian Coal', *World Coal Asia Special*, May, 2009, www.marston.com/Portals/0/MARSTON_Review_of_Indonesian_Thermal_Coal_Industry.pdf.

Fears, D. (2017), 'Donald Trump Promises to Bring Back Coal Jobs but Experts Disagree', *The Independent*, 29 March 2017, www.independent.co.uk/news/world/americas/donald-trump-coal-mining-jobs-promise-experts-disagree-executive-order-a7656486.html.

Genest, A. (2015), 'The Canada-FIT Case and the WTO Subsidies Agreement: Failed Fact-Finding, Needless Complexity, and Missed Judicial Economy', *McGill International Journal of Sustainable Development Law and Policy*, **10**(2): 237–258.

Harris, P. G. and T. Lee (2017), 'Compliance with Climate Change Agreements: The Constraints of Consumption', *International Environmental Agreements: Politics, Law and Economics*, **17**(6): 779–794.

International Energy Agency (2012), *Energy Policies of IEA Countries: Australia 2012 Review*, Paris: IEA, www.iea.org/publications/freepublications/publication/Australia2012_free.pdf.

——— (2014), *World Energy Outlook 2014*, Paris: IEA, www.iea.org/publications/freepublications/publication/WEO2014.pdf.

——— (2016a), *Coal Information*, Paris: IEA.

——— (2016b), *World Energy Outlook 2016*, Paris: IEA, www.iea.org/newsroom/news/2016/november/world-energy-outlook-2016.html.

IEA, OPEC, OECD, and World Bank (2011), *Joint Report by IEA, OPEC, OECD and World Bank on Fossil-Fuel and other Energy Subsidies: An Update of the G20 Pittsburgh and Toronto Commitments*, www.oecd.org/env/49090716.pdf.

Killoran, M. and J. McCarthy (2016), 'Matt Canavan says "Positive News" is set to be announced on Adani Mega Mine', *The Courier Mail*, 5 December 2016, www.couriermail.com.au/news/queensland/matt-canavan-says-positive-news-is-set-to-be-announced-on-adani-mega-mine/news-story/a7fadc07f070e64cf1e4f9c3cdfd8927.

Kojima, M. and D. Koplow (2015), *Fossil Fuel Subsidies: Approaches and Valuation*, Working Paper no. 7220, World Bank Group, http://documents.worldbank.org/curated/en/961661467990086330/pdf/WPS7220.pdf.

Koplow, D. (2009), *Measuring Energy Subsidies Using the Price-Gap Approach: What Does It Leave Out?* Manitoba: International Institute for Sustainable Development, https://www.iisd.org/pdf/2009/bali_2_copenhagen_ff_subsidies_pricegap.pdf.

Koziol, M. and D. Wroe (2016), 'Turnbull Set for Adani talks Amid Rumours Government Will Chip in $1B for Railway Line', *The Sydney Morning Herald*, 5 December 2016.

Leitner, K. and S. Lester (2015), 'WTO Dispute Settlement 1995–2014 – A Statistical Analysis', *Journal of International Economic Law*, **18**(1): 203–214.

Marhold, A.-A. (2017), 'Subsidy Regulation in WTO Law: Some Implications for Fossil Fuels and Renewable Energy', in L. Hancher, A. De Hauteclocque, and F. M. Salerno (eds.), *State Aid in the Energy Sector*, Oxford: Hart Publishing.

Mavroidis, P. C. (2012), *Trade in Goods*, Oxford: Oxford Public International Law.

McKitrick, R. (2017), 'Global Energy Subsidies: An Analytical Taxonomy', *Energy Policy*, **101** (February): 379–385.

Meyer, T. (2017), 'Explaining Energy Disputes at the World Trade Organization', *International Environmental Agreements: Politics, Law and Economics*, **17**(3): 391–410.

——— (2015), 'How Local Discrimination Can Promote Global Public Goods', *Boston University Law Review*, **95**(6): 1937–2025.

Norris, G. (2017), 'Aurizon Signals its Plans for Mine Link', *The Courier Mail*, 16 March 2017, http://www.couriermail.com.au/news/queensland/aurizon-seeks-funding-for-abbot-point-to-galilee-basin-rail-link/news-story/d7d70d6082b89b8173dcf4cc5fd16493.

Organisation for Economic Co-operation and Development (OECD) (2013), *Inventory of Estimated Budgetary Support and Tax Expenditures for Fossil Fuels 2013*, Paris: OECD Publishing, www.oecd.org/environment/inventory-of-estimated-budgetary-support-and-tax-expenditures-for-fossil-fuels-2013-9789264187610-en.htm.

Robertson, J. (2016), 'Adani Coal Mine: Green Groups Fume Over Plan for $1B Federal Loan', *The Guardian*, 3 December 2016, https://www.theguardian.com/business/2016/dec/03/adani-coal-mine-green-groups-fume-over-plan-for-1b-federal-loan.

Rockström, J., O. Gaffney, J. Rogelj, M. Meinshausen, N. Nakicenovic, and H. J. Schellnhuber (2017), 'A Roadmap for Rapid Decarbonization', *Science*, **355**(6331): 1269–1271.

Rubini, L. (2015), 'The Wide and the Narrow Gate: Benchmarking in the SCM Agreement after the Canada–Renewable Energy/FIT Ruling', *World Trade Review*, **14**(2): 211–237.

Shadikhodjaev, S. (2015), 'Renewable Energy and Government Support: Time to "Green" the SCM Agreement?', *World Trade Review*, **14**(3): 479–506.

Shah, V. R. (2007), 'The Allocation of Free Emissions Allowances by Germany to Its Steel Industry: A Possible Subsidy Claim under the WTO Agreement on Subsidies and Countervailing Measures', *American University International Law Review*, **22**(3): 445–478.

Skovgaard, J. (2017), 'The Devil Lies in the Definition: Competing Approaches to Fossil Fuel Subsidies at the IMF and the OECD', *International Environmental Agreements: Politics, Law and Economics*, **17**(3): 341–353.

Steenblik, R. (2008), *A Subsidy Primer*, Geneva: Global Subsidies Initiative of the International Institute for Sustainable Development, www.iisd.org/gsi/sites/default/files/primer.pdf.

Stevens, M. (2017), 'Aurizon Returns to Galilee Coal by Rail', *The Australian Financial Review*, 15 March 2017, www.afr.com/business/energy/aurizon-returns-to-the-galilee-basin-with-northern-infrastructure-fund-plan-20170315-guys3y.

Swann, T. (2017), *Don't be so NAIF: Adani and Governance of the Northern Australia Infrastructure Facility (NAIF)*, Sydney: The Australia Institute, www.tai.org.au/sites/defualt/files/P318%20Dont%20be%20so%20naif%20FINAL.pdf.

Tordo, S., M. Warner, O. E. Manzano, and Y. Anouti (2013), *Local Content Policies in the Oil and Gas Sector*, Report No. 78994, Washington, DC: The World Bank.

Turnbull, M. (2017), 'Address to the National Press Club', Speech given to the National Press Club, Canberra, 1 February 2017, www.liberal.org.au/latest-news/2017/02/01/MTNPC.

Van Asselt, H. and K. Kulovesi (2017), 'Seizing the opportunity: tackling fossil fuel subsidies under the UNFCCC', *International Environmental Agreements: Politics, Law and Economics*, **17**(3): 357–370.

Van den Bossche, P. and W. Zdouc (2013), *The Law and Policy of the World Trade Organization*, Cambridge: Cambridge University Press.

Verkuijl, C., H. van Asselt, T. Moerenhout, L. Casier, and P. Wooders (2017), *Tackling Fossil Fuel Subsidies through International Trade Agreements*, Climate Strategies, November 2017.

Viellaris, R. (2016), 'Turnbull's $1B Boost for Adani Megamine', *The Courier Mail*, 3 December 2016.

Waltman, R. A. (2016), 'Amending WTO Rules to Alleviate Constraints on Renewable Energy Subsidies', *Willamette Journal of International Law and Dispute Resolution*, **23**(2): 367–397.

Wold, C., G. Wilson, and S. Foroshani (2012), 'Leveraging Climate Change through the World Trade Organization: Are Fossil Fuel Subsidies Actionable?', *Georgetown Journal of International Law*, **43**(3): 635–694.

Yonetani, M. *et al.* (2015), *Global Estimates 2015: People Displaced by Disasters*, Geneva: Internal Displacement Monitoring Centre, www.internal-displacement.org/assets/library/Media/201507-globalEstimates-2015/20150713-global-estimates-2015-en-v1.pdf.

Young, M. A. (2017), 'Energy Transitions and Trade Law: Lessons from the Reform of Fisheries Subsidies', *International Environmental Agreements: Politics, Law and Economics*, **17**(3): 371–390.