Government Support for Renewable Energy and WTO Law: The Case of the UK's Contracts for Difference Scheme

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ABSTRACT: It is clear that some degree of government intervention is required to accelerate the transition to renewable energy. Technologies to harness renewable sources such as wind and solar have higher up-front costs than non-renewable sources like coal and gas. Left to the market, investment would continue to flow towards fossil fuels with the associated negative implications for climate change. Governments are faced with difficult policy choices. Precisely what form should the intervention take? Are there opportunities to blend the required transition with industrial development objectives such as bolstering domestic capacity and expertise in the goods and services associated with renewable technologies? Part of the challenge here is to understand how world trade law constrains these policy choices. The overall picture is complex. Overlapping treaty provisions raise difficult questions of interpretation and application. The question is whether there is a navigable route for states to transition to renewables without breaching trade law obligations. The focus is on the UK's primary initiative to support renewable energy infrastructure – the Contracts for Difference scheme.

Keywords: Contracts for Difference; net-zero transition; renewable energy; WTO; subsidy

1. INTRODUCTION

This contribution focuses on the WTO law compatibility of the UK's Contracts for Difference scheme. Launched via the first allocation round in 2014, the scheme provides support within contracts between the government owned Low Carbon Contracts Company (LCCC), and electricity generators using renewable sources. Allocation rounds determine 'strike prices' for electricity generated using different forms of renewable technology. Successful applicants are guaranteed to receive the strike price. When the wholesale price is lower than the strike price, payments are made to cover the difference; hence Contracts for Difference (CfD).

Informed observers might be aware of the scheme's reported successes and missteps. The fifth allocation round (AR5) was generally considered to have failed.[1] Despite its status as the dominant technology, the offshore wind industry did not participate. More recently, the results of AR6 in September 2024 generated among the first positive news stories for the new Labour administration. It was reported that offshore wind is 'back in business'.[2] A record number of 131 projects were approved, including a record number of solar projects. Onshore wind has also returned following revocation of the *de facto* 2015 ban[3] and the world's largest floating offshore wind project was approved. Most recently, Prime Minister Sir Keir Starmer announced the Clean Industry Bonus (CIB) on the opening day of COP29. The CIB will operate within CfD allocation rounds beginning with AR7 to provide extra revenue support for fixed and floating offshore wind CfD applicants if they, 'choose to invest in more sustainable supply chains'.[4]

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[1] Adam Vaughan, 'No new offshore wind farms in blow to net zero plans' The Times, 8 September 2023; Alban Thurston, 'Offshore wind chiefs slam government's AR5 auction failure' The Energyst, 8 September 2023 < https://theenergyst.com/offshore-wind-chiefs-slam-governments-ar5-auction-failure/> accessed 25 June 2025.

[2] Press Release, 'Government secures record pipeline of clean cheap energy projects', 3 September 2024, < https://www.gov.uk/government/news/government-secures-record-pipeline-of-clean-cheap-energy-projects> accessed 25 June 2025.

[3] Policy Paper, 'Policy Statement on onshore wind', 8 July 2024, <https://www.gov.uk/government/publications/policy-statement-on-onshore-wind/policy-statement-on-onshore-wind#:~:text=We%20are%20therefore%20committed%20to,Planning%20Policy%20Framework%20(NPPF)> accessed 25 June 2025.

[4] CfD Allocation Round 7: Clean Industry Bonus framework and guidance, 12 November 2024,

Less well known is that the EU initiated the first step of WTO dispute settlement proceedings by calling for consultations with the UK in March 2022. This remains the only such recourse since the UK's withdrawal from the EU on the 31st January 2020.[5] The EU considered that aspects of AR4 incentivized applicants to specify the use of UK domestic goods thereby discriminating against EU goods. Assurances provided by the UK prevented escalation to the formation of a dispute settlement panel. There is no record of any legal arguments which might have been made, other than reference to a provision at the heart of the multilateral trading system – GATT Article III:4 which prohibits internal regulatory (non-tax) discrimination between like domestic and imported products. This applies both as a matter of WTO law, and under the EU-UK Trade and Co-operation Agreement.[6]

Against this background, a legal analysis has been motivated by several considerations. In microcosm, the outcome of the consultations indicates a commitment towards complying with a body of international law with which the UK has little direct recent experience. The WTO law compatibility of the CfD scheme ought therefore to be of interest to UK policy makers. The scheme differs from those which have previously been successfully challenged in WTO dispute settlement.[7] It can be questioned whether the UK might have implemented support for clean energy infrastructure in a manner which largely achieves WTO law consistency; a matter of interest to the general WTO membership. The article considers three aspects of the CfD scheme.

First is the CfD aspect raised by the EU in relation to AR4. This pertained to the process of gaining eligibility to apply for a CfD. The EU considered that applicants were incentivized to specify the use of domestic over imported generating equipment. As noted, the EU referred to a possible breach of GATT Article III:4. A novel legal question is raised. The WTO cases to date dealing with domestic content requirements for renewable energy schemes,[8] have something in common. It was reasonably obvious that GATT Article III:4 was breached because the measures unequivocally mandated the use of domestic over imported electricity generating equipment. While there were incontestable breaches in these cases, the same cannot be said of the manner in which AR4 referred to UK content. As will be explained, it is difficult to make sense of AR4 on whether there was any advantage to be gained from commitments on UK content relative to imported content. The novel question is therefore whether GATT Article III:4 is breached when government measures are ambiguous in relation to the noted advantage.

The second CfD aspect moves forward from eligibility to participate in allocation rounds to the core feature of the CfD scheme; the payments received by successful applicants. As noted, these payments are made when the wholesale price is lower than the strike price. This aspect is reviewed for compatibility with the Agreement of Subsidies and Countervailing Measures (ASCM). It is interesting that the EU did not raise any concern about these payments bearing in mind that analogous payments have been challenged in WTO dispute settlement proceedings.[9] This might be explained based on a

<https://www.gov.uk/government/publications/contracts-for-difference-cfd-allocation-round-7-clean-industry-bonus-framework-and-guidance> accessed 25 June 2025.

[5] In fact, the more pertinent date here is the end of the transition period on 31 December 2020. From this date, the UK gained the capacity to, 'launch and defend WTO disputes in its own right'. WT/GC226, End of the UK-EU Transition Period: Communication From the United Kingdom, 4 January 2021, para. 4.1.

[6] EU-UK Trade and Cooperation Agreement (EU-UK TCA), OJ L 149, 30 April 2021, Article 19.

[7] Infra n. 8. These cases feature in Sections 5 and 6.2

[8] Four cases have been decided to date, the first three of which were appealed to the Appellate Body: Panel Report, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS412/R, 24 May 2013; Panel Report, *Canada – Measures Relating to the Feed-In Tariff Programme*, WT/DS426/R, 24 May 2013; Panel Report, *India – Certain Measures Related to Solar Cells and Solar Modules*, WT/DS456/R, 14 October 2016; Panel Report, WT/DS510/R, *United States – Certain Measures Relating to the Renewable Energy Sector*, Report Circulated 27 June 2019. A further case is in consultation: DS625, *Chinese Taipei – Measures Relating to Investments in Offshore Wind Installations*, consultations requested 26 July 2024.

[9] See Section 6.2.

'glasshouse' situation in which no state wishes to throw the first (or another) stone.[10] Another possible explanation is that, upon close examination, the payments do not fall within the definition of a subsidy in ASCM Article 1. Government financial support for renewable energy infrastructure can generically be referred to as subsidies, but this does not necessarily mean that there is a subsidy as a matter of WTO law.

The third aspect is the new CIB under which CfD generators can secure extra revenue support by investing in sustainable supply chains. The CIB equates sustainability with shorter supply chains which, in turn, is defined as investments in UK deprived area firms manufacturing, assembling or installing specified goods. The investments could take the form of a purchase of goods, and these goods are more likely to be of domestic than imported origin. It follows that there is a possible breach of GATT Article III:4 here, raising the possibility that the matters of concern to the EU have been reintroduced via the CIB. Relevant here, however, is the GATT Article III:8(b) exception for production subsidies under which a breach of Article III can be excused. The Appellate Body has significantly narrowed the scope of this exception, but not necessarily such as to affect its availability for the CIB.[11] The CIB investments received by UK deprived area firms are also considered as possible subsidies falling under the ASCM.

Thematically, the article is primarily a sustained legal analysis of WTO law compatibility commenting on the extent of coherence and predictability as between overlapping treaty provisions. Outside of the legal analysis, two distinct contextual aspects are also considered. This particular interaction between the EU and the UK is placed in the broader context of the UK's independent capacity in the trade law and policy sphere.[12] The article also considers the nature of the measures at issue. The greater the focus of a measure on directly supporting clean energy, as opposed to supporting domestic products and industry, the less that measure should raise issues of compatibility with WTO law.[13]

The Article is structured according to the CfD aspects indicated above, beginning with a further overview of how the CfD scheme operates.

2. BASIC ATTRIBUTES AND OPERATION OF THE CFD SCHEME

Within the CfD allocation rounds, contracts are entered into between generators and the government owned LCCC covering 15 year periods. For each round, the government publishes a budget in advance along with the highest price per MWh of electricity the government is prepared to pay for each method of renewable energy generation.[14] This is known as the administrative strike price which varies considerably as between different generating methods reflecting the maturity of the technology and the cost of investment.[15] Suppliers submit sealed bids offering their strike price in a reverse auction. Bids are accepted sequentially from lowest to highest until the budget is exhausted. While bids naturally

[10] L. Rubini (2012) '*Ain't Wastin' Time no More*: Subsidies For Renewable Energy, The ASCM Agreement, Policy Space, and Law Reform', *Journal of International Economic Law* 15(2), 525-579 at 555.
[11] Appellate Body Reports, *Brazil – Certain Measures Concerning Taxation and Charges (Brazil – Taxation)*, WT/DS472,497AB/R, adopted 11 January 2019.
[12] See Section 4.
[13] See Sections 6.1 and 10.1.
[14] CfD Allocation Round 6: Statutory Notices, 6 March 2024 https://www.gov.uk/government/publications/contracts-for-difference-cfd-allocation-round-6-statutory-notices
[15] For example, while the AR6 administrative strike price for offshore wind is £73, it is £176 for floating offshore wind. See G. Millman (2023) 'Relief as government confirms increased administrative strike prices for offshore wind', 16 November 2023 <https://www.regen.co.uk/relief-as-government-confirm-increased-administrative-strike-prices-for-offshore-wind/> accessed 25 June 2025.

differ, the strike price for all successful bidders is set according to the price bid by the last (and therefore highest price) project accepted.

When the wholesale price is lower than the strike price, the generator receives a subsidy to make up for this difference. These payments are funded by a levy on licensed electricity suppliers with this cost passed on to consumers. In contrast, when (less frequently) the wholesale price is higher than the strike price, the difference flows in the other direction from the generator to the government.[16] This prevents generators from reaping windfall profits.

To date, six allocation rounds have been completed with the most recent auction results published in September 2024.[17] With the exception of AR5, total capacity from awarded contracts has increased from one round to the next. For AR1 in 2015, total capacity was 2.1 GW. For AR6, it is 9.6 GW.[18] Total capacity for AR5 announced in September 2024 was 3.7 GW representing a 66% drop from AR4.[19] The dip is explained by absence of bids from offshore wind developers which had been the dominant technology in previous rounds. This outcome was widely criticised by the industry and attributed to an insufficiently high administrative strike price.[20] For AR6, offshore wind is once again the dominant technology with a capacity of 5 GW.[21] AR6 also sees a record capacity of 3.4 GW awarded to Solar PV[22] with the previous high being 2.2 GW for AR4.[23]

Strike prices bid by suppliers have generally decreased between rounds, reflecting the strengthening of supply chains and economies of scale. For example, the average offshore wind price for AR1 was £120/MWh.[24] For AR6, it is £59/MWh.[25] With an administrative strike price of £73 for offshore wind in AR6,[26] the government did not repeat the mistake of AR5.

3. AR4 UK CONTENT ASPECTS OF CONCERN TO THE EU

The EU complaint pertained to aspects leading up to eligibility to participate in the AR4 auction. As remains the position, applicants were required to submit a Supply Chain Plan for AR4. For scored sections of the Plan, a minimum score of 50% was all but required. The guidance here specified that

[16] It has been reported that payments, 'went negative (in aggregate) in October 2021 and were negative in 10 of the following 14 months'. See N, Watson and P. Bolton (2023) 'Contracts for Difference' House of Commons Library, Research Briefing No 9871, 12 September 2023, 13 CFD research briefing 2023.pdf.
[17] CfD Allocation Round 6: Results, 3 September 2024 https://www.gov.uk/government/publications/contracts-for-difference-cfd-allocation-round-6-results
[18] Auction results for each allocation round can be viewed here: <https://www.gov.uk/government/collections/contracts-for-difference#full-publication-update-history> accessed 25 June 2025.
[19] Ibid., 7-8.
[20] Ibid., 16-18.
[21] Figure from Herbert Smith Freehills, 'UK CfD Allocation Round 6 results announced with record support for renewables', 5 September 2024 <https://www.herbertsmithfreehills.com/notes/energy/2024-posts/AR6-CfD-Results> accessed 25 June 2025.
[22] Ibid.
[23] Watson and Bolton, supra n. 16, 8.
[24] K. Monahan and M. Beck, 'The United Kingdom's contracts for difference policy for renewable energy generation', Canadian Climate Institute, 14 February 2023, 11 <https://climateinstitute.ca/publications/uk-contracts-for-difference-policy-for-renewable-electricity-generation/> accessed 25 June 2025.
[25] G. Millman, 'CfD AR6 analysis – offshore energy', 3 September 2024 <https://www.regen.co.uk/cfd-ar6-analysis-offshore-energy/> accessed 25 June 2025.
[26] G. Millman, 'Relief as government confirms increased administrative strike prices for offshore wind', 16 November 2023 <htt, ps://www.regen.co.uk/relief-as-government-confirm-increased-administrative-strike-prices-for-offshore-wind/> accessed 25 June 2025.

failure to meet this threshold in each section would be, 'unlikely to pass and to be issued with a statement by the Secretary of State approving their Supply Chain Plan'.[27]

For the AR4 Plan, the Project Summary section was unscored. The remaining four sections were allocated a maximum of 500 marks each for Green Growth; Infrastructure; Innovation and Skills. Within the Green Growth section, 175 marks was allocated to '% UK Content', with the remaining 325 marks allocated to five other criteria. Some of the guidance for Green Growth clearly pertains to national industrial development objectives, but without specifying overt preference for UK suppliers and goods. For example, it is noted that:

> Delivering the transition to Net Zero requires significant investment in renewable electricity generation which is a major opportunity for green economic growth, business creation, local investment and industrial decarbonisation across the country, helping to level up the UK.[28]

The '% UK Content' sub-section of Green Growth refers to a Table for completion.[29] This sets out various items like turbines, towers and cables. Further guidance is provided on how to calculate UK content.[30] Along with the applicant's proposed numeric values for UK content, the table also has a qualitative section headed as 'Commentary to explain the reasons for your anticipated levels of UK Content in each phase of the project'. It is reasonable to state that this commentary is just as important as the numeric values. This is because the scoring criteria are themselves qualitative as indicated by the following opening statement:

> Marks will be awarded for the comprehensiveness of response, scale of ambition in activities and anticipated outcomes, feasibility, whether you identify quantifiable outcomes with measurable metrics, and how delivery will be assured (e.g. through contractual commitments, details of your company's internal measurement/monitoring processes and obligations, including reporting). A high weighting is placed on the scale of ambition.[31]

Clearly, applicants would have this statement in mind when drafting their commentaries. It is notable that the phrase 'scale of ambition' is repeated. Bearing in mind that the Supply Chain Plan allocates 175 points specifically to '% UK Content', the phrase 'scale of ambition' can reasonably be read as indicating that a high score will result from high numeric values when these values are accompanied by a robust commentary. Were it otherwise, it would be reasonable to question the point of a distinct mark bearing sub-section for UK content along with guidance for its calculation.

At the same time, it is notable that the quoted statement makes no reference to UK content. It is intended to apply across all four mark bearing sections of the Supply Chain Plan. Immediately following the opening statement, the scoring criteria are specified on a range from zero to four. The descriptors for each of the five possible scores are similarly intended to apply across the four mark bearing sections. As can be seen from the descriptor for the highest score of four, there is no hierarchy between UK and imported content:

> Fully comprehensive responses to all parts of question with activities and/or processes delivering in aggregate a high material contribution to international and UK supply chains to support the low carbon electricity sector, supported by detailed evidence of feasibility, assurance of delivery, and measurable outcomes.

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[27] AR4 Questionnaire Submission Template p. 20 <https://www.gov.uk/government/publications/contracts-for-difference-cfd-allocation-round-4-supply-chain-plan-questionnaire-and-guidance> accessed 25 June 2025.
[28] Ibid., 7.
[29] Ibid., 24.
[30] Ibid., 27.
[31] Ibid., 21.

Applicants whose Supply Chain Plans pass, and who subsequently gain CfD contracts are subject to monitoring and assessment based on the content of the approved plans.[32] It would be an overstatement to describe the Plan, as submitted and approved, as establishing strict contractual commitments. The guidance provides that, '[c]ommitments that were unfulfilled but nonetheless the subject of substantial and sustained efforts from the Generator **will not** be classed as failed, or on track to fail'.[33] It is also clear that original Plans can be amended with 'alternative commensurate commitments' when progress is identified as off-track or unlikely to be met. This is a collaborative and iterative process. Nevertheless, contract termination is envisaged as a last resort when Plans, as amended, do not achieve the 50% of total available marks for scored sections.[34] The possibility of exclusion from future CfD allocation rounds is also envisaged.[35]

In summary, before the EU complaint, AR4 contained a distinct mark bearing sub-section within 'Green Growth' for '% UK Content'. Indicated percentages for UK content were not directly scored because of the qualitative nature of the evaluation criteria. Nevertheless, an applicant could reasonably conclude that the most direct route to a 4 rating (corresponding with the full 175 marks) would be commitment to high numeric values for UK content, accompanied with a robust commentary in relation to choice of suppliers. Conversely, a score of zero for the '% UK content' sub-section was also an option, provided the other sub-sections within Green Growth achieve marks totalling the required 50% threshold. This would be a minimum of 250 marks from the remaining 375 available. The extent of delivery on indicated levels of UK content would be part of the review of the implementation of plans. It would be difficult for a supplier, without justification, and with complete impunity, to commit to a high level of UK content while delivering very little.

The EU's request for consultations with the UK was made in March 2022.[36] According to the EU, local content was a criterion for eligibility to participate in contracts, and to receive payments under these contracts. A number of policy papers, press releases and legal instruments were referred to. For the most part the content here falls under the description offered above; there are statements which clearly pertain to national industrial development objectives, but without specifying overt preference for UK suppliers and goods.[37] It is notable that one of the documents referred to confirms the point above, that a score of zero for % UK content is an option.[38]

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[32] Supply Chain Plan Guidance, 12-16 <https://www.gov.uk/government/publications/contracts-for-difference-cfd-allocation-round-4-supply-chain-plan-questionnaire-and-guidance> accessed 25 June 2025.
[33] Ibid., 13 para. 4.9.
[34] Ibid., 16 para. 4.32.
[35] Ibid., 12 para. 4.2.5.
[36] WT/DS612/1G/L/1428, United Kingdom – Measures Relating to the Allocation of Contracts for Difference in Low Carbon Energy Generation, Request for Consultation by the European Union, 30 March 2022 (EU Complaint).
[37] For example, a consultation document provides:
The revised questionnaire focuses on building competitiveness, capability and capacity in local supply chains and is intended to continue to help deliver projects to predictable timescales at low costs while creating skilled, fulfilling, well-paid jobs in regions and communities around the UK. To drive increases in competitiveness and productivity, opportunities must be visible to suppliers within international and UK supply chains. Processes must also assure full and fair access to capable UK suppliers in order that they can compete for supply chain opportunities.
'Contracts for Difference for Low Carbon Electricity Generation. Consultation on New Supply Chain Plan Questionnaire', Department for Business, Energy & Industrial Strategy, January 2021, 12 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachm ent_data/file/952198/cfd-supply-chain-plan-questionnaire-consultation-document.pdf.
[38] This option is envisaged in a CfD Supply Chain Plans Q and A:
Q - What happens if a developer does not deliver on its UK content commitment?
To obtain their Supply Chain Implementation Statement, a generator must obtain at least 50% of the marks available in each section of their Supply Chain Plan. A generator can pass their Supply Chain Plan even if they have not delivered a specific commitment, so long as they obtain at least 50% of the marks overall per section.

Invoking GATT Article III:4, the EU considered that these measures incentivised 'applicants to commit to and implement an ambitious percentage of United Kingdom content in the context of the allocation of CfD', thereby affording, 'less favourable treatment to imported goods than to like domestic goods'.[39]

This matter was resolved via an exchange of letters between the UK and the EU.[40] The UK letter clarifies that anticipated numeric values for UK content will not be scored and 'will be used for information purposes only'. The revised guidance continues:

> What is scored is the information provided in [the commentary], which is the explanations and evidence provided for your procurement choices. When carrying out the implementation assessment BEIS [now superseded Department for Business, Energy & Industrial Strategy] is looking for evidence that, when narrowing down your choices, you have carefully studied and understood the options available in the supplier market, as well as the extent to which the suppliers chosen, whether in the UK or other countries, contribute to increasing the capacity, capability and efficiency of supply chains.[41]

It is further clarified that:

> … the anticipated level of UK content you may have provided … is not seen as a commitment by you and so will not be assessed as the project is monitored and implemented.[42]

While these clarifications convey a definite message, it is suggested that the AR4 guidance remained apt to cause confusion. The end point was the preservation of a scored section entitled '% UK Content', which was not to be taken as implying any preference for UK content. This potential confusion has been removed from AR5. UK content has been removed completely from the scored sections and is now among the key statistics to be provided.[43] Applicants are expected to 'anticipate the levels of UK Content to be delivered over the project lifetime'.[44] As for AR4, the method for calculating UK content is specified.[45] The AR5 guidance does not contain language which implies national industrial development objectives as was found in AR4. References to 'local investment' and 'helping to level up the UK' have been removed.[46] An equivalent statement in the AR5 guidance provides that the, 'government is keen to understand who the most capable and competitive key component suppliers are, whether in the UK or internationally, for your chosen renewable energy technology'.[47] The revised scored Green Growth section has been drafted to avoid any inference of advantage for choosing UK suppliers. For example, while applicants are asked to 'specify the location of facilities', it is also stated that, 'the location is not scored, it is asked to elicit precise answers about where capacity bottlenecks

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'Contract for Difference Supply Chain Plan Your Questions and Answers' 28 September 2021, 6 <28092021 CfD SCP Q and A.pdf (cfdallocationround.uk)> accessed 25 June 2025.

[39] EU Complaint, supra n. 36, 3.

[40] UK Secretary of State for International Trade to Executive Vice President of European Commission, 1 July 2022; Response from Executive Vice President of European Commission to letter from the UK Secretary of State for International Trade <https://circabc.europa.eu/ui/group/cd37f0ff-d492-4181-91a2-89f1da140e2f/library/a29a0b47-2e7b-442f-8a4a-e6a63786987d/details> accessed 25 June 2025.

[41] AR4 Supply Chain Plan Guidance,17, para. 4.36 <https://assets.publishing.service.gov.uk/media/65df4da1f1cab3863afc479c/cfd-scp-guidance-ar4-version-2-july-2022.pdf> accessed 25 June 2025.

[42] Ibid., para. 4.37.

[43] AR5 Supply Chain Plan Questionnaire, All projects equal to or greater than 300MW, 5 <https://www.gov.uk/government/publications/contracts-for-difference-cfd-allocation-round-5-supply-chain-plan-questionnaire-and-guidance> accessed 25 June 2025.

[44] Ibid., 5.

[45] Ibid., Appendix C.

[46] AR4 Questionnaire Submission Template, 7 <https://www.gov.uk/government/publications/contracts-for-difference-cfd-allocation-round-4-supply-chain-plan-questionnaire-and-guidance> accessed 25 June 2025.

[47] AR5 Supply Chain Plan Questionnaire, supra n. 43, 7.

are'.[48] For AR5, the pass threshold for each scored section was increased from 50% to 60%, also with a tightening from the 'unlikely to pass' language, to a mandatory minimum score.[49]

4. AN OUTCOME REFLECTIVE OF A BROADER TREND?

Before applying GATT Article III:4, this interaction between the EU and the UK can be placed in the broader context of the UK's independent capacity in the trade law and policy sphere. It is suggested that the resolution detailed above reflects an emerging trend of cooperation and alignment. Relatedly, there is also evidence that the UK is effectively harnessing and developing its capacity in this field. These are recurring themes in the UK's recently published trade strategy.[50]

Given the focus of this article on WTO law and its enforcement, the most significant development released in the trade strategy is the change in position on the Multi-Party Interim Appeal Arbitration Arrangement (MPIA). This was established in 2020 in response to the non-functioning of the WTO Appellate Body.[51] To date, 29 WTO members, which include the EU, have joined the MPIA. There was never a clear explanation for the UK's absence. It is possible to speculate that this was some combination of commitment to the first and best outcome of reviving the Appellate Body, waiting to see whether the MPIA would find its feet as a credible mechanism, and the difficulty of joining an international dispute settlement forum in the immediate post-Brexit period. However, the UK will now join the MPIA based of its commitment to an, 'effective rules-based international trading system'.[52]

While not referred to in the trade strategy, there is an interesting example of the UK aligning with other WTO members to show disapproval of apparent US disregard for the rules based system. Along with India and Japan, both the EU and the UK are responding to the US tariffs on cars and car parts, ostensibly imposed on national security grounds, as if they were imposed as safeguard measures.[53]At the same time, it speaks to the UK's independent capacity that, as of June 2025, it is the first country to secure the reduction of these tariffs from 27.5% to 10% in return for politically sensitive concessions on ethanol and beef.[54] The trade strategy places this sector-specific agreement with the US in the context of a pragmatic approach to enhancing market access with trading partners. The main message here is that a broad range of agreements will be used depending on which, 'stands the best chance of making a serious and early contribution to exports and growth'.[55] The UK will continue to pursue free trade agreements (FTA) with broad reach when appropriate. The trade strategy cites the UK-India[56] and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership[57] as prominent

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[48] Ibid.
[49] Ibid., 4.
[50] 'The UK's Trade Strategy' (Trade Strategy), CP1339, June 2025 <https://www.gov.uk/government/publications/uk-trade-strategy> accessed 1 July 2025.
[51] <https://wtoplurilaterals.info/plural_initiative/the-mpia/> accessed 25 June 2025.
[52] Ibid., 32.
[53] G/C/W/868; G/SG/326, Council for Trade in Goods Committee on Safeguard, Communication from the United States in Response to the United Kingdom's Notification Proposing to Suspend Concessions Under Article 8.2 of the *Agreement on Safeguards*' 12 June 2025.
[54] 'Trump Signs Order Confirming Parts of UK-US Tariff Deal' BBC News, 16 June 2025 <https://www.bbc.co.uk/news/articles/cy8gxp7dvepo> accessed 25 June 2025; Department of Business & Trade, 'Update on the UK-US Economic Prosperity Deal' 20 June 2025 <https://www.gov.uk/government/publications/us-uk-economic-prosperity-deal-epd/update-on-the-uk-us-economic-prosperity-deal-epd-web-accessible-version> accessed 1 July 2005; Kathleen Claussen, 'What to Expect When You're Expecting a Trade Deal' International Economic Law and Policy Blog, 30 June 2025 <https://ielp.worldtradelaw.net/2025/06/what-to-expect-when-youre-expecting-a-trade-deal.html> accessed 1 July 2025.
[55] Trade Strategy, supra n. 50, p. 10. The various possible agreements and instruments are identified at pp. 40-54.
[56] Ibid., p. 30; 48.
[57] Ibid., p. 33.

examples here. However, the FTA is no longer perceived as the single best instrument or gold standard.[58] More limited instruments covering, for example, digital trade, financial services and mutual recognition of product technical regulations and professional qualifications have been successfully deployed.[59]

Naturally, the trade strategy comments on the trading relationship with the EU.[60] Some of the content here is chastening. It is noted that, according to some estimates, 16,400 businesses have stopped exporting to the EU since Brexit.[61] The agreement at the UK-EU summit in May 2025 to develop a common sanitary and phytosanitary area might go some way to mitigating this position at least for the food sector.[62]

Surprisingly absent from the trade strategy is any mention of public procurement as a market access opportunity for UK suppliers.[63] While the UK's general WTO membership was not in doubt as a result of leaving the EU, this was not the position for the Agreement on Government Procurement (GPA). As the GPA is a plurilateral / optional WTO agreement, an independent accession was required. The access of UK firms to the procurement markets of the GPA Parties would otherwise have been compromised. Noting that, 'a successful outcome was by no means assured', Anderson credits a, 'core group of senior negotiators from the UK itself; from the EU; and from the US, who worked intensively and creatively to bridge gaps and ensure a balanced outcome for all sides'.[64]

Despite Anderson's depiction of the accession process as a whole, a significant error on the UK's part has been reported.[65] Mirroring the EU's procurement contract coverage,[66] the UK committed to open its contracts for, 'ships, boats and floating structures, except warships'.[67] This contrasts with several other GPA Parties, including the US and Australia, who have specifically excluded, 'ships and small craft'.[68] Rather than open contracts for its Border Force fleet to the GPA Parties, the UK has resolved to equip the fleet with military equipment to avoid contract coverage thereby significantly increasing costs. Whether the blunder here was in the accession negotiations, or in the decision to procure something different from that required and covered, is a matter of perspective.

The overall picture is nevertheless one of strategic and pragmatic collaboration. In this context, it can now be questioned whether the resolution detailed in Section 3 was required as a matter of legal obligation.

5. APPLYING GATT ARTICLE III:4

[58] Ibid., p. 40.
[59] Ibid., pp. 41-46.
[60] Ibid., pp. 19-20.
[61] Ibid.
[62] Ibid., p. 27; Policy Paper, 'UK-EU Summit-Common Understanding' 19 May 2025, paras. 23-33 <https://www.gov.uk/government/publications/ukeu-summit-key-documentation/uk-eu-summit-common-understanding-html> accessed 2 July 2025.
[63] The Trade Strategy only refers to procurement in the context of excluding suppliers deemed unfit to bid. Trade Strategy, supra n. 50, p. 78.
[64] Robert D. Anderson, 'The UK's Role in the WTO Agreement on Government Procurement: Understanding the Story and Seizing the Opportunity' (2021) 3 *Public Procurement Law Review* 159 at 163.
[65] Matt Dathan, 'BREXIT Blunder delays Border Force Fleet Replacement Until 2030' *The Times*, 18 September 2024.
[66] GPA Coverage, EU Goods, Annex 4, item 47 https://e-gpa.wto.org/en/GPACoverage/Annex4/18 .
[67] GPA Coverage, UK Goods, Annex 4, item 47 https://e-gpa.wto.org/en/GPACoverage/Annex4/142 .
[68] GPA Coverage, US Central Government Entities, Annex 1, Notes <https://egpa.wto.org/en/GPACoverage/Annex1/100> accessed 25 June 2025.

GPA Coverage, Australia, Central Government Entities, Annex 1, Notes. <https://e-gpa.wto.org/en/GPACoverage/Annex1/135#note_732> accessed 25 June 2025.

The EU invoked GATT Article III:4 in its request for consultations arguing that AR4 incentivised use of domestic over imported goods. As established below, the existence of such an incentive is a reasonable shorthand to identify when the provision is breached. However, this is not enough in itself to resolve the matter. In all the cases considered below, there was unequivocally a government bestowed advantage conditioned on the use of domestic goods. In contrast, AR4 was ambiguous on whether there was any such advantage both before, and, to a lesser extent, after the clarification provided by the UK. As established above, it was also clear that the applicants could achieve the minimum required 50% overall score without any commitment on UK content, thereby calling into question the extent of any incentive. It follows that AR4 raises a question of first impression which, moreover, has been left open by other contributions.[69]

GATT Article III is entitled: National Treatment on Internal Taxation and Regulation. Article III:1 provides a general statement about what is prohibited. Internal measures, 'should not be applied to imported or domestic products so as to afford protection to domestic production'. The provision therefore prohibits protectionism which can also be termed as nationality or origin-based discrimination between domestic and imported products. For internal regulatory measures (like the CfD), as opposed to tax based measures, the relevant part is Article III:4:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable 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.

This provision is only breached when the domestic and imported products are 'like'. However, this element is uncontentious in cases of *de jure* discrimination understood as discrimination which is openly based on origin. For example, if, as in *Canada – Renewable Energy*[70] and *India – Solar Cells*[71], eligibility for electricity generating contracts is conditioned on the use of domestic over imported goods, likeness is a non-issue. The domestic and imported products concerned, whatever they may be, are distinguished on the basis of a prohibited criterion – their nationality or origin.[72]

For origin-based measures, the focus is on the 'treatment no less favourable' (TNLF) standard. The fundamentals of this standard are well-established. It is breached when government measures disturb the 'effective equality of opportunities', or the 'competitive relationship' between domestic and imported products.[73] Measures can be inconsistent with Article III:4 based on their potential discriminatory impact on imported products. The provision is addressed to, 'relative competitive opportunities created by the government in the market, not to the actual choices made by enterprises in that market'.[74] The focus is on the conditions of competition, rather than the actual trade effects of

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[69] UK Local Content Requirements for Offshore Wind Projects, DAI 2023, 58 <https://www.dai.com/news/dai-publishes-review-of-local-content-requirements-for-uk-offshore-wind-projects> accessed 25 June 2025.

[70] Appellate Body Report, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* WT/DS412/AB/R, 24 adopted May 2013; Appellate Body Report, *Canada – Measures Relating to the Feed-In Tariff Programme,* WT/DS426/AB/R, adopted 24 May 2013.

[71] Appellate Body Report, *India – Certain Measures Related to Solar Cells and Solar Modules* (*India – Solar Cells*), WT/DS456/AB/R, adopted 14 October 2016.

[72] The *Turkey - Rice* panel put the matter as follows: 'A number of panels have held the view that where a difference in treatment between domestic and imported products is based exclusively on the products' origin, it is correct to treat products as "alike" within the meaning of Article III:4. In that case, there is no need to establish the likeness between imported and domestic products in terms of the traditional criteria – that is, their physical properties, end-uses and consumers' tastes and habits.' Panel Report, *Turkey – Measures Affecting the Importation of Rice*, WT/DS334/R, adopted 22 October 2022, para. 7.214

[73] Panel Report, *Canada – Certain Measures Affecting the Automotive Industry (Canada – Autos)*, WT/DS139/R, adopted 7 April 2000, para. 10.78.

[74] Ibid.

disputed measures. It follows that, 'positive evidence that a measure may have had only minimal impact on the purchasing decisions of private firms will not be sufficient to rebut a *prima facie* showing that a measure affects the competitive relationship between imported and domestic products because, for example, it confers an advantage upon the use of domestic products while denying that advantage if imported products are used'.[75] In deciding whether there is a violation, it is relevant to consider, 'the design, the architecture and the revealing structure of a measure'.[76]

For the example of electricity supply contracts conditioned on the use of domestic goods, TNLF is no more contentious than likeness. Article III:4 is self-evidently breached when governments require private enterprises to use domestic goods. The same applies to a closely related provision. Article 2.1 of the Agreement on Trade-Related Investment Measures (TRIMs), prohibits, 'any TRIM that is inconsistent with' GATT Article III. The Annex to the TRIMs Agreement provides an illustrative list of inconsistent TRIMs. This, 'include[s] those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require: (a) the purchase or use by an enterprise of products of domestic origin or from any domestic source …'.[77]

GATT Article III:4 also overlaps with the definition of a prohibited subsidy under ASCM Article 3.1(b); an area which the article re-visits in Section 10.3. Prohibited subsidies include those which are, 'contingent … upon the use of domestic over imported goods'. The concept of contingency here has been strictly interpreted. If, under a government measure, the use of domestic goods is likely, rather than strictly and unavoidably required, the subsidy will not be contingent on the use of domestic goods. However, there would be a breach of GATT Article III:4 here. The reference in the EU complaint to the incentive to use UK goods has its origin in this context. Demonstrating such an incentive establishes a breach of GATT Article III:4, but does not satisfy the continency requirement for a prohibited subsidy.[78]

A further important point is that Article III violations cannot be avoided by deflecting attention away from particular elements of concern within overall measures or initiatives. It is not a defence to claim that most aspects of an initiative are neutral as between domestic and imported products, or even that there are offsetting elements which provide more favourable treatment to imports. A GATT panel report noted that Article III:4 is, '…applicable to each individual case of imported products'. It 'rejected any notion of balancing more favourable treatment of some imported products against less favourable treatment of other imported products', on the basis that this would lead to 'great uncertainty about the conditions of competition between imported and domestic products'.[79]

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[75] Panel Report, *United States – Certain Measures Relating to the Renewable Energy Sector*, WT/DS510/R, Report Circulated June 27th, 2019.

[76] It is possible to debate whether this language is strictly relevant under GATT Article III:4. Its origin appears to be the Appellate Body report in *Japan – Alcoholic Beverages* under the analysis of GATT Article III:2 second sentence (Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS/8,10,11/AB/R, adopted 1 November 1996, p. 29. Nevertheless, a search of this language across all Appellate Body reports reveals that WTO members very often refer to this language across a range of WTO law provisions.

[77] The ease of establishing breaches of these provisions when there is origin based discrimination is again illustrated by *Canada – Renewable Energy*. While the panel offered a careful and thorough analysis, the impression is that it was not dealing with finely balanced issues. Indeed Canada offered no argument on whether the local content requirements breached the TRIMs illustrative list. Panel Report, *Canada – Renewable Energy*, supra n. 8, paras. 7.109-7.164.

[78] Appellate Body Reports, *Brazil – Taxation*, supra n. 11, para. 5.254.

[79] Panel Report, *United States – Section 337 of the Tariff Act of 1930*, adopted 7 November 1989, BISD 36S/345, para. 5.14

That uncertainty is inherently problematic is confirmed in the analogous context of case law under GATT Article XI which prohibits border measures in the form of quantitative restrictions on imports.[80]

It is submitted that GATT Article III:4 is very likely breached when there is any degree of ambiguity on whether access criteria for a government bestowed advantage favour the use of domestic over imported goods. The likeness of domestic and imported products is once again not an issue. To the extent that there might be less favourable treatment, this would be on the basis of origin alone. Further, the fundamentals of the TNLF standard referred to above, suggest that ambiguity around equality of treatment itself amounts to less favourable treatment. The reference to 'uncertainty' in the conditions of competition is especially notable. Even after the UK clarification, AR4 contained a scored section entitled '% UK content'[81] thereby preserving uncertainty about the conditions of competition. Moreover, there is no valid argument to the effect that the 50% score can be attained even if applicants overlook the '% UK content' section. Were it otherwise, applicants who score highly under % UK content would be unfairly advantaged by having less to achieve under the other scored sections. It follows that particular aspects of a measure can be considered in isolation without regard for potentially offsetting aspects under which there is equal treatment, or even more favourable treatment of imports.

Another way to think about this is that ambiguity around the use of domestic content has the potential to modify what the private commercial decisions would otherwise be in relation to the mix of domestic and imported goods.

The absence of a violation would also send the wrong signal – that ambiguity around the use of domestic content is acceptable. Panels will contemplate that it is not difficult to design measures to put beyond doubt that they do not breach Article III, and require members to do so. Indeed, the revised AR5 removed the violation. There is no longer ambiguity in relation to equal treatment of domestic and imported content.

6. CFD PAYMENTS AND THE ASCM

This section focuses on the CfD payments to suppliers which cover the gap between the wholesale price and the strike price. These payments are assessed for compatibility with the ASCM. In common with GATT Article III, the ASCM applies as a matter of WTO law and the EU-UK Trade and Co-operation Agreement.[82]

6.1. Nature of the Measure at Issue

Before offering a legal analysis, it is useful to consider the nature of the measure at issue, and academic views on the intensity of review which such measures ought to receive. The CfD payments, when decoupled from ambiguity around local content, are a form of government support for renewable energy production.

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[80] As can be seen from the passage below, there is overlap between legal tests developed under Article III and Article XI:

> When examining whether measures have a limiting effect on importation, some panels have focused on whether those measures limited the competitive opportunities available to imported products. Panels have thus given relevance to factors such as the existence of uncertainties affecting importation, whether the measures affect investment plans, restrict market access for imports or make importation prohibitively costly or unpredictable, whether they constitute disincentives affecting importations, or whether there is unfettered or undefined discretion to reject a licence application.

Panel Reports, *Indonesia – Importation of Horticultural Products, Animals and Animal Products*, WT/DS477,478/R, adopted 22 November 2017, para. 7.46.

[81] AR4 Questionnaire Submission Template p. 4 <https://www.gov.uk/government/publications/contracts-for-difference-cfd-allocation-round-4-supply-chain-plan-questionnaire-and-guidance> accessed 25 June 2025.

[82] EU/UK TCA supra n. 6, Article 32.

That the local content element is more objectionable than the support for renewable energy is already reflected in WTO law. If a subsidy is contingent on the use of domestic goods, it will be covered by the ASCM Article 3 prohibition. If the local content element falls short of the contingency test, but the use of domestic goods is nevertheless incentivized, GATT Article III:4 will be breached. In contrast, the remaining underlying subsidy without the local content element is no longer prohibited, and no longer breaches GATT Article III:4. The question is whether this subsidy is actionable under ASCM Part III, or countervailable under ASCM Part V.

There is an emerging consensus that subsidies for clean energy should be non-actionable once decoupled from overt industrial policy objectives. Writing in 2014, Cosbey and Mavroidis explore an, '…important distinction between trade-related measures designed to achieve [global public goods] and those designed to achieve benefits that vest purely at the domestic level'.[83] A decade later, Leonelli and Clora have advanced a framework based on the extent to which, 'different groups of subsidies may tackle a specific environmental externality and redress market or regulatory failures'.[84] They contend that subsides which demonstrably respond to these challenges, without also pursuing other goals such as promoting domestic manufacturing should be categorized as 'unconditionally justifiable subsidies'.[85] They should be non-actionable and non-countervailable notwithstanding that they may have trade-distorting effects. The authors also eschew any notion of balancing environmental benefits and trade costs. The focus should rather be on the 'specific environmental credentials' of the subsidy in question.[86]

This provides a context for the legal analysis which follows. If it can be established that the CfD payments do not fall within the ASCM definition of a subsidy, this would preserve much needed policy space for governments to support clean energy.

6.2. CfD Payments and the ASCM Definition of a Subsidy

As noted in the introduction, government financial support for renewable energy infrastructure can generically be referred to as subsidies, but this does not necessarily mean that there is a subsidy as a matter of WTO law. Indeed, while the existence of a subsidy might be uncontentious for some purposes,[87] this is less likely to be the position within WTO dispute settlement.

ASCM Article 1 provides that, 'a subsidy shall be deemed to exist if there is a financial contribution by a government or any public body', and, 'a benefit is thereby conferred'. If these requirements are satisfied, the subsidy must also be 'specific' as defined in Article 2.

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[83] A. Cosbey and P. C. Mavroidis, (2014) 'A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO', *Journal of International Economic Law* 17(1) at 30.

[84] G. C. Leonelli and F. Clora (2024) 'Retooling the regulation of net-zero subsidies: lessons from the US Inflation Reduction Act', *Journal of International Economic Law* 27(2), 441-461, 444.

[85] Ibid.

[86] Ibid., 448.

[87] It is notable that the definition of a subsidy in Section 2 of the UK's Subsidy Control Act (SCA) 2022 strongly resembles the ASCM definition. The SCA was introduced in connection with the EU/UK TCA obligation to develop and maintain an effective system of subsidy control. Subsidy reviews are undertaken by the newly created Subsidy Advice Unit (SAU) which sits within the Competition and Markets Authority. For the CfD allocation rounds, the most recent referral and report is for AR6 published 21 February 2024. <https://www.gov.uk/cma-cases/referral-of-the-proposed-subsidy-scheme-contracts-for-difference-for-renewables-as-at-allocation-round-6-by-the-department-for-energy-security-and-net-zero> accessed 25 June 2025.There is an important point of distinction between the reviews conducted by the SAU, and the treaty interpretation undertaken by WTO panels and the Appellate Body. The SAU does not engage with matters of law – whether the CfD scheme actually constitutes a subsidy within Section 2 of the SCA. The reports proceed on the basis that there is a subsidy. For WTO dispute settlement, in contrast, whether there is a subsidy within the ASCM definition tends to be a contentious issue.

In *Canada – Renewable Energy,* it was uncontentious that there was a 'financial contribution'. One form of such contribution is when, 'a government … purchases goods'.[88] There were clearly purchases of electricity in this case.[89] Moreover, it was clear that the relevant body (Hydro One Inc.) was a 'public body' within ASCM Article 1.[90]

For CFD payments, it is also clear that LCCC is a 'public body'; one which, according to the Appellate Body, 'must be an entity that possesses, exercises or is vested with governmental authority'.[91] The LCCC has the authority to enter into CfDs by reason of statutory instrument pursuant to the Energy Act 2013, Section 7. It is a central government organisation and is wholly owned by government.[92]

On the matter of 'financial contribution', it is clear that the LCCC does not purchase goods. However, it is likely that the CFD payments would fall under another part of the definition whereby:

> a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees)[93]

According to the Appellate Body, this provision, 'captures conduct on the part of the government by which money, financial resources, and/or financial claims are made available to a recipient'.[94] The example of 'grants' indicates that conveyance of funds may not involve reciprocal obligations for the recipient, while 'loans' and 'equity infusion' are positive indicators of reciprocity.[95]

CfD payments clearly fall under the Appellate Body's explanation of money being made available to recipients. To the extent that they are a type of financial transaction,[96] they are analogous to 'loans and equity infusion'. The phrase, 'potential direct transfer of funds' is apt because payments depend on the contingency of the wholesale price being lower than the strike price. These payments are 'direct', whether this term is understood as, 'the immediacy of the link between the parties to the transfer', or, 'the immediacy of the mechanism by which the transfer is effectuated'.[97] There is an element of reciprocity bearing in mind that payments can flow in both directions.

In contrast to the 'public body' and 'financial contribution' requirements, it would very likely be difficult for a complainant to establish that CfD payments confer a 'benefit'. This difficulty stems from the Appellate Body's identification of the appropriate benchmark, coupled with a salient characteristic of the CfD system; the use of auctions as a price discovery mechanism.

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[88] ASCM Article 1.1(a)(1)(iii).
[89] Payments to suppliers under long term contracts were directly for the electricity delivered into Ontario's grid. Panel Report, *Canada – Renewable Energy*, supra n. 8, paras. 7.208 and 7.232
[90] The panel noted that Ontario expressly recognized Hydro One as a governmental 'agent'. Significant weight was given to one aspect of Ontario's definition of government agents as entities, 'to which the government has assigned or delegated authority and responsibility, or which has statutory authority and responsibility to perform a public function or service'. Panel Report, *Canada – Renewable Energy*, supra n. 8, para. 7.234.
[91] Appellate Body Report, *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India (US – Carbon Steel (India))*, WT/DS436/AB/R, adopted 19 December 2014 , para. 4.9.
[92] LCCC Framework Document, February 2023, para. 3.1 <https://lcc-web-production-eu-west-2-files20230703161747904200000001.s3.amazonaws.com/documents/LCCC_Framework_Document_published_version_Feb_2023_2.pdf> accessed 25 June 2025.

[93] ASCM Article 1.1(a)(1)(i).
[94] Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012, para. 614.
[95] Ibid., 616.
[96] L. Kitzing, L. Meeus and N. Rossetto, 'What are Contracts-for-Difference (CfDs)? How are they designed? And how do they apply to the markets?' EUI Florence School of Regulation, 12 April 2023 <https://fsr.eui.eu/contracts-for-difference/> accessed 25 June 2025.
[97] Appellate Body Report, *US – Carbon Steel (India)*, supra n. 91, para. 4.89.

The essence of the 'benefit' analysis is whether the financial contribution puts the recipient in an advantageous position relative to what could be obtained in the marketplace.[98] This would be the position, for example, when goods are purchased at more than market value, or when a loan is provided at an interest rate below that available on the market.

When the product is electricity, a difficult question arises. Should payments under renewable energy support schemes be compared to the market price of electricity as a single undifferentiated product, or to the market price of electricity generated using the particular form of renewable technology which is supported? If the former, there will almost self-evidently be a 'benefit'. Support payments for renewable energy are only required because the electricity market does not provide sufficient remuneration for the required investment in renewable generating facilities to be made. By design, CfD payments fill the gap between the wholesale price of electricity and the strike price, thereby constituting a 'benefit'. If, in contrast, the relevant market comparison is not the electricity market, but rather the market for electricity generated from renewable sources, there will only be a 'benefit' if CfD payments over-compensate recipients relative to the market price of renewable energy. It would be extremely difficult to establish any over compensation bearing in mind that CfD payments compensate up to the strike price which is determined via competitive auction; perhaps the gold standard of price discovery mechanisms.

In deciding on the relevant market for comparison, the Appellate Body in *Canada – Renewable Energy* grappled with the question of whether the guaranteed payments to renewable generators amounted to government intervention in an existing market for electricity, or the creation of a new market for renewable energy. An exclusive focus on demand side considerations would more likely lead to finding a single undifferentiated market to the extent that consumers do not differentiate between electricity produced via different means, and that electricity is physically identical regardless of how it is produced. In contrast, introducing supply side considerations reveal the need for government intervention to create a market which would not otherwise exist:

> In the present disputes, supply-side factors suggest that windpower and solar PV producers of electricity cannot compete with other electricity producers because of differences in cost structures and operating costs and characteristics. Windpower and solar PV technologies have very high capital costs (as compared to other generation technologies), very low operating costs, and fewer, if any, economies of scale. Windpower and solar PV technologies produce electricity intermittently (depending on the availability of wind and sun) and cannot be relied on for baseload and peak-load electricity. Differences in cost structures and operating costs and characteristics between windpower and solar PV technologies, on the one hand, and other technologies, on the other hand, make it very unlikely, if not impossible, that the former may exercise any form of price constraint on the latter. In contrast, conventional generators produce an identical commodity that can be used for base-load and peak-load electricity. They have larger economies of scale and exercise price constraints on windpower and solar PV generators.[99]

These supply side differences prevented, 'the very existence of windpower and solar PV generation, absent government definition of the energy supply-mix of electricity generation technologies'.[100] It followed that prices should be benchmarked against those, 'that would be available under market-based conditions … taking the supply-mix as a given'.[101] Complainants, 'have to show that such prices do not reflect what a market outcome would be'.[102] The benchmark may be found, *inter*

[98] This is clear from ASCM Article 14 entitled *Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient*.
[99] Appellate Body Report, *Canada – Renewable Energy*, supra n. 70, para. 5.174.
[100] Ibid., para. 5.178.
[101] Ibid., para. 5.189.
[102] Ibid., para. 5.228.

alia, 'in price-discovery mechanisms such as competitive bidding or negotiated prices, which ensure that the price paid by the government is the lowest possible price offered by a willing supply contractor'.[103]

As indicated, the Appellate Body found itself unable to complete the 'benefit' analysis. There was insufficient factual evidence on record from the panel proceedings for it to do so.[104] Cosbey and Mavroidis question whether it is realistic to expect the repetition of this outcome as a means of avoiding the existence of a subsidy.[105] After the Appellate Body report, there is clarity on the appropriate benchmark, and guidance to complainants on how to establish a 'benefit' in the context of this benchmark. However, in the context of CfD payments, the interesting observation is that this note of caution does not apply to the extent that it warns of future successful challenges. On the contrary, the content above would seem to preclude a positive finding in relation to 'benefit'. CfD payments are fixed with reference to a competitive bidding process and therefore represent the lowest price that suppliers will accept within any particular CfD round. Indeed, these payments might well be relied upon by complainants to establish that government administered prices in other jurisdictions are over-compensating suppliers.

For completeness, it can be mentioned that, were there is a 'benefit', there would be a subsidy which, moreover, would clearly satisfy the specificity requirement of ASCM Article 2.[106] This concept turns on, 'the extent to which a subsidy is sufficiently broadly available throughout an economy'.[107] Clearly, CfDs are open only to enterprises operating in the various covered renewable technologies,[108] and are specific for this reason.

It is clear however that CfD payments do not confer a 'benefit'. They fall outside of the WTO law definition of a subsidy. As there is no subsidy, it would not be possible for a complainant to establish an actionable subsidy subject to ASCM Part III, or a countervailable subsidy subject to Part V.

7. THE CLEAN INDUSTRY BONUS

The CIB is a new initiative launched in November 2024 which will operate within CfD allocation rounds, beginning with AR7. The launch headline refers to extra CfD revenue support for fixed and floating offshore wind applicants if they, 'choose to invest in more sustainable supply chains'.[109] The scheme is based on meeting specified investment requirements, including investment in firms 'manufacturing, assembling or installing' key components like blades, nacelles and towers.[110] Under the first of two investment criteria entitled, 'Investment in Shorter Supply Chains', the firms receiving

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[103] Ibid., para. 5.288.
[104] Ibid., para 5.244.
[105] Cosbey and Mavroidis, supra n. 83,12 and 28.
[106] ASCM Article 2.1: In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:

(a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.

[107] Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/R, adopted 23 March 2012, para 7.191.
[108]See CfD Allocation Round Resource Portal: Which technologies will be eligible to compete in Allocation Round 6? <https://www.cfdallocationround.uk/faqs> accessed 25 June 2025.
[109] CfD Allocation Round 7: Clean Industry Bonus framework and guidance <https://www.gov.uk/government/publications/contracts-for-difference-cfd-allocation-round-7-clean-industry-bonus-framework-and-guidance> accessed 25 June 2025.
[110] CfD AR7: Clean Industry Bonus Allocation Framework, 2024, Section 5. <https://assets.publishing.service.gov.uk/media/67910467cf977e4bf9a2f17e/cfd-clean-industry-bonus-allocation-framework-corrected-22012025.pdf> accessed 25 June 2025.

the investment must be located in a UK deprived area.[111] The relevant investment is therefore made by the CfD generator, to UK firms manufacturing goods in a deprived areas. The term 'investment' is broadly defined as 'any transfer of money' which could be 'a direct investment, a loan an equity stake, etc'.[112] The deprived area located firm could be of any size and level of experience from a small infant industry upwards. However, the example which accompanied the CIB launch was Scottish Power's award of a £1 billion turbine contract for its East Anglia TWO offshore wind project to Siemens Gamesa, including blade production at the manufacturer's East Yorkshire, Hull blade factory.[113]

There is a marked contrast between the guidance for AR5 described above and the CIB. As noted at the end of Section 3, from AR5 onwards, language indicating national industrial development objectives, and ambiguity around preference for UK content, was removed. The CfD guidance is now at pains to project neutrality in this regard. In contrast, the CIB focuses explicitly on these objectives; the first investment criterion applies only to UK deprived area firms.

Applicants are in part required, and, in part incentivized to participate in the CIB initiative. The mandatory element for CfD applicants is termed 'CIB minimum standards'.[114] This is based on meeting minimum specified investment sums as a condition to enter the CfD round.[115] There is no additional bonus for meeting the minimum required standard. CfD applicants can also choose to offer 'CIB extra proposals'.[116] Extra proposals must specify the value of the investment, along with the amount of extra CfD revenue required to make the investment. This extra CfD revenue effectively represents the extent to which applicants wish to be reimbursed for the extra investment. Extra proposals are evaluated in a competitive process. The more an applicant puts forward their own funds, in the sense of low reimbursement, the higher their ranking will be.[117] For successful applicants, the CIB payment will be the specified cost of their CIB extra proposal; effectively the specified reimbursement. Both the minimum standards and any agreed extra proposals become legally binding obligations for the CfD generator.[118]

8. CIB COMPATIBILITY WITH GATT ARTICLE III:4

It is sufficient here to recall the short-hand expression noted in Section 5. Demonstrating that a government measure provides an incentive for industry to use domestic over imported goods establishes a breach of GATT Article III:4.[119] As explained below, the CIB clearly provides an incentive to use domestic goods; more so than the now removed eligibility criteria for AR4 which were merely ambiguous in this respect.

As noted, the term 'investment' is defined as 'any transfer of money'. This could occur via a purchase of goods. The goods are likely to be of UK domestic origin if they are purchased from a UK deprived area firm which manufactures key components. The government inducement to invest is perhaps stronger for the CIB minimum standards as this is a condition to participate in the CfD allocation round. In contrast, the CIB extra investment is optional and voluntary. However, the

[111] Ibid., Section 10.
[112] Ibid., Section 5.3.
[113] Press Release: Boost for UK clean energy growth as PM arrives at COP 29, 11 November 2024, <https://www.gov.uk/government/news/boost-for-uk-clean-energy-growth-as-pm-arrives-at-cop29> accessed 25 June 2025.

[114] CfD AR7, supra n. 110, Sections 7 & 8.
[115] Ibid., Section 7.1.
[116] Ibid., Section 9.
[117] Ibid., Section 13 Method to score CIB extra proposals.
[118] Guidance for Fixed Bottom and Floating Offshore Wind projects on Monitoring the Implementation of Clean Industry Bonus, para. 2.1 <https://assets.publishing.service.gov.uk/media/67338a0bc10bb403d96bf31b/cfd-guidance-on-monitoring-implementation-of-clean-industry-bonus.pdf> accessed 25 June 2025.
[119] *Brazil – Taxation*, supra n. 11, para. 5.254.

government incentive here is the uplift in ranking within the CfD allocation round which depends on the extent to which the generator wishes to be reimbursed for the extra investment. The investments, which might include the purchase of domestic goods, are distinct from purely private commercial decisions even though they might have been made independently of the CIB initiative. The investments are made in the context of a government administered scheme which involves enforceable legal obligations between the CfD generator and the government.

In sum, the CIB initiative breaches GATT Article III:4 in so far as it provides incentives for CfD generators to purchase domestic over imported goods.

9. GATT ARTICLE III:8(b)

The question here is whether the GATT Article III:4 breach could be exonerated under the Article III:8(b) exception for production subsidies:

> The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

Depending on the order of analysis, and what the respondent state intends to contest or concede, this provision can present a dilemma. The 'affirmative defence'[120] provided by Article III:8(b) is based on the existence of 'subsidies'. It could be difficult for a respondent state to establish or concede this if, under the ASCM Agreement, it is inclined to contest the existence of a subsidy. In the present context, the UK might well wish to contest that the CIB bonus involves a subsidy as defined in Article 1 of the ASCM Agreement. This could be on the basis that no financial contributions flow directly from the government to the deprived area firms; the investments are rather made by CfD generators. As considered in the next section, the absence of a subsidy on this basis cannot be taken for granted. For the moment, it will be assumed that the CIB investments constitute financial contributions by government within the ASCM Agreement Article 1 definition of a subsidy. The question is whether the investments, as 'subsidies' fall under the exception.

The Appellate Body has narrowed the coverage of the Article III:8(b) exception in two ways. First, the phrase, 'payment of subsidies' has been interpreted as not corresponding with the full range of financial contributions under the definition of a subsidy in Article 1.1 of the ASCM Agreement. The exception covers, 'only the payment of subsidies which involves the expenditure of revenue by a government'.[121] This excludes other types of subsides within the Article 1.1 definition such as foregoing 'government revenue that it otherwise due'. The dubious distinction is therefore between payments from the government to the producer, and payments owed by the producer to the government which are reduced or waived; dubious because there might be no difference in the cost to the public purse. In the relevant case law, this limitation prevented reliance on the exception.[122] However, this limitation would not apply to the CIB investments given that they are defined as 'any transfer of money'. This would satisfy at least the 'expenditure of revenue' part of the Appellate Body's test.

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[120] The Appellate Body has confirmed that GATT Article III:8(b) is properly understood as an exception to the national treatment obligation serving as an affirmative defence for otherwise inconsistent measures. *Brazil – Taxation*, ibid., para. 5.84.

[121] Ibid., para. 5.92. A member of the Appellate Body disagreed on this interpretation of 'payment of subsidies' under GATT Article III:8(b) and issued a separate opinion (paras. 5.125 – 5.138). This is not further detailed here. While the choice between the two interpretations was important in the case itself, it has no bearing on the current subject matter.

[122] *Brazil - Taxation*, ibid; Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997, pages 32-35.

There is uncertainty, however, over whether the transfers of money from CfD generators to deprived area firms would be, 'by a government'. The CIB investments are made by CfD generators, rather than directly by the government. This uncertainty can be met by noting that the ASCM Article 1 definition of a subsidy also refers to the financial contribution being, 'by a government'. As discussed in the next section, the further definition of when the financial contribution can be 'by a government' is broad, potentially extending to the situation when the conduct of private firms is attributable to the government. The Appellate Body's reference to 'by a government' is most likely shorthand for the various ways in which a financial contribution can be 'by a government' under ASCM Article 1, excluding only those aspects which involve foregone payments owed by the producer to the government. It follows that the first respect in which the GATT exception has been narrowed is unlikely to limit its use in relation to the CIB investments.

The exception has also been narrowed in a second respect. To paraphrase,[123] the provision covers product discrimination which is inherent to identifying the domestic producers entitled to receive the subsidy. It does not extend to product discrimination resulting from additional conditions which go beyond what is necessary to establish who can receive the subsidy. For example, if a subsidy is available to turbine manufacturers in deprived areas, the exact goods and geographical areas covered require definition to determine eligibility. The receipt and use of the subsidy can result in product discrimination. Production of the domestic turbines has been subsidized which adversely modifies the conditions of competition with imported turbines. This discrimination, which would otherwise breach GATT Article III:4, is covered by the exception.

In contrast, if there are additional conditions attached to the subsidy, any resulting discrimination will not be covered. For example, if the subsidy is conditioned on the use of domestic components in the production of the turbines, this discrimination will not be covered. Therefore, in this example, the discrimination between domestic and imported turbines is covered, whereas the discrimination between domestic and imported turbine components remains subject to GATT Article III:4. It follows that the limitation can only apply when there is discrimination against two distinct products; turbines and turbine components in this example.

The rationale for this limitation is the need for coherence between the GATT exception and the concept of prohibited subsides in ASCM Article 3. Prohibited subsidies include those which are, 'contingent … upon the use of domestic over imported goods'. With the limitation, if a production subsidy is contingent on the use of domestic goods, this contingency cannot be justified under the GATT exception and is also prohibited under ASCM Article 3; a coherent outcome. Without the limitation, the contingency would be covered by the exception but nevertheless prohibited under the ASCM. In practice, the GATT exception without the limitation would have no value.

This narrowing is unlikely to affect the availability of the GATT exception for CIB investments. For these investments, it is difficult to see how there would be discrimination against two distinct products – something which is inherent to the limitation. The limitation can apply when the subsidy is something other than the purchase of goods, for example, a grant or loan. This subsidy will have eligibility conditions. It might also have additional conditions such as use of domestic components by the recipient. The outcome is that discrimination from the general eligibility conditions is covered by the exception, but not the discrimination against different goods caused by the additional condition.

This distinction breaks down when applied to CIB investments. Suppose that the investment / subsidy is itself the purchase of goods. The CfD generator is unlikely to specify that it will only purchase the goods if domestic components are used – the CIB initiative does not contain a stipulation along these lines. Also, it is not possible to otherwise identify two distinct categories of goods which are discriminated against. The general eligibility criteria will identify certain products. It is these products

[123] *Brazil - Taxation*, ibid, para. 5.95.

which the CfD generator purchases – not their components. Therefore, the only discrimination which can be identified is that which is inherent to the general eligibility criteria. This discrimination is covered by GATT Article III:8(b).

The same outcome applies when the CIB investment is something other than a purchase of goods. Suppose the transfer of money is in the form of a loan with a below market interest rate. Again there will be eligibility criteria identifying certain goods and defining deprived area status. The loan might well result in a GATT Article III:4 violation. As the production of domestic goods is subsidized, this alters the conditions of competition to the detriment of like imported products. This discrimination is covered by GATT Article III:8(b). Again, it is difficult to see how goods distinct from those specified in the eligibility criteria are also and additionally discriminated against. The loan is unlikely to be conditioned on the use of domestic components in the manufacture of the specified goods.

In sum, the product discrimination caused by CIB investments is likely to be covered by the GATT Article III:8(b) exception. The investments would satisfy the Appellate Body's 'expenditure of revenue by a government' test. The money transfers will involve positive expenditures rather than the foregoing of revenue. The expenditures might well be 'by a government' by reason of the definition of a 'financial contribution by government' in ASCM Article 1. Moreover, the product discrimination will most likely be limited to what is inherent to the eligibility criteria, and not involve further and separate discrimination against other products.

While it is likely that any GATT Article III:4 violations would be exonerated, the ASCM continues to apply.

10. CIB AND THE ASCM

The possible subsidy here is the payments made by CfD generators to domestic producers of renewable energy generating equipment.

Given the focus on deprived areas, brief mention may be made of ASCM Article 8 which identified non-actionable subsidies. This category included, 'assistance to disadvantaged regions'.[124] Pursuant to a review scheduled under Article 31, Article 8 expired at the end of 2000 following a failure to reach agreement on its renewal. Had Article 8 been renewed without modification, it would not apply to the CIB investments. The provision only applied to non-specific subsides. As the CIB initiative is limited to firms operating in or servicing the offshore wind industry, the assistance is specific under ASCM Article 2.

10.1. Nature of the Measure at Issue

The payments to domestic producers at issue here can be contrasted with the mechanism at the heart of the CfD scheme; the support payments to CfD generators. As noted in Section 6.1, commentators have defended the non-actionability of support payments once decoupled from preferences for domestic goods. Section 6.2 proceeded to find a correspondence between this normative recommendation and the ASCM status of the CfD payments. As these payments do not fall within the definition of a subsidy, they are not regulated by the ASCM.

The normative recommendation is less definite for the payments to domestic producers of renewable energy generating equipment. Leonelli and Clora argue here for a rebuttable presumption of protective application and, therefore, actionability under the ASCM.[125] This arises from the focus on promoting domestic industry (giving rise to the presumption), together with the possible scope for production subsides to produce environmentally positive effects (giving rise to the possibility of rebuttal); primarily that transnational upscaling can lower the price of goods required for the net-zero

[124] ASMC Article 8.2(b).
[125] G. C. Leonelli and F. Clora (2024), supra n. 84, 454-457.

transition. The authors caution that such positive effects can be achieved only under certain conditions involving close co-ordination between states. There would need to be some means to identify and agree upon the point at which achievement of the positive effects spills over into merely promoting domestic industry. This might involve allocating 'national fair shares' of production subsides, within the limits of which states would refrain from imposing countervailing duties.

Given that the recommendation here is premised on coordination, it is not possible to fully assess whether outcomes under the current legal framework correspond with this recommendation. Nevertheless, some of the analysis above already indicates that the current legal framework is not incompatible with the future development of coordination mechanisms for production subsidies. While CIB investments very probably breach GATT Article III:4, they can be justified under Article III:8(b) exception. The further analysis below considers the position under the ASCM. This tends to confirm that WTO law is, in principle, compatible with coordination mechanisms.

10.2. CIB and the ASCM Definition of a Subsidy

Cleary, any investment would constitute a 'financial contribution' within the ASCM Article 1 definition of a subsidy whether in the form of a loan, equity stake or the purchase of goods. The first more difficult question is whether the financial contribution would be, 'by a government or any public body'.[126]

At first glance, it might be argued that CIB investments are not 'by a government' because they are made by the CfD generators which are private firms. However, this position would allow governments to circumvent the ASCM by channelling financial contributions via private firms. Some kind of anti-circumvention obligation can therefore be expected in the following legal standards.

Under ASCM Article 1.1(a)(1), the 'financial contribution by a government' can be where:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees)

…

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments.

The anti-circumvention obligation is clearly evident in paragraph (iv). Apart from explicitly establishing this,[127] the Appellate Body has noted that paragraph (iv):

> covers situations where a private body is being used as a proxy by the government to carry out one of the types of functions listed in paragraphs (i) through (iii). Seen in this light, the terms 'entrusts' and 'directs' in paragraph (iv) identify the instances where seemingly private conduct may be attributable to a government for purposes of determining whether there has been a financial contribution within the meaning of the ASCM.[128]
>
> …

[126] ASCM Article 1.1(a)(1).
[127] Appellate Body Report, *United States - Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS/296/AB/R, adopted 20 July 20, 2005, para. 113.
[128] Ibid., para. 108.

> … [E]ntrustment and direction—through the giving of responsibility to or exercise of authority over a private body—imply a more active role than mere acts of encouragement.[129]
>
> … In most cases, one would expect entrustment or direction of a private body to involve some form of threat or inducement …[130]

It can first be noted that the CIB minimum standards, and the CIB extra investment, have something in common which could bring them both within paragraph (iv). By the time the investments are made, they become enforceable legal obligations between the CfD generator and the government. This is a strong indicator of entrustment and direction respectively understood as the government giving responsibility to, or exercising authority over, CfD generators.

If, in addition, the extent of government involvement in the initial decision to invest is considered, the outcome could be different as between the two investment components. The government inducement to invest is perhaps stronger for the CIB minimum standards as this is a condition to participate in the CfD allocation round. In contrast, the CIB extra investment is optional and voluntary. However, the government incentive here is the uplift in ranking within the CfD allocation round which depends on the extent to which the generator wishes to be reimbursed for the extra investment.

Even if there is perceived to be a higher inducement for the minimum standard, it is submitted that this is offset by a characteristic of the extra investment. The reimbursed portion of the extra investment has the same cost to the public purse as if the government had directly transferred the funds to the deprived area firm. While reimbursement cannot be considered a requirement under paragraph (iv),[131] its presence will make it close to irrefutable that the required entrustment and direction is present. The situation is no different than if the deprived area firm had received funds directly from the government.

While paragraph (iv) is the most relevant provision when the financial contribution does not come directly from government, paragraph (i) is also relevant when the financial contribution is made by a private body, but with some degree of government participation. According to the Appellate Body in *US – Carbon Steel (India)*:

> The use of the word "involves" thus suggests that the government practice need not consist, or be comprised, solely of the transfer of funds, but may be a broader set of conduct in which such a transfer is implicated or included. The term also appears to introduce an element suggesting a lack of immediacy to the extent that it does not prescribe that a government must necessarily make the direct transfer of funds, but only that there be a "government practice" that "involves" the direct transfer of funds.[132]

In contrast to the broadening effect of the phrase, 'government practice involves', the Appellate Body noted the tension with the term 'direct' indicating a narrowing effect.[133] However, this term was not restricted to the situation where funds are transferred directly from the government to a firm. The transfer could be 'direct' based on the, 'immediacy of the link between the parties to the transfer', or, 'the immediacy of the mechanism by which the transfer is effectuated'.[134] Moreover, the Appellate Body

[129] Ibid., para. 114.
[130] Ibid., para.116
[131] If reimbursement was a requirement under paragraph (iv) the provision could easily have been drafted to establish this. This would have significantly curtailed the reach of the provision. The actual language indicates more breadth and flexibility.
[132] Appellate Body Report, *US – Carbon Steel (India)* supra n. 91, para 4.90.
[133] Ibid., para. 4.92.
[134] Ibid., para. 4.89.

considered that the transfer need not, 'necessarily emanate from government title or possession over such resources'.[135]

The CfD scheme within which the CIB initiative operates might therefore be seen as a broad set of government conduct in which transfers are implicated. These transfers are 'direct' in the sense that their legally binding nature gives immediacy to the 'mechanism by which the transfer is effectuated'.

The next question is whether a 'benefit' is conferred on the firms receiving the CIB investments. As noted above, the 'benefit' analysis focuses on whether the financial contribution puts the recipient in an advantageous position relative to what could be obtained in the marketplace.[136] This would be the position, for example, when goods are purchased at more than market value, or when a loan is provided at an interest rate below that available on the market.

It is not possible to offer a definitive assessment because benefit analyses are so intensely fact dependent. However, the reimbursed portion of any extra investment stands out as especially relevant to establishing and quantifying a 'benefit'. For example, if the generator determines that the best market price for goods is £8 million as offered by a foreign supplier, while the same goods from the deprived area UK firm will cost £9 million, the generator might specify a reimbursement of £1 million, or some portion of this. The reimbursement provides evidence of a possible 'benefit' in the sense that the purchase may have been, 'made for more than adequate remuneration'.[137] Of course, the absence of reimbursement does not establish the absence of a benefit, because the generator might have elected to absorb the difference between the best market price and that available from a deprived area firm in order to achieve a higher ranking in the CfD allocation round.

It is therefore possible that the CIB initiative involves subsidies within the meaning of ASCM Article I.

10.3. CIB and Prohibited Subsidies

The next question is whether any subsides would fall under the Article 3 prohibition. Under Article 3.1(b), this category includes, 'subsidies contingent, whether solely or as one of several conditions, upon the use of domestic over imported goods'.

It is unlikely that this would apply to CIB investments because of the strictness of the contingency standard. It is a reasonable approximation that where the use of imported goods in the framework of the government measure would be commercially puzzling, but nevertheless theoretically possible, the standard will not be satisfied. The reader is invited to consider how likely the use of imported goods might be in this scenario described by the Appellate Body in *Brazil - Taxation*:

> The structure of the PPBs [basic production process measures] suggests that the subsidy recipients will likely 'use' in a subsequent production step the domestic components and subassemblies that were manufactured in a previous production step. For example, production step I under the PPB for Optical Splice Closures provides for the 'manufacture of the moulds for the injection of the plastic parts', while production step II envisages the 'injection of the plastic parts'. Thus, the moulds produced for the injection of the plastic parts in accordance with the first production step are likely to be used in the injection of the plastic parts under the second production step. …However, while such use of domestic goods may be a likely consequence of the eligibility

[135] Ibid., para. 4.96. In making this point, the Appellate Body referred to Article 9.1(c) of the Agreement on Agriculture. This provides that 'payments' may be 'financed by virtue of governmental action, whether or not a charge on the pubic account is involved'.
[136] This is clear from Article 14 entitled *Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient*.
[137] ASCM Article 14(d).

requirements for the tax incentives under the Informatics programme, this does not, in and of itself, indicate the existence of a condition requiring the use of domestic over imported products.[138]

The use of the term 'likely' in this passage is an understatement. It would be most unusual to manufacture moulds for the injection of plastic parts, but then use imported moulds for the injection. Once again, there is a coherence based rationale here. The objective is to avoid ASCM Article 3 becoming a prohibition on the subsidization of domestic production.[139] This preserves a balance between the GATT Article III:8(b) exception and the ASCM concept of prohibited subsidies. The exception for production subsidies would be undermined if the concept of prohibited subsides extended to the situation when use of domestic goods is highly likely, but not strictly required.

When applied to CIB investments, regardless of the form of transfer of money involved, the transfers are unlikely to be contingent on the use of domestic goods such as to fall under the Article 3 prohibition. The CIB investment must be to a deprived area firm, 'manufacturing, assembling or installing' specific goods. Even when the focus is on manufacturing, there is no requirement that all components be of domestic origin. Indeed, this occurrence might be somewhat less likely than in relation to the moulds and plastic parts in the excerpt above.

10.4. CIB and ASCM Part III and Part V

In the absence of a prohibited subsidy, CIB investments remain potentially subject to Part III of the ASCM dealing with Actionable Subsidies and Part V dealing with Countervailing Measures. It is not possible to provide a definitive analysis here due to the fact intensive nature of the relevant enquiries. However, two observations may be offered.

First, Parts III and V are only relevant if there is a subsidy. As considered above, CIB investments are not necessarily subsidies as defined in ASCM Article I. When goods are purchased by the CFD generator without any reimbursement, this indicates that the goods may well have been purchased at market value and, therefore, without conferring a benefit.

Secondly, in the event of CIB investments amounting to subsidies, Part III would seem to be more relevant than Part V. Part V is about regulating the circumstances in which WTO members can unilaterally impose countervailing measures on subsidized imports causing serious injury to the domestic industry. The relevance of Part V cannot be excluded. For example, if CIB investments are in the form of loans conferring benefits to UK firms, these firms could export subsidized goods to WTO members potentially causing serious injury to the competing domestic industries of these members. In contrast, when the CIB investment is a purchase of goods, these goods are more likely to be used in the UK than imported by other WTO members. For this example, imports which could be countervailed seem unlikely.

Part III, in contrast, has broader reach covering not only the serious injury which is the focus of Part V, but also, 'serious prejudice to the interests of another Member'.[140] Article 6.3 sets out the circumstances in which this serious prejudice 'may arise', including where, 'the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member'.[141] This could be invoked in response to the purchase of goods in the UK above market value. The purchase of domestic goods might displace the competing imported goods. Part V would have no relevance assuming (as seems likely) that the purchased goods would be used in the UK. Apart from this broader reach of Part III, complaints here are subject to general WTO consultation and dispute settlement rules, rather than the unilateral countervailing duties envisaged in Part V. In the event that

[138] Appellate Body Report, *Brazil – Taxation*, supra n. 11, para. 5.281.
[139] Ibid., para. 5.246.
[140] ASCM Article 5.
[141] ASCM Article 6.3(a).

adverse effects of the subsidy under Part III are confirmed in the dispute settlement process, the obligation is to withdraw either the adverse effects of the subsidy, or the subsidy itself. Recalcitrance here results in authorization for the complaining member, 'to take countermeasures commensurate with the degree and nature of the adverse effects determined to exist'.[142]

While successful recourse to Part III cannot be excluded, there is marked contrast between what must be established here, and the nature of the analysis under GATT Article III:4. The latter can be breached without showing that a measure has had any actual impact of trade flows to the detriment of imported products.[143] In contrast, under ASCM Part III, there is first the challenge of establishing that there is subsidy; in particular that a 'benefit' has been conferred. Success under Part III also depends upon showing actual impacts on trade flows.[144]

11. CONCLUSION

This article has considered the WTO law compatibility of the UK's primary scheme for supporting the generation of renewable energy. The CfD scheme is mainly consistent with WTO law, subject to possible successful invocation of ASCM Part III in relation to the CIB.

Most important is the mechanism at the core of the scheme; the payments to CfD generators to cover the gap between the wholesale price and the strike price. These payments can be described generically as subsidies. However, they do not fall within the definition of a subsidy in Article 1 of the ASCM. Specifically, CfD payments do not confer a 'benefit' because the strike prices for the different renewable technologies covered are determined via auction, thereby ensuring that the payments are no higher than what a market outcome would be. This outcome corresponds with the normative recommendation that WTO law should unconditionally permit government interventions which contribute towards a global public good (the transition to net-zero), without also pursuing industrial policy goals involving preferences for domestic firms and goods. Moreover, the firmness of this conclusion (the absence of a 'benefit') somewhat ameliorates concerns around legal uncertainty and the need for law-reform.[145]

WTO law does however apply to other aspects of the CfD scheme. There cannot be any ambiguity on whether committing to domestic content confers an advantage relative to imported content. This ambiguity (now removed) was present in the AR4 eligibility procedures. Uncertainty here itself breaches GATT Article III:4. The provision is not limited to the situation covered in the case law to date – where it is clear that domestic content confers an advantage.

The coverage of the CIB offered the opportunity to explore how GATT obligations correspond and interact with the ASCM. The CIB incentivises the purchase of domestic goods. It therefore breaches GATT Article III:4; indeed more clearly so than the now removed aspects of AR4 which the EU complained about. The article considered the availability of the GATT Article III:8(b) exception for production subsidies. In the case law, respondent states have been unable to successfully invoke this exception. The Appellate Body has limited its availability in two respects; one involving a dubious distinction, the other necessary for coherence between the exception and the ASCM concept of

[142] ASCM Article 7.9.
[143] See Section 5 above.
[144] As noted by the Appellate Body, 'displacement arises under Article 6.3(a) of the SCM Agreement where imports of a like product of the complaining Member are declining in the market of the subsidizing Member, and are being substituted by the subsidized product'. The identification of displacement, 'should focus on trends in the markets, looking at both volumes and market shares'. The complaining Member must also, 'establish … that such displacement is the effect of the challenged subsidies'. Appellate Body Report, *European Communities and Certain Other Member States – Measures Affecting Trade in Large Civil Aircraft* WT/DS316/AB/R, adopted June 1, 2011, para, 1170.
[145] Rubini, supra n. 10, 558.

prohibited subsidies. Neither of these limitations would apply to the CIB. Ultimately, therefore, this new initiative is GATT compliant.

The article finally considered the CIB under the ASCM. The analysis here was in part reasonably definite, and, in part, necessarily speculative. It is clear that the investments by CfD generators to UK firms are, in principle, capable of falling under the ASCM Article 1 definition of a subsidy. This depends on whether the investments confer a 'benefit'; a fact intensive assessment on which no definite conclusion can be offered. More definite is the assessment that any such subsidies would not fall under the ASCM Article 3 concept of prohibited subsidies. The same coherence-based rationale which limits the GATT Article III:8(b) exception, also results in a strict interpretation of the contingency requirement in ASCM Article 3. A subsidy is only prohibited when the use of domestic goods is strictly and unavoidably required, as opposed to being highly likely in practice. When CIB investments involve the purchase of domestic goods, these are likely to be domestic goods. However, the purchase of imported goods from UK firms is not strictly and unavoidably required.

In the absence of a prohibited subsidy, the most relevant remaining disciplines are found in Part III on Actionable Subsidies. This is based on the possibility of domestic goods displacing the like imported goods. There is no indication to date that the CIB has been raised and discussed at the WTO. This may be an area in which the question of strict compatibility with WTO law gives way to whether members are inclined to mount a challenge, or exercize restraint. In addition to the 'glasshouse' situation, of relevance here might be the balance between the legal obligations at issue, and the level of displacement affecting the WTO member in question. The easier it is to establish a violation, and the higher the level of displacement, the more likely a legal challenge becomes. The article has shed light on the former question for the CIB bonus and the other aspects of the CfD scheme considered. The latter question is an assessment for individual WTO members.