

***CANADA – CERTAIN MEASURES AFFECTING THE
RENEWABLE ENERGY GENERATION SECTOR***

(AB-2013-1 / DS412)

***CANADA – MEASURES RELATING TO THE
FEED-IN TARIFF PROGRAM***

(AB-2013-2 / DS426)

**THIRD PARTICIPANT SUBMISSION
OF THE
UNITED STATES OF AMERICA**

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Table of Reports Cited

Panel Report	Panel Report, <i>Canada – Certain Measures Affecting the Renewable Energy Generation Sector</i> , WT/DS412/R, circulated 19 December 2012; <i>Canada – Measures Relating to the Feed-In Tariff Program</i> , WT/DS426/R, circulated 19 December 2012
<i>Brazil – Aircraft (AB)</i>	Appellate Body Report, <i>Brazil – Export Financing Programme for Aircraft</i> , WT/DS46/AB/R, adopted 20 August 1999
<i>Canada – Aircraft (Panel)</i>	Panel Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/R, adopted 20 August 1999, as modified by the Appellate Body Report, WT/DS70/AB/R
<i>Canada – Aircraft (AB)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 20 August 1999
<i>EC – LCA (AB)</i>	Appellate Body Report, <i>European Communities and Certain Member States - Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011
<i>India – Autos (Panel)</i>	Panel Report, <i>India – Measures Affecting the Automotive Sector</i> , WT/DS/146/R, WT/DS175/R, and Corr. 1, adopted 5 April 2002
<i>Japan – Alcohol (AB)</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
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I. Introduction

1. The United States welcomes this opportunity to provide its views on certain issues raised in this dispute, in which Canada, Japan, and the European Union each appeal certain findings by the Panel. The United States has a strong interest in the proper interpretation of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”), the *Agreement on Trade-Related Investment Measures* (“TRIMs Agreement”), and the *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”), and in particular, as one of the foremost utilizers of renewable energy and a significant importer and exporter of renewable energy generation equipment, in their proper application to measures such as those at issue in this dispute.

2. In this submission, the United States addresses issues on appeal related to the proper interpretation of Article III:8(a) of the GATT 1994, the relationship between Article III:8(a) and the TRIMs Agreement, and the proper method for determining the existence of benefit under Article 1.1(b) of the SCM Agreement.

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

3. Canada, Japan, and the EU each appeal certain findings of the Panel with regard to the so-called “government procurement exception” set out in Article III:8(a) of the GATT 1994. Article III:8(a) states:

The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.¹

4. Canada appeals the Panel’s interpretation of the phrases “with a view to;” Canada and, conditionally, Japan appeal the Panel’s interpretation of the phrase “commercial resale;” and the EU and, conditionally, Japan appeal the Panel’s interpretation of “for governmental purposes.” The United States will address each phrase in turn.

A. “With a View To”

5. The Panel found that, as a matter of fact, the Government of Ontario does commercially resell the electricity it acquired under the FIT program.² Canada believes this finding in error because, it claims, the Panel failed to consider whether commercial resale of electricity by the Government of Ontario was the goal or aim of the FIT program.³ The United States disagrees

¹ GATT 1994, Article III:8(a) (emphasis added).

² Panel Report, para. 7.147.

³ Canada Appellant Submission, para. 30.

with Canada’s interpretation of the phrase “with a view to,” and believes the Panel’s analysis was correct.

6. Canada states that the “with a view to” requires that a panel consider the “aim” or “purpose” of a purchase, and asserts that the Panel failed to interpret or apply that phrase with respect to the FIT program.⁴ Canada further argues that the aim of the FIT program is not to commercially resell electricity, but rather to ensure the supply of electricity and to protect the environment.⁵

7. First, setting aside whether the principle of *effet utile* requires that each word in a provision individually must be given effect, with respect to the Panel’s analysis, the Panel does appear to have taken into consideration the “aim” or “purpose” of the purchases at issue and correctly concluded that they were with the aim of commercial resale. Simply put, the Government of Ontario purchases the electricity in the full knowledge and intent that the electricity will be resold on the market to private consumers. Canada makes the purchase knowing it never intends to use the electricity or otherwise put the electricity to a governmental purpose.

8. In its consideration of whether the Government of Ontario commercially resold the electricity it purchased through the FIT program, the Panel determined that the program, as operated by Hydro One, aimed to sell the purchased electricity into the market: the Panel found that transmission of electricity into the electrical grid (in competition with private sellers of electricity) is, in fact, the purpose for which Hydro One was created.⁶ Where a government program or entity is established with the purpose of selling goods on the market, this would seem to clearly indicate that the purchases have an “aim” of “commercial resale.”⁷ Moreover, Japan has noted that there may be multiple means by which a government could pursue aims such as ensuring the supply of electricity without purchasing and selling electricity on the market.⁸ In that situation, a government’s decision to achieve those aims through procurement and commercial resale necessarily means that the commercial resale constitutes a distinct aim of the purchases.

B. “Commercial Resale”

9. Canada also appeals the Panel’s findings with respect to the requirement that government purchases that qualify for the exception under Article III:8(a) not include those made “with a

⁴ Canada Appellant Submission, para. 30.

⁵ Canada Appellant Submission, para. 34.

⁶ Panel Report, paras. 7.34-7.35; 7.147.

⁷ This is not to suggest that such a program or entity must be established in order to satisfy the “with a view to” criterion; rather, the observation is simply that where such a program or entity does exist, a panel may be likely to find, with little additional discussion, that the criterion has been satisfied.

⁸ Japan Appellant Submission, paras. 177-178.

view to commercial resale.”⁹ Canada contends that, as used in Article III:8(a), the word “commercial” means “underlying intent to profit.”¹⁰ Japan argues that, as used in Article III:8(a), “commercial” means “to be sold or introduced into the stream of commerce, trade, or market.”¹¹

10. The United States notes that all the parties present dictionary definitions that support their respective views of the ordinary meaning of the term “commercial.” A proper interpretation of the term will also take into consideration the context in which the term appears. The United States believes that in light of the structure of Article III:8(a), and the context provided by the rest of the provision – in particular, the phrases “for governmental purposes” and “not ... with a view to the use in the production of goods for commercial sale” – the phrase “commercial resale” means “to be sold into the market.”

11. The United States notes that, as the Appellate Body stated in *Japan – Alcohol*, “Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products.”¹² The first part of Article III:8(a) provides an exception to those obligations for “laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes.” The second part of Article III:8(a), beginning with the phrase “and not,” places limitations on the exception. First, Article III:8(a) excludes from the scope of the exception products purchased “with a view to commercial resale.” Second, Article III:8(a) excludes products purchased “with a view to use in the production of goods for commercial sale.” Taken as a whole, by including in its ambit government purchases made “for governmental purposes” and excluding those made for “commercial resale,” Article III:8(a) clearly seeks to distinguish between purchases made for “governmental” reasons and those made for “commercial” reasons.

12. In this regard, though the Panel did not ultimately offer an interpretation of the meaning of the phrase “commercial resale,” the United States does find its approach instructive. In particular, the Panel found that the phrases “for governmental purposes” and “not with a view to commercial resale” exist in “juxtaposition” with one another: “a purchase of goods ‘for governmental purposes’ cannot at the same time amount to a government purchase of goods ‘with a view to commercial resale’ under the terms of Article III:8(a).”¹³ While this observation alone does not give meaning to the word “commercial,” the structure of Article III:8(a) – in particular the juxtaposition of “for governmental purposes” and “not with a view to commercial

⁹ Canada Appellant Submission, paras. 40-44 (*regarding*, Panel Report, paras. 7.146-7.151). Canada’s appeal appears to be limited to the meaning of the word “commercial” as it appears in the phrase “commercial resale;” Canada does not appear to appeal the Panel’s finding that the Government of Ontario does in fact resell the electricity it purchases.

¹⁰ Canada Appellant Submission, para. 40.

¹¹ Japan Appellee Submission, para. 35; Japan Other Appellant Submission, paras. 182-188.

¹² *Japan – Alcohol (AB)*, p. 17.

¹³ Panel Report, para. 7.145.

resale – clarifies that a purchase leading to a commercial resale is not a purchase for governmental purposes, and *vice versa*.¹⁴

13. The limit to the government procurement exception contained in the phrase “not ... with a view to use in the production of goods for commercial sale” clarifies that “commercial,” as used in Article III:8(a), means to enter the market. The United States notes that the restriction imposed by this phrase is not limited to use in *government* production of goods for commercial resale; the phrase applies equally to goods purchased by a government for use in *private* production of goods for commercial resale. In other words, Article III:8(a) does not allow a government to exclude imported production inputs from its market simply by taking possession of those inputs and then providing them to a private producer. This makes clear that the exception provided under Article III:8(a) ends once the government chooses to place itself in the market with private sellers.¹⁵

14. In sum, while Article III:8(a) provides an exception to national treatment for government purchases of goods for governmental purposes, it excludes from the exception products procured by the government that are entered in the market. By specifying that this exception does not extend to goods purchased “with a view to commercial resale,” Article III:8(a) preserves the equality of competitive conditions for imported products once the government steps out of its governmental role and into the market.¹⁶ The United States therefore agrees with Japan’s interpretation of the obligation, and considers the theory advanced by Canada – which limits commercial sale to those transactions that are intended to result in a profit – to limit the term in a manner that is not consistent with the context in which it appears.

15. Indeed, Canada’s approach would mean that the basic national treatment obligations would not apply to a government purchase simply because a Member chose to provide a subsidy

¹⁴ If, after the Appellate Body completes its analysis under Article 31 of the *Vienna Convention on the Law of Treaties* (“Vienna Convention”), the Appellate Body finds the meaning “commercial resale” ambiguous, it may have recourse to the preparatory work of the GATT 1994 as a supplementary means of interpretation. In this regard, the United States finds that the preparatory work brought forth by Japan and the EU demonstrates that the drafters of Article III:8(a) intended to provide an exception for government purchases for governmental use or purposes, but not for “commercial purposes such as resale.” (EU Appellee Submission, fn. 30 (emphasis added); *see also*, Japan Appellee Submission, fn. 51).

¹⁵ The United States notes that the Panel looked to the presence of domestic, private sellers of electricity to determine that the Government of Ontario sold electricity into a market. (Panel Report, paras. 7.147-7.148). Under the facts of this case, this is an acceptable approach. Nevertheless, the absence of private sellers from a market – for instance, in the event of a government monopoly – would not automatically mean the government was not engaging in commercial resale. Sales at a rate that excludes private participation in the market would still constitute competition with private sellers, and would still constitute “commercial resale.”

¹⁶ Canada argues that interpreting “commercial” to mean entering the market would not give effect to the full phrase “commercial resale” because “resale” already means entering the market. (Canada Appellee Submission, para. 77). The United States disagrees that “resale” necessarily occurs in the market. Rather, the presence of the qualifier “commercial” in the phrase “commercial resale” means that the procurement of a good by one unit of government (such as a government purchasing agency) that is sold to another unit of government would not, as a result of that transaction, be excluded from the coverage of Article III:8(a).

through its procurement. A Member that purchases goods at a price above the market price and then sold those goods in the market at or below the market price, would not be looking to obtain a profit on those sales. Yet the sale could be otherwise indistinguishable from any other commercial sale in that market.

C. “For Governmental Purposes”

16. In interpreting the phrase “for governmental purposes,” the Panel focused on the context in which it appears, and in particular on the phrase immediately following “for governmental purposes”: “and not with a view to commercial resale.” In particular, the Panel stated that “a purchase of goods for ‘governmental purposes’ cannot at the same time amount to a government purchase of goods ‘with a view to commercial resale’ under the terms of Article III:8(a).”¹⁷ Having found that purchases of electricity under the FIT program did not meet the criterion of being “not with a view to commercial resale,” the Panel concluded that these purchases could therefore not be for governmental purposes within the meaning of Article III:8(a). The Panel did not make additional findings as to whether the FIT program governs the procurement of “products purchased for governmental purposes.”

17. Japan (on a conditional basis) and the EU request that the Appellate Body modify the Panel’s interpretation of the ordinary meaning of “for governmental purposes.”¹⁸ While the United States agrees with the Panel that products purchased with a view to commercial resale cannot be products purchased for a governmental purpose within the meaning of Article III:8(a), the United States believes that the phrase “for governmental purposes” has meaning independent of “not for commercial resale.”¹⁹ The United States considers that the term “products purchased for governmental purposes” means that the products purchased by the government must be for use by the government in pursuit of its functions, including consumption by the government, or in the provision of goods or services to its citizens.²⁰ To use an example given by the EU, a government that purchases books for use in public education is purchasing a product for a governmental purpose.

¹⁷ Panel Report, para. 7.145.

¹⁸ Japan Other Appellant Submission, para. 170; EU Other Appellant Submission, para. 87.

¹⁹ See, *US – Sonar Mapping (GATT)*, para. 4.6 (considering the phrase “procurement by governmental agencies of products purchased for governmental purposes” on its own, and not equating the phrase with “not with a view to commercial resale”).

²⁰ See, EU Other Appellant Submission, paras. 75, 79.

D. “Laws, Regulations or Requirements Governing the Procurement by Governmental Agencies of Products”

18. In considering whether the laws, regulations, and requirements at issue govern the procurement by the Government of Ontario of electricity under the FIT program, the Panel decided there was a “close relationship” between the product procured by the government (electricity) and the products affected by the “Minimum Required Domestic Content Level.”²¹ It then concluded that the Minimum Required Domestic Content Level was one of the “requirements governing” the alleged procurement. In its appellee submission, Canada also describes the relationship between the product procured by the government and the product purchased by private entities subject to a domestic content requirement as “close and real.”²²

19. The United States believes this approach is in error. Article III:8(a) applies to measures “govern[ing]” the “procurement by governmental agencies of products.” First, the use of the word “governs” in Article III:8(a) indicates that the law, regulation, or requirement that is excepted is limited to that which directly pertains to procurement by a government of a specific product. Article III:8(a) does not except any measure that breaches the national treatment obligation merely because it appears within a law, regulation, or requirement that also contains a government procurement provision. Second, the measures that may be excepted from a Member’s national treatment commitments, are limited to those pertaining to a product purchased by a government. The exception does not apply to products being purchased by a private entity.

III. Application of Article III:8(a) of the GATT 1994 to the TRIMs Agreement

20. The Panel found that the TRIMs Agreement, and in particular Article 2.2 and the Illustrative List in the annex to the agreement, does not preclude the application of the Article III:8(a) exception to measures of the type included in the Illustrative List.²³ The EU appeals this finding on the grounds that Article 2.2 “sets out an illustrative list of measures that are

²¹ Panel Report, para. 7.127.

²² Canada Appellee Submission, para. 55. The United States notes that, in its appellee submission, Canada refers to the “object and purpose of paragraph 8(a).” (Canada Appellee Submission, para. 49). The object and purpose that must inform the Appellate Body’s interpretation of Article III:8(a) is the object and purpose of the GATT 1994 as a whole. Indeed, setting aside that attempting to discern an “object and purpose” of an individual provision is inconsistent with the terms of Article 31 of the VCLT (which instructs that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”), this instance illustrates the flaws in the approach. The national treatment obligations of Article III and the exception to those obligations in Article III:8(a) obviously would have different purposes – hence why the Vienna Convention is clear that the object and purpose that must inform the interpretation of treaty provisions is the object and purpose of the agreement as a whole, and not its individual terms.

²³ Panel Report, para. 7.121.

necessarily “inconsistent with Article III:4,” and as a result, those necessarily inconsistent measures cannot “escape” that breach of Article III:4 by virtue of Article III:8(a).²⁴

21. The United States agrees with the Panel that a measure excepted from the obligations of Article III by Article III:8(a) would not breach Article III:4 by virtue of being included on the TRIMs Agreement Illustrative List. Article 2.2 and the Illustrative List clarify some types of TRIMs “that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of the GATT 1994,” but they do not establish independent obligations.²⁵ Rather, a national treatment breach under Article 2 of the TRIMs Agreement only occurs in the event of a breach of Article III of the GATT 1994, which will not arise where one of its exceptions are met.

IV. Article 1.1(b) of the SCM Agreement

22. After finding that the Government of Ontario provided a financial contribution to the FIT suppliers through the purchase of goods,²⁶ the Panel sought to determine whether that financial contribution conferred a benefit within the meaning of Article 1.1(b) of the SCM Agreement. The majority of the Panel rejected the benchmarks put forth by Japan and the EU because it did not accept what it characterized as the “premise” underlying the complainants’ “two main lines of benefit arguments, namely, that in the absence of the FIT Programme, the FIT generators would be faced with having to operate in a *competitive* wholesale electricity market.”²⁷

23. The United States considers that, with respect to this finding, the majority was in error because it: (1) did not properly account for the evidence that the FIT generators would not have entered the Ontario wholesale electricity market but for the FIT program; (2) based its findings on improper standards, *i.e.* a requirement that the complainants’ benefit analysis be based on a “competitive” wholesale electricity market and that their benchmarks must reflect certain policy choices made by the Government of Ontario; and (3) as a result of this erroneous standard, failed to properly consider the benchmarks put forth by the complainants based on wholesale and retail prices.²⁸

²⁴ EU Other Appellant Submission, paras. 31-32.

²⁵ TRIMs Agreement, Art. 2.2; *see also*, *India – Autos (Panel)*, para. 7.157.

²⁶ Panel Report, para. 7.243.

²⁷ Panel Report, para. 7.309 (emphasis added).

²⁸ The United States notes that the Panel found, in relation to the TRIMs Agreement, that compliance with the domestic content requirements were necessary to “obtain an advantage” through participation in the FIT program (Panel Report, para. 7.166). The Panel found this “advantage” to be a 20-year guaranteed price for every kilowatt hour delivered to the Ontario electricity system. (Panel Report, para. 7.165). The finding suggests that the FIT program does in fact confer an advantage that should, at a minimum, inform the question of whether the guarantee of those rates conferred a benefit for purposes of the SCM Agreement.

A. The Panel Majority Failed to Find the Existence of Benefit on the Basis of Unrebutted Evidence

24. In its consideration of whether the financial contribution identified by the Panel conferred a benefit on the FIT generators, the majority found that the FIT generators would be “unable to conduct viable operations” in a competitive wholesale electricity market in Ontario in the absence of the FIT program.²⁹ It further noted that “all parties” to the dispute agreed.³⁰ As Japan notes³¹, this constitutes a finding on the basis of unrebutted evidence that the FIT generators receive a benefit – a financial contribution with terms “more favourable to what is available to the recipient on the market.”³² Were this not so, the FIT generators would be able to enter the market even in the absence of the FIT program. The United States considers that, on this basis, the Panel should have found that the FIT program and FIT contracts constitute a subsidy as they are a financial contribution conferring a benefit.

25. Canada argues that this finding would mean that “every time a government purchases a good for which there is no private sector demand, the fact of that purchase itself would demonstrate a ‘benefit’ conferred *regardless of the price* at which that purchase is made.”³³ This, Canada states, would collapse the required benefit analysis into a finding that a financial contribution exists.³⁴ Canada is incorrect and appears to misunderstand the minority’s analysis and findings with respect to the FIT program.

26. The minority’s analysis was not that there is necessarily a benefit whenever the government purchases a product for which there is no private demand. Rather, the minority found that the FIT producers would not have been in the market absent the prices received under the FIT program, whether viewed in relation to a competitive wholesale market in Ontario or within the actual “constrained” wholesale electricity market in Ontario.³⁵ In other words, the Ontario wholesale electricity market is a market, and there is private demand, but the FIT producers would not be able to enter the market absent the financial contribution. This appears to be a classical benefit analysis.

27. Canada also attempts to dismiss the minority’s analysis of the Government of Ontario’s purchase of solar PV and wind power electricity by stating that the minority failed to take into consideration the actual price “the government – represent[ing] the demand-side of the relevant purchase transaction” – would pay.³⁶ This, Canada alleges, constitutes a finding of the existence

²⁹ Panel Report, para. 7.311 and fn. 614; *accord*, Panel Report, paras. 9.18, 9.23.

³⁰ Panel Report, para. 7.311.

³¹ Japan Other Appellant Submission, para. 82.

³² *EC – LCA (AB)*, para. 974.

³³ Canada Appellee Submission, para. 177 (emphasis original).

³⁴ Canada Appellee Submission, para. 177.

³⁵ Panel Report, para. 9.23.

³⁶ Canada Appellee Submission, paras. 193, 195.

of a financial contribution, but not a consideration as to the existence of benefit.³⁷ In contrast to Canada’s depiction of the minority’s analysis, however, the minority does appear to have analyzed the “very high” costs of production of electricity from solar PV and wind power based on evidence provided by Canada.³⁸ It also concluded that the price at which the Government of Ontario purchases solar PV and wind power was adequate to cover these “very high” capital costs plus a reasonable rate of return to the FIT generators.³⁹ It further concluded that this price would not otherwise be available either in a competitive market or in the market as it actually exists in Ontario, and thus conferred a benefit within the meaning of Article 1.1(b).⁴⁰ Thus, contrary to Canada’s assertion, the minority did conduct the required benefit analysis, and concluded that a subsidy existed.

28. In contrast to the minority’s analysis, the majority appears to have disregarded this un-rebutted evidence of the existence of a benefit because it based its benefit analysis on a different counterfactual. Namely, while the majority found that the FIT generators would not enter a competitive Ontario wholesale electricity market, it found that the Ontario wholesale electricity market is not competitive. Rather, the majority insisted that a proper benchmark must be based on the “particular situation in Ontario,” that is, a market characterized by the Government of Ontario’s intervention in order to secure “a reliable supply of electricity.”⁴¹ In the next section, the United States discusses the errors with the majority’s standards for demonstrating the existence of a benefit.

B. The Benchmarks Required by the Panel Majority were in Error

29. The majority required that the complainants’ benchmarks be based on a “competitive wholesale electricity market,”⁴² and further required that any benchmark used to show the existence of a benefit reflect certain policy choices made by the Government of Ontario.⁴³ The United States believes that the majority’s decision to impose both these requirements on a benchmark suitable for demonstrating the existence of a benefit is incorrect.

³⁷ Canada Appellee Submission, para. 197.

³⁸ Panel Report, paras. 9.21-9.22; *see also*, Panel Report, para. 7.311.

³⁹ Panel Report, para. 9.23.

⁴⁰ Panel Report, para. 9.23.

⁴¹ Panel Report, paras. 7.311-7.312.

⁴² Panel Report, paras. 7.308-7.309.

⁴³ Panel Report, paras. 7.311-7.312.

1. A Benchmark is not Required to be Based on a “Competitive Market”

30. The majority appears to have rejected benchmarks put forth by the complainants accounting for the Hourly Ontario Electricity Price (“HOEP”) because it found that the HOEP was “significantly affected by government intervention in a way that renders it an inappropriate benchmark.”⁴⁴ While the United States does not take a position as to whether the HOEP is an appropriate benchmark, to the extent the majority’s rejection of HOEP-based benchmarks is based on the premise that a benchmark *must* be based on a competitive market devoid of government intervention, the majority was in error. There is no requirement in Article 1.1(b) that benefit must be demonstrated on the basis of such a purely competitive market, nor is there any context provided by Article 14 that would lead to that conclusion.

31. The majority began its benefit analysis by noting that Article 14(d) of the SCM Agreement “establishes guidelines for calculating the amount of subsidy in terms of benefit to the recipient” and that this provides “useful context” for determining whether a benefit is conferred.⁴⁵ The majority then interpreted the term “market” as it appears in the phrase used in Article 14(d): “in relation to prevailing market conditions.” The majority concluded that “market” refers to “a market where there is effective competition, in the sense that prices for the purchased good must be established through the operation of unconstrained forces of supply and demand, and not by means of government intervention of a kind that renders ‘the comparison contemplated by Article 14 ... circular.’”⁴⁶ The Panel’s sole basis for reaching this conclusion appears to be the findings of the Appellate Body in *US – Softwood Lumber IV* concerning the acceptable use by an investigating authority of benchmarks other than in-country private prices.⁴⁷

32. The United States considers that the majority (1) failed to properly apply the context provided to Article 1.1(b) by Article 14; (2) misinterpreted the phrase “prevailing market condition” in Article 14(d) and the guidance offered by the Appellate Body on Article 14(d) in *US – Softwood Lumber IV*; and (3) failed to give meaning to the phrase “in relation to.” The result is that the Panel erred in its conclusion that the Ontario wholesale electricity market cannot serve as a benchmark for determining the existence of a benefit.

33. First, the Panel failed to properly apply the context provided by Article 14(d) to Article 1.1(b). It should be recalled that Article 1.1(b) concerns whether “a benefit is thereby conferred.”⁴⁸ For a benefit to be conferred, there must *be* a benefit. In contrast, Article 14 concerns not the presence of a benefit, but the “method[] used by the investigating authority to

⁴⁴ Panel Report, para. 7.308.

⁴⁵ Panel Report, para. 7.271; *see also*, *Canada – Aircraft (AB)*, para. 155 (finding that Article 14 constitutes “relevant context” for the interpretation of benefit in Article 1.1(b)).

⁴⁶ Panel Report, para. 7.275 (*quoting US – Softwood Lumber IV (AB)*, para. 93).

⁴⁷ *See*, Panel Report, paras. 7.273-7.275, *especially* para. 7.274.

⁴⁸ SCM Agreement, Art. 1.1(b).

calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1.”⁴⁹ While Article 14 provides “relevant context” to Article 1, Article 14 does not change the fact that the task of a panel under Article 1.1(b) is to determine the *existence* of a benefit, not to calculate its amount. While both an investigating authority considering the application of a countervailing duty, and a panel considering the existence of a subsidy, must determine whether a financial contribution conferred a benefit, once a panel has done so, the analysis required by Article 1 is complete. In contrast, an investigating authority acting within its right to assess a countervailing duty equal to the “full extent”⁵⁰ of a subsidy will go on to calculate the amount of subsidy in terms of benefit using a method consistent with Article 14.⁵¹

34. Second, the majority understood the standard set out by the Appellate Body’s interpretation of Article 14(d) to be that the benchmark against which to evaluate a financial contribution to determine the conferral of a benefit “*must ... be a market where there is effective competition.*”⁵² In contrast to the majority, however, the Appellate Body did not find that there is any situation in which an investigating authority *must* rely on a benchmark solely based on a theoretical competitive market or resort to an actual competitive market outside the market at issue.⁵³ By misunderstanding *US – Softwood Lumber IV* as directing a panel to consider a hypothetical or actual market with “effective competition” in order to find existence of a benefit, the majority evaluated the complainants’ benchmarks under an erroneous standard.⁵⁴

35. Third, the majority appears to have not given effect to the context provided by Article 14(d); that is, in interpreting the meaning of “market” as used in Article 14(d), it failed to consider that the benchmark is not required to be the “market” itself, but to be “in relation to” the market. Thus, even after determining that the HOEP alone cannot serve as a benchmark, the

⁴⁹ SCM Agreement, Art. 14 (*chapeau*) (emphasis added).

⁵⁰ *US – Softwood Lumber IV (AB)*, para. 100.

⁵¹ As the Appellate Body found, this is consistent with the object and purpose of the SCM Agreement, which includes “disciplining the use of subsidies and countervailing measures while, at the same time, enabling WTO Members whose domestic industries are harmed by subsidized imports to use such remedies. ... If the calculation of the benefit yields a result that is artificially low ... then a WTO Member could not fully offset, by applying countervailing duties, the effect of the subsidy as permitted by the Agreement.” (*US – Softwood Lumber IV (AB)*, para. 95).

⁵² Panel Report, para. 7.275 (emphasis added).

⁵³ *US – Softwood Lumber IV (AB)*, para 103 (“We find ... that an investigating authority may use a benchmark other than private prices of the goods in question in the country of provision, when it has been established that those private prices are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods.”) (emphasis added).

⁵⁴ Panel report, para. 7.308 (“In the light of the benefit standard that has thus far been applied in WTO disputes, we find that the HOEP and all of the HOEP-derivatives that the complainants have advanced, cannot serve as appropriate benchmarks for the purpose of the benefit analysis.”); *cf. US – AD/CVD (AB)*, para. 438 (“in *US – Softwood Lumber IV*, ... with respect to the interpretation of Article 14(d) ... the Appellate Body asked whether that provision permits investigating authorities to use a benchmark other than private prices in the country of provision for determining if goods have been provided by a government for less than adequate remuneration. The Appellate Body answered that question in the affirmative.”) (emphasis added).

majority erred in refusing to consider any benchmarks that included HOEP as *part* of the benchmark.⁵⁵ Even if one accepts that the HOEP alone is an inappropriate basis for a benchmark, it is incorrect that it cannot serve any role in a benchmark.⁵⁶ The majority gave no basis for deciding that such a benchmark has no “relation to” prevailing market conditions, and appears not to have considered the phrase at all.⁵⁷

36. Moreover, the majority’s approach was internally inconsistent. It used the logic that the “market” to be used as a benchmark must be one where there is “effective competition” to reject numerous of the benchmarks put forward by the complainants as affected by government regulation.⁵⁸ But the benchmark the majority itself viewed as appropriate would be those prices “that would exist in a wholesale electricity market whose broad parameters are defined by the Government of Ontario” – that is, “in a wholesale market where the conditions of supply and demand mirror those that currently exist in Ontario.”⁵⁹ In the majority’s approach, the benchmark against which FIT prices would be compared would be prices in a market affected by government regulation, and not a hypothetical market where “prices for the purchased good must be established through the operation of unconstrained forces of supply and demand.”⁶⁰ Thus, the majority relied on the alleged error in the complainants’ approach to benchmark that it set out to avoid.

37. In conclusion, the majority erred by requiring that the complainants’ benchmarks be based on a competitive market absent government intervention. While it could be appropriate to consider what the recipient in question (the FIT generators) would receive in a market characterized by, as the majority put it, “unconstrained forces of supply and demand,”⁶¹ it is not necessary. In light of the guideline in Article 14(d) to consider whether remuneration provided by a government for a purchased good is “adequate” in relation to “prevailing market conditions,” it would also be appropriate to consider what the purchase price would be in that market. A benchmark that demonstrates that the recipients of the financial contributions provided through the FIT program received any advantage is sufficient to show the existence of benefit for purposes of Article 1.1(b). The complainants appear to have put forth at least two benchmarks capable of demonstrating such a benefit. The United States will turn to those benchmarks in Part C, below.

⁵⁵ See, *US – Softwood Lumber IV (AB)*, para. 89 (“The phrase ‘in relation to’ has a meaning similar to the phrases ‘as regards’ and ‘with respect to.’ These phrases do not denote the rigid comparison suggested by the Panel, but may imply a broader sense of ‘relation, connection, reference.’”).

⁵⁶ See, Japan Appellant Submission, paras. 87-88, 94.

⁵⁷ See, e.g., Panel Report, paras. 7.308-7.309.

⁵⁸ Panel Report, para. 7.301.

⁵⁹ Panel Report, para. 7.322.

⁶⁰ Panel Report, para. 7.275.

⁶¹ Panel Report, para. 7.275.

2. A Benchmark is not Required to Include a Government’s Policy Choices

38. In addition to its view that the complainants’ benchmarks must be held to a “competitive market” standard, the majority also took the position that an acceptable benchmark must reflect “the particular situation in Ontario,” namely policy decisions made by the Government of Ontario with regard to the level of supply and sources of electricity.⁶² The United States disagrees that a benchmark must reflect certain policy choices made by a government.

39. First, there is no textual basis for the majority’s position that a benchmark must reflect certain policy choices made by a government making a financial contribution. The ordinary meaning of “benefit” is an “advantage” or “a favourable or helpful factor or circumstance.”⁶³ In the context of Article 1.1(b), the term “benefit” implies “some kind of comparison,” and the proper comparison is to the “marketplace.”⁶⁴ Nothing in this interpretation of the term “benefit” suggests that the “marketplace” must reflect governmental policy choices. Neither the majority nor Canada have pointed to any findings by a panel or the Appellate Body that would support their interpretation of the term “benefit.”

40. It should also be recalled that, in conducting a benefit analysis, a panel is called upon to “determine whether the recipient of the financial contribution has been advantaged or made ‘better off’ than it would otherwise have been *absent that contribution*.”⁶⁵ The majority’s decision to require a benchmark to reflect the Government of Ontario’s policy decisions is inconsistent with this basic principle. Every decision by a government to provide a subsidy reflects a policy decision. To require that the applicable benchmark be adjusted to reflect the government’s policy would, as Japan points out, threaten to make the finding of a subsidy impossible.⁶⁶ That is not consistent with the text, nor would it lead to a desirable result: it would allow the use of subsidies to achieve any government objective, even objectives that adversely affect other Members, including import substitution and export subsidization.

41. Turning to the specifics of the majority’s analysis, the United States notes that the majority posited that a suitable benchmark would be “comparing the terms and conditions of the challenged FIT and microFIT Contracts with the terms and conditions that would be offered by commercial distributors of electricity acting under a government-imposed obligation to acquire electricity from generators operating solar PV and wind power plants of a comparable scale to

⁶² Panel Report, paras. 7.309-7.312.

⁶³ *Canada – Aircraft (AB)*, para. 153.

⁶⁴ *Canada – Aircraft (AB)*, para. 157.

⁶⁵ *EC – LCA (AB)*, para 973 (emphasis added); *see also, Canada – Aircraft (Panel)*, para 9.112 (“it is necessary to determine whether the financial contribution places the recipient in a more advantageous position than would have been the case *but for the financial contribution*.”) (emphasis added); *Canada – Aircraft (AB)*, paras. 149 and 161; *Brazil – Aircraft (AB)*, fn. 149.

⁶⁶ Japan Other Appellant Submission, para. 106.

those functioning under the FIT Programme.”⁶⁷ In essence, the majority seems to envision a benchmark reflecting a commercial electricity distributor operating under a mandate to purchase a percentage of electricity from green electricity producers. The United States believes this hypothetical benchmark demonstrates the error of the majority’s approach.

42. As an initial matter, where a government mandate to purchase a given level of green-sourced electricity is enough by itself for green-sourced electricity to enter the market, there will not necessarily be an impact on electricity prices. For example, in a situation where the cost of producing green-sourced electricity (including a return on investment) is close to the cost of producing electricity from traditional energy sources, and the maximum amount of traditionally-sourced electricity allowed by the mandate has been produced, producers will face a choice between (1) selling higher-cost green-sourced electricity to the distributor and making some profit (albeit less than received from sales of electricity produced from traditional sources), or (2) selling nothing and forgoing the profit on those sales. The rational producer will decide to enter the market using green-sourced electricity, accepting higher costs and lower profit. In this situation, the government mandate for green-sourced electricity will not affect the price of electricity and therefore will not distort a benchmark based on that price.

43. On the other hand, if the cost of producing green-sourced electricity is significantly higher than the cost of producing electricity from traditional sources, even with a mandate, producers will face a choice between (1) selling higher-cost green-sourced electricity at a loss, or (2) selling nothing and forgoing loss on those sales. The rational producer will not enter the green energy sector. In that case, producers will require an inducement to enter the green energy sector in the form of a higher price sufficient to cover the cost of producing green-sourced electricity (including a return on investment). Under the majority’s requirement that the benchmark reflect this inducement, the benchmark price would be the same as the higher electricity price: the price necessary to bring otherwise economically unviable green-sourced electricity to market.

44. In this situation, using as the benchmark the “terms and conditions” offered by a commercial distributor operating under the mandate to purchase green-sourced electricity will necessarily result in no finding of subsidy. If the distributor is to meet its mandate, the price a commercial distributor would have to pay for the electricity would be the same as that paid by a government purchasing that electricity: a price sufficient to cover the green electricity producer’s cost of generation (including return on investment). The majority would require a comparison between financial contributions that are essentially the same: the government

⁶⁷ Panel Report, para. 7.322. The United States notes that this benchmark also appears to be based on an erroneous legal standard. The majority stated that a proper evaluation of whether the challenged measures confer a benefit would be to compare the measures to the actions of private purchasers of electricity “where the conditions of supply and demand mirror those that currently exist in Ontario.” (Panel Report, para. 7.322 (emphasis added)). The relevant context provided by Article 14(d) to the meaning of “benefit” as set out in Article 1.1(b) does not include that the comparison “mirror” prevailing market conditions; Article 14(d) states that the comparison need only be “in relation to” prevailing market conditions.

purchase of goods (at a price that offers more than adequate remuneration) compared to the government-directed purchase of goods by a private distributor (at the same price). In this scenario, by including in the benchmark a hypothetical financial contribution that “mirrors” the financial contribution made by the government, the majority has made it impossible to find the existence of benefit.

45. In contrast, a proper benchmark would not include the government’s choice to require certain levels of green-sourced electricity *per se*; rather, that benchmark would allow a panel to determine whether any financial contribution – whether provided by a government or a private body acting under the direction of the government – that occurred in pursuit of that policy choice conferred a benefit.⁶⁸ As discussed next, the complainants appear to have provided at least two such benchmarks.

C. The Panel Majority’s Analysis of the Wholesale and Retail Price-Based Benchmarks was in Error

46. During the panel proceedings, the complainants put forth a range of benchmarks purporting to show the existence of a subsidy.⁶⁹ Both the majority and the minority rejected benchmarks based on the HOEP because they found that the equilibrium price established through HOEP is not “set in a competitive wholesale market.”⁷⁰ The complainants also put forward benchmarks based on weighted average wholesale rate and prices paid by consumers under the Regulated Price Plan. The majority rejected those benchmarks on the basis that it considered them to be “HOEP-derivative.”⁷¹

47. As an initial matter, even if one accepts the majority’s findings with respect to the operation of the HOEP, it appears that the majority’s analysis with respect to benchmarks that include HOEP as one factor, without further analyzing in what way the HOEP interacts with the other factors, is in error. While it may be acceptable in some cases for a panel to reject a benchmark “derived” from a factor that it considers to be unsuitable for purposes of determining benefit, in this case, the panel did not establish that this was so. Moreover, it does not appear even that the wholesale and retail price-based benchmarks can be accurately characterized as “deriving” from the HOEP. Both the wholesale and retail price benchmarks appear to be established not just on the basis of the HOEP but also on the basis of the Global Adjustment. As the Panel found elsewhere in its report, the Global Adjustment “is inversely related to HOEP.”⁷² The majority erred by rejecting prices it characterized as being “derived” from the HOEP when,

⁶⁸ As Japan points out, the resulting finding of subsidization would not by itself mean the program at issue breaches the WTO Agreement (Japan Other Appellant Submission, para. 73).

⁶⁹ See, Panel Report, paras. 7.250-7.258.

⁷⁰ Panel Report, paras. 7.300 and 9.10; see also, para. 7.298.

⁷¹ Panel Report, para. 7.308 and fn. 610.

⁷² Panel Report, para. 7.55.

in fact, it found that the HOEP and the Global Adjustment operate against one another to establish that price.

48. With respect to the wholesale and retail price-based benchmarks put forth by the complainants, the United States notes that, in general, wholesale and retail prices may serve as suitable benchmarks for the determination of benefit. If a producer receives more for its good than the price that wholesalers or retailers pay for that good – and the difference is made up by a financial contribution to the producer – a subsidy may exist. Japan and the EU have provided benchmarks that purport to demonstrate the existence of benefit on this basis, *i.e.*, that the FIT generators receive rates higher than the prices paid for the FIT generator-produced electricity on the wholesale and retail markets. While the United States does not take a position as to whether the data contained in these benchmarks do in fact demonstrate the existence of a benefit, the Panel should have considered these benchmarks rather than simply dismissing them (as the majority did) on the erroneous basis that the benchmarks are “HOEP-derivative.”

49. The United State believes the Appellate Body should consider whether the wholesale and retail price-based benchmarks constitute acceptable methodologies for demonstrating the existence of benefit. If the Appellate Body finds that one or both constitute acceptable benchmarks, the United States also believes it would be appropriate – to the extent there are sufficient findings by the Panel and uncontested facts on the record – for the Appellate Body to complete the analysis as to whether the Government of Ontario provided a benefit to the FIT generators through the FIT program and FIT contracts. If the Appellate Body does complete the analysis with respect to the existence of a benefit, and therefore finds the FIT program and FIT contracts constitute subsidies, the United States also believes it would be appropriate for the Appellate Body to complete the analysis as to whether those subsidies are prohibited, within the meaning of Article 3.

V. Conclusion

50. The United States appreciates the opportunity to provide its views in this appeal and hopes that its comments will be useful to the Appellate Body.