

8. CANADA - CERTAIN MEASURES AFFECTING THE RENEWABLE ENERGY GENERATION SECTOR/CANADA - MEASURES RELATING TO THE FEED-IN PROGRAM

A. REPORTS OF THE APPELLATE BODY  
(WT/DS412/AB/R - WT/DS426/AB/R) AND REPORTS OF THE PANEL  
(WT/DS412/R AND WT/DS412/R/ADD.1 - WT/DS426/R AND  
WT/DS426/R/ADD.1)

- Mr. Chairman, the United States wishes to thank the Panel, the Appellate Body, and the Secretariat for their work in these proceedings. The United States was a third party in this dispute and, in view of the limited time available today, would like to take this opportunity to comment on just two points in the Appellate Body's report.
- First, with respect to the so-called "government procurement exception," the United States notes Article III:8(a) of the GATT 1994 applies only to measures governing the procurement of certain products by governmental agencies. The United States agrees with the Appellate Body finding in this case that the derogation in Article III:8(a) does not apply where the procurement by a government agency is of one product (electricity) while the domestic content requirements are on private entities purchasing a different product (renewable energy generation equipment).
- The United States also agrees with the Appellate Body's finding that a mere "connection" between two different products, where only one of the products is being procured by the government, is not sufficient to bring the other product within the scope of Article III:8(a).<sup>1</sup> The United States furthermore agrees that, in determining the scope of the product covered by a measure governing government procurement, the "competitive relationship" test set out by the Appellate Body can be helpful.<sup>2</sup>
- The United States is very concerned, however, by the Appellate Body's analysis of "benefit" under Article 1.1(b) of the SCM Agreement, and considers that Members will want to reflect further and discuss the consequences of such an approach.
- The United States notes that electricity markets may present some characteristics that differ from other product markets. Nevertheless, the Appellate Body's discussion of the "relevant market" for purposes of analyzing whether the FIT program confers a "benefit"

---

<sup>1</sup> Appellate Body Report, para. 5.78.

<sup>2</sup> Appellate Body Report, para. 5.79.

raises difficult issues that the report does not appear to address.

- For instance, it is not clear in what situations a "supply-side" analysis focused on the recipients of a financial contribution will be necessary or appropriate in determining whether the products of those recipients compete with the identical product produced by lower-cost producers. Nor is it clear what factors are relevant to that analysis.
- The Appellate Body acknowledges that in the present disputes that producers of solar- and wind-generated electricity have higher costs and states that currently "markets for wind- and solar PV-generated electricity can only come into existence as a matter of government regulation." (AB Report, para. 5.175.) But these statements tend to undermine and not support the approach in the report. First, it is not any "government regulation" that was being challenged, but the purchase of goods through specific tariff rates under the FIT program. Second, if there is no separate market today for electricity generated from certain renewable sources, and those generators have higher costs, that would suggest it is the government's financial contribution that permits such electricity to be purchased in the existing marketplace. The Appellate Body's approach in this dispute calls into question its long-standing interpretation of benefit as consisting of a determination whether the transaction "makes a recipient 'better off' than it would otherwise be in the marketplace." (AB Report, para. 5.163 (citing Canada -- Aircraft (AB), para. 155.)
- In this case, the Appellate Body focused on the fact that due to their cost structures, certain producers, including the recipients of the FIT contracts, "cannot compete" with other producers of the same good, electricity.<sup>3</sup> In contrast to supply-side substitutability that focuses on the ability of producers to shift between production of arguably like products, it is not clear what relevance higher costs of production have for such a supply-side analysis. It is also not clear how, if one must define the relevant market to be used for a benchmark as a market that would not exist but for the government's "creation" of that market<sup>4</sup>, how that definition of a "relevant market" will continue to maintain SCM Agreement disciplines on a wide range of potential subsidies.
- Mr. Chairman, the United States supports the increased use of renewable energy sources to meet the world's energy needs. And we strongly believe that the SCM Agreement allows Members to help bring those markets into being, while continuing to discipline inefficient, trade-distortive practices – such as domestic content requirements – that ultimately encumber the spread of renewable energy.

---

<sup>3</sup> Appellate Body Report, para. 5.174.

<sup>4</sup> Appellate Body Report, para. 5.188.