

WTO CASE REVIEW 2013¹

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¹ This *WTO Case Review* is the 14th in our annual series on substantive international trade adjudications issued by the Appellate Body of the World Trade Organization (WTO). Each *Review* explains and comments on Appellate Body reports adopted by the WTO Dispute Settlement Body during the preceding calendar year (January 1st through December 31st), excluding decisions on compliance with recommendations contained in previously adopted reports. Our preceding *Reviews* are:

- *WTO Case Review 2012*, 30 ARIZ. J. INT'L & COMP. L. 207-419 (2013).
- *WTO Case Review 2011*, 29 ARIZ. J. INT'L & COMP. L. 287-476 (2012).
- *WTO Case Review 2010*, 28 ARIZ. J. INT'L & COMP. L. 239-360 (2011).
- *WTO Case Review 2009*, 27 ARIZ. J. INT'L & COMP. L. 83-190 (2010).
- *WTO Case Review 2008*, 26 ARIZ. J. INT'L & COMP. L. 113-228 (2009).
- *WTO Case Review 2007*, 25 ARIZ. J. INT'L & COMP. L. 75-155 (2008).
- *WTO Case Review 2006*, 24 ARIZ. J. INT'L & COMP. L. 299-387 (2007).
- *WTO Case Review 2005*, 23 ARIZ. J. INT'L & COMP. L. 107-345 (2006).
- *WTO Case Review 2004*, 22 ARIZ. J. INT'L & COMP. L. 99-249 (2005).
- *WTO Case Review 2003*, 21 ARIZ. J. INT'L & COMP. L. 317-439 (2004).
- *WTO Case Review 2002*, 20 ARIZ. J. INT'L & COMP. L. 143-289 (2003).
- *WTO Case Review 2001*, 19 ARIZ. J. INT'L & COMP. L. 457-642 (2002).
- *WTO Case Review 2000*, 18 ARIZ. J. INT'L & COMP. L. 1-101 (2001).

We are grateful to the Editors and Staff of the *Arizona Journal of International and Comparative Law* for their excellent editorial assistance and continuing support of our work.

The WTO reports we discuss are available on the web site of the WTO, www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm. The texts of the WTO agreements we discuss also are available on the WTO web site, www.wto.org/english/docs_e/legal_e/legal_e.htm, and are published in a variety of sources, including RAJ BHALA, *INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE – DOCUMENTS SUPPLEMENT* (3d ed. 2008). We endeavor to minimize footnotes and, toward that end, provide citations to indicate sources from which various portions of our discussion are drawn.

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treatise MODERN GATT LAW (2d ed. 2013) (two volumes). The discussion of the case herein will appear in modified form in the new editions of DICTIONARY OF INTERNATIONAL TRADE LAW and MODERN GATT LAW.

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I. INTRODUCTION

Only one Appellate Body Report, *Canada—Renewable Energy*,² was approved by the Dispute Settlement Body (DSB) in 2013, the fewest since 1995. As of the end of January 2014, no appeals had been lodged. However, this is the calm before the storm. During the end of 2013 and the first half of 2014, eight panel reports are to be circulated,³ of which five or six are likely to be appealed. Several other panel reports are likely to be circulated at indeterminate times during the second half of 2014.⁴ At least five other panel proceedings are ongoing, but are not likely to be completed in time to affect the Appellate Body's agenda during 2014.⁵ Thus, if the Appellate Body is able to do so, it will likely send

² Appellate Body Reports, *Canada—Certain Measures Affecting the Renewable Energy Generation Sector, Canada—Measures Relating to the Feed-In Tariff Program*, WT/DS412/AB/R, WT/DS426/AB/R (May 6, 2013) (adopted May 24, 2013) [hereinafter jointly referred to as Appellate Body Report, *Canada—Renewable Energy*].

³ See Panel Reports, *European Communities—Certain Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS369/R, WT/DS400/R, WT/DS401/R (Feb. 14, 2011); Communication from the Chairperson of the Panel, *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431/8, WT/DS432/8, WT/DS433/8 (Mar. 22, 2013); Communication from the Panel, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/23 (Jan. 15, 2013); Communication from the Panel, *United States—Countervailing Duty Measures on Certain Products from China*, WT/DS437/4 (Nov. 18, 2013); Communication from the Panel, *China—Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, WT/DS440/4 (Sept. 25, 2013); Communication from the Panel, *United States—Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/5 (July 8, 2013); Communication from the Panel, *United States—Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/5 (Sept. 11, 2013); Communication from the Panel, *Argentina—Measures Affecting the Importation of Goods*, WT/DS438/13, WT/DS444/12, WT/DS445/12 (Nov. 15, 2013).

⁴ See Communication from the Panel, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/26 (Dec. 9, 2013); Communication from the Panel, *India—Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/6 (Aug. 5, 2013).

⁵ See generally *United States—Anti-Dumping Measures on Certain Frozen Warmwater Shrimp from Viet Nam*, WT/DS429; *China—Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes*, WT/DS454; *United States—Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina*, WT/DS447; *Peru—Additional Duty on Imports of Certain Agricultural Products*, WT/DS457; *United States—Certain Country Origin Labelling (Cool)*

several reports to the DSB before the end of 2014. It should be noted that the issue is not simply one of the number of cases referred to the Appellate Body, but their complexity (including the number of issues raised in each appeal), the growing length and number of the pleadings and other aspects of the proceedings, and the number of Parties and Third Parties.⁶ Nor is there any indication that the number of panel reports subject to appeal is decreasing; during the full period from 1995 to 2013, 70% of all reports were appealed.⁷

The challenges for the Appellate Body have increased, at least in the short term, because it is operating with only six members, rather than the authorized seven, for the first time since it was created in 1995. Ricardo Ramirez of Mexico, who served as Chair during 2013, was re-elected for another one-year term as chairman. In addition, Peter Van den Bossche of the European Union (the Netherlands) was re-appointed to a second four-year term.⁸ As of March 2014, no one has been appointed to replace David Unterhalter (South Africa), whose second term expired on December 11, 2013. The chairman of the DSB, Canadian Ambassador Jonathan Fried, indicated in January: “[A]ll members could benefit from more time for reflection and consultations regarding the best way forward.”⁹ The new chair of the DSB, Mexican Ambassador Fernando de Mateo, assumes his responsibilities in March 2014¹⁰ and undoubtedly will be tasked with the responsibility of trying to resolve the impasse.

According to reports, the selection committee has considered four candidates, three from Africa, and has narrowed the choices to two, who remain unspecified:

- Joan Fitzhenry, an Australian trade lawyer;
- James Thuo Gathii, a Kenyan national and international law professor at Loyola University (Chicago);
- Yenkong Ngangjoh Hodu, a Cameroon national and senior lecturer at the University of Manchester; and
- Abdel-Hamid Mamdouh, an Egyptian national and director of the WTO’s trade in services division.¹¹

Requirements (Recourse to Article 21.5 of the DSU by Canada), WT/DS384, WT/DS386; *Argentina—Measures Relating to Trade in Goods and Services*, WT/DS453.

⁶ See Communication from the Appellate Body, Annex 1, JOB/AB/1 (May 30, 2013), *Appellate Body: Annual Report for 2013*, at 32-40, WT/AB/20 (Mar. 14, 2014), available at http://www.wto.org/english/news_e/news14_e/ab_14mar14_e.htm.

⁷ *Id.* at 52 (Annex 6).

⁸ See *Appellate Body Member Reappointed and Chair Re-elected*, WORLD TRADE ORG. (Dec. 12, 2013), http://www.wto.org/english/news_e/news13_e/disp_12dec13_e.htm.

⁹ See Daniel Pruzin, *WTO Dispute Chairman Delays Resuming Appellate Body Judge Selection*, 31 INT’L TRADE REP. (BNA) 199 (Jan. 27, 2014).

¹⁰ See Daniel Pruzin, *WTO Panel Ducks on Choice of New Judge for Appellate Body as Australia Pulls Back*, 31 INT’L TRADE REP. (BNA) 432 (Mar. 6, 2014).

¹¹ *Id.*

Given that Judge Unterhalter was from Africa, the selection committee was under pressure to select his replacement from among the three African candidates.¹² The situation was further complicated when Australia withdrew Ms. Fitzhenry's name. The United States has apparently objected to Professor Gathii because his legal writings have suggested that the system is biased in favor of rich countries.¹³ Other objections have been raised with regard to Mr. Mamdouh (by the European Union) and to Ms. Fitzhenry (by African members demanding that the position be reserved for an African national).¹⁴

It was originally considered likely that the selection committee would resolve its deadlock in time for the regularly scheduled meeting of the DSB on February 26, 2014, but this did not occur given the objections to multiple candidates raised by various Members. The time for resolution of this impasse was uncertain as of the date of publication of this *Review*, with the issue before the DSB at its March 2014 meeting.

The risks of this dispute for the effective operation of the Appellate Body in the future are obvious. Kenya has reportedly threatened to block a new consensus in favor of any Appellate Body nominee for the current vacancy.¹⁵ While no other members of the Appellate Body have terms that expire before December 2015,¹⁶ the current stalemate is setting an unfortunate precedent which could be repeated in the future if one or more of the WTO Members decides to object to the appointments process based on the rejection of their candidate or other factors.

¹² See Daniel Pruzin, *WTO Selection Panel Sharply Divided on Appointment of Next Appellate Judge*, 31 INT'L TRADE REP. (BNA) 23 (Jan. 2, 2014) (discussing the status of play on the selection committee).

¹³ Pruzin, *WTO Dispute Chairman Delays*, *supra* note 9.

¹⁴ *Id.*

¹⁵ Pruzin, *WTO Panel Ducks*, *supra* note 10.

¹⁶ See *Appellate Body Members*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (last visited Mar. 19, 2014) (showing the terms of Ujal Singh Bhatia and Thomas R. Graham).

II. DISCUSSION OF THE 2013 CASE LAW FROM THE APPELLATE BODY

A. Trade Remedies – Subsidies and Countervailing Duties: 2013 Canada—Renewable Energy Case

1. Citation

Appellate Body Reports, *Canada—Certain Measures Affecting the Renewable Energy Generation Sector, Canada—Measures Relating to the Feed-In Tariff Program*, WT/DS412/AB/R, WT/DS426/AB/R (May 6, 2013) (adopted May 24, 2013)¹⁷

2. Facts

The *Canada—Renewable Energy* dispute concerned an energy policy implemented by the Government of Ontario, Canada in 2009.¹⁸ The scheme sought to increase the supply of electricity generated from certain renewable sources of energy.¹⁹ The basic aspects of the system are relatively common and referred to as feed-in tariff programs, or FIT programs.²⁰ The Ontario FIT Program was the third in a series of schemes designed to diversify the energy supply-mix in Ontario and aid in the replacement of coal-fired facilities.²¹ The program was launched by the Ontario Power Authority (OPA) in 2009, pursuant to the Direction of the Ontario Minister of Energy and Infrastructure acting under the authority of the *Electricity Act of 1998*, as amended by the *Green Energy and Green Economy Act of 2009*.²²

Power generators taking part in the program were paid by the OPA a guaranteed price per kilowatt hour (kWh) of electricity delivered into the Ontario electricity grid under 20- and 40-year contracts between the generating firms and

¹⁷ The Appellate Body issued and the Dispute Settlement Body adopted the two reports on the same day. For most purposes, the Appellate Body treated the two disputes as one, and – unless otherwise noted – such is the treatment herein.

The Panel Reports in the cases were Panel Report, *Canada—Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS412/R, and Panel Report, *Canada—Measures Relating to the Feed-In Tariff Program*, WT/DS412/R. On appeal and at the Panel stage, the following WTO Members were third-party participants in the *Feed-In Tariff* dispute: Australia, Brazil, China, El Salvador, India, Japan, Kingdom of Saudi Arabia, South Korea, Mexico, Norway, Taiwan, Turkey, and United States. In the *Renewable Energy* dispute, the following were third-party participants: Australia, Brazil, China, El Salvador, European Union, Honduras, India, Kingdom of Saudi Arabia, South Korea, Mexico, Norway, Taiwan, and United States.

¹⁸ See Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 4.17.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

the OPA.²³ The program was open to generators of electricity located in Ontario that produced renewable energy in the form of, *inter alia*, wind and solar photovoltaic (PV) electricity.²⁴ The FIT Program was divided into the FIT stream (for larger, mass produced, energy projects) and the microFIT stream (for smaller projects such as small households, farms, or business generation).²⁵

The FIT Program included certain contractual obligations, which if followed, provided the participating generators with a standard contract price for their renewable energy.²⁶ The prices were intended to cover development costs and provide a reasonable rate of return over the duration of the contracts.²⁷ The WTO Panel found the after tax rate of return on equity from the prices provided by the contracts was 11 percent.²⁸

The most notable elements of the disputed measures in Ontario were the *Minimum Required Domestic Content Levels*. These Levels had to be satisfied during the development and construction of solar PV electricity generation facilities in the FIT and microFIT streams of the program, as well as in the windpower electricity generation facilities in the FIT stream of the program.²⁹ For windpower generators between 2009 and 2011, the required level of domestic content in the development and construction of relevant facilities was 25 percent, and increased to 50 percent in 2012.³⁰ For solar-PV FIT Program generators, the domestic content requirement was 50 percent from 2009 to 2010, and increased to 60 percent in 2011.³¹ For solar-PV microFIT Program generators, the domestic content requirement was 40 percent from 2009 to 2010, and increased to 60 percent in 2011.³²

3. Three Key Appellate Issues

The FIT Program in Ontario was first challenged by Japan in September 2011. Almost one year later, the European Union (EU) initiated a dispute against the program. Panels were established with the same Members, and a single panel then harmonized the timetables and the disputes. The Panel prepared joint reports, with its separate recommendations and conclusions. The same process also was implemented with regard to the appellate portion of the dispute.

The scope of the complaints encompassed three WTO agreements, namely: the General Agreement on Tariffs and Trade 1994 (GATT), the

²³ See Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 4.17.

²⁴ *Id.*

²⁵ *Id.* ¶ 4.18.

²⁶ *Id.* ¶ 4.20.

²⁷ *Id.* ¶ 4.23.

²⁸ See Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 4.23.

²⁹ *Id.* ¶ 4.21.

³⁰ *Id.* ¶ 1.4.

³¹ *Id.*

³² *Id.*

Agreement on Trade-Related Investment Measures (*TRIMs Agreement*), and the Agreement on Subsidies and Countervailing Measures (*SCM Agreement*).³³ On appeal, three main issues emerged.

a. Relationship Between GATT Article III:8(a) and *TRIMs Agreement* Article 2.2

The first substantive issue before the Appellate Body dealt with Article III of GATT and Article 2 of the *TRIMs Agreement*. Article 2 of the *TRIMs Agreement* provides, in relevant part:

National Treatment and Quantitative Restrictions

1. Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994.
2. An illustrative List of TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 and the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 is contained in the Annex to this Agreement.

Additionally, the *Illustrative List of TRIMs* referenced in Article 2.2 of the *TRIMs Agreement* states, in relevant part:

1. TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include 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, whether specified in terms of particular products, in terms of volume or value of products,

³³ See General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter *GATT*]; Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186 [hereinafter *TRIMs Agreement*]; Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 [hereinafter *SCM Agreement*].

or in terms of a proportion of volume or value of its local production;

The core issue was whether a TRIM that is within the scope of Article 2.2 of the *Illustrative List* of the *TRIMs Agreement* is inconsistent with Article III:4 of the GATT, even if that TRIM also falls within the scope of Article III:8(a) of the GATT.

Article III:4 of the GATT contains the famous national treatment obligation for non-fiscal measures:

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 favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges, which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

Article III:8(a) of the GATT derogates from the general duties Article III requires of WTO Members, providing an exception to the national treatment obligation:

8. (a) 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.

The Panel found Articles 2.1 and 2.2 of the *TRIMs Agreement* do not preclude application of GATT Article III:8(a).³⁴ In other words, the Panel said a TRIM that is illegal under Articles 2.1 or 2.2 as a violation of national treatment thereunder still may qualify for the Article III:8(a) exception to national treatment, setting up a potential conflict between two distinct WTO agreements.

On appeal, the EU challenged the Panel finding. The EU cited the express reference to Article III:4 of GATT in Article 2.2 of the *TRIMs Agreement*. The EU claimed the derogation from GATT Article III allowed for by Article III:8(a) should not apply when a measure falls within the *Illustrative List* in the Annex of the *TRIMs Agreement*.³⁵ The EU asserted that this result necessarily follows because the *TRIMs Agreement* did not contemplate the application of

³⁴ See Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶¶ 1.12-1.15, 1.24.

³⁵ See *id.* ¶¶ 2.112-2.114.

Article III:8(a).³⁶ Ultimately, the Appellate Body rejected the European argument and instead found that application of Article III:8(a) is not precluded where the challenged measures fall within the scope of Article 2.2 and Paragraph 1(a) of the *Illustrative List of the TRIMs Agreement*.³⁷

b. Application of GATT Article III:8(a) to Facts

The second issue was dependent upon the first, insofar as once the Appellate Body found that application of the GATT Article III:8(a) exception was not precluded, it was required to address whether Article III:8(a) applied to the facts of the case at bar. On appeal, Canada contended the Panel incorrectly found that Article III:8(a) did not apply to the FIT Program and related FIT and microFIT Contracts.³⁸ Obviously, Canada wanted to take advantage of the Article III:8(a) exception to the national treatment obligation for its schemes. Conversely, the EU and Japan agreed with the Panel finding regarding the non-applicability of Article III:8(a) to the disputed measures, though both parties disagreed with some aspects of the Panel interpretation and conclusions that led to that finding.³⁹

After an exhaustive textual and predictably lexicographic analysis of the language of Article III:8(a), the Appellate Body reversed the Panel finding that the domestic content requirements in the disputed measures were laws, regulations, or requirements governing the procurement by governmental agencies of electricity within the meaning of this Article.⁴⁰ Thus, the disputed measures did not qualify for the exception in Article III:8(a); instead those measures were required to comply with the general national treatment obligations of Article III.⁴¹ However, because Canada chose not to appeal the underlying Panel finding regarding the inconsistency of the disputed measures with Article 2.1 of the *TRIMs Agreement* and Article III:4 of the GATT, the Panel finding remained valid. This finding ultimately was the most important because it provided the EU and Japan a victory in the dispute, and it led to the Appellate Body recommendation that Canada remove the measures in question.

c. *SCM Agreement* Article 1 Definition of Subsidy and Benchmarks

The final substantive issue addressed by the Appellate Body was whether the disputed measures were subsidies within the meaning of Article 1 of the *SCM Agreement*. To be deemed a subsidy under Article 1.1 of the *SCM Agreement*, a

³⁶ *Id.* ¶ 2.114.

³⁷ *See id.* ¶ 5.29.

³⁸ *Id.* ¶ 5.35.

³⁹ *See* Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.36.

⁴⁰ *See id.* ¶¶ 5.54-5.85.

⁴¹ *See id.* ¶¶ 5.84-5.85.

measure must be found to consist of a “financial contribution” that confers a “benefit” to the recipient.⁴² The pertinent provision of the *SCM Agreement*, with the footnote omitted, states:

Article 1: Definition of a Subsidy

1.1. For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a) (1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as “government”), i.e. 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);

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);

(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; or

(a) (2) there is any form of income or price support in the sense of Article XVI of GATT 1994; and

(b) a benefit is thereby conferred.

On appeal, the presence of a financial contribution was not contested.⁴³ However, Japan posed a strategic challenge. It maintained the Panel characterization of the disputed measures as “purchases [of] goods” was incorrect.⁴⁴ Japan argued the disputed measures should be, either on their own, or

⁴² See *id.* ¶ 5.163 (citing Appellate Body Report, *Canada—Measures Affecting the Export of Civilian Aircraft*, ¶ 157, WT/DS70/AB/R (adopted Aug. 20, 1999) [hereinafter Appellate Body Report, *Canada—Aircraft*]).

⁴³ See *id.* ¶¶ 5.159-5.166.

⁴⁴ Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.106 (citing Japan’s other appellant’s submission (DS412), ¶ 29).

jointly with the Panel determination, characterized as “direct transfer[s] of funds,” “potential direct transfers of funds,” or “income or price support.”⁴⁵ The Panel had determined that a disputed measure could be considered only one type of financial contribution, but Japan insisted the Subparagraphs of Article 1.1(a)(1) of the *SCM Agreement* were not mutually exclusive.⁴⁶

The Appellate Body agreed in part with Japan, finding that different aspects of the same measures could apply to different types of financial contributions under Article 1.1(a)(1).⁴⁷ However, after upholding the Panel decision that the disputed measures consisted of government “purchases [of] goods,” the Appellate Body found that Japan failed to establish the differing aspects of the measures that would have warranted characterization under other Subparagraphs of Article 1.1(a)(1).⁴⁸

The more significant issue relating to the *SCM Agreement* concerned analyses by the Panel and the Appellate Body of what constitutes the conferral of a benefit. In attempting to ascertain whether the disputed measures conferred a benefit to its recipients, the Panel and Appellate Body separately considered potential market benchmarks, as envisioned under Article 1.1(b) of the *SCM Agreement*, when considered in context of Article 14. Unfortunately, the Panel and Appellate Body, though through different means, eventually encountered the same underwhelming outcome.

The Panel rejected numerous proposed benchmarks put forth by the parties and eventually developed its own market benchmark. Yet, when it attempted to apply its market benchmark, it found there was insufficient evidence to conclude the analysis. Similarly, the Appellate Body also created its own market metric by rejecting the proposed benchmarks by the parties and the benchmark developed by the Panel. However, it also found insufficient evidence to complete its analysis and thus was unable to do so. Thus, Canada prevailed with regard to this portion of the dispute, though effectively by default.

4. Holdings and Rationales

a. Applicability of GATT Article III:8(a) to Measures Relating to *TRIMs Agreement* Article 2.2

The first substantive issue addressed by the Appellate Body was whether Article III:8(a) of the GATT applied to measures falling under Article 2.2 of the *TRIMs Agreement* and the *Illustrative List* referenced in that article.⁴⁹ On appeal, the EU asserted the Panel was wrong to hold that Articles 2.1 and 2.2 of the

⁴⁵ *Id.*

⁴⁶ *See id.*

⁴⁷ *Id.* ¶ 5.121.

⁴⁸ *See id.* ¶¶ 5.128, 5.131-5.132.

⁴⁹ Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.9.

TRIMs Agreement do not preclude the application of Article III:8(a) of the GATT.⁵⁰ The EU said those *TRIMs Agreement* Articles actually do prevent, or block, invocation of the exception contained in GATT Article III:8(a). To the Europeans, Article 2.1 of the *TRIMs Agreement* refers to Article III of the GATT, whereas the *Illustrative List* mentioned in Article 2.2 of that *Agreement* precludes the applicability of Article III:8(a), where it states the measures found in the *Illustrative List* are necessarily inconsistent with Article III:4 of the GATT.⁵¹ In effect, from the EU standpoint, if a measure is illegal under Article 2.2 of the *TRIMs Agreement* and the *Illustrative List*, then GATT Article III:8(a) cannot save or rescue that measure. Article III:8(a) does – or should – not take precedence over the *TRIMs Agreement*, voiced the EU.⁵²

Conversely, Canada agreed with the Panel. To the Canadians, Article III:8(a) applied to the FIT Program domestic content measures and thus exempted those measures from the national treatment obligation.⁵³ That is because Article 2.2 of the *TRIMs Agreement* expressly refers to the national treatment obligation contained in Paragraph 4 of GATT Article III, rather than to Article III generally.⁵⁴ Thus, according to Canada, “Article 2.2 does not address the consistency of the measures listed in the *Annex* with Article III, as a whole, including Article III:8(a).”⁵⁵

Canada also chose to attack the logical basis underlying the EU interpretation of Article 2.2 of the *TRIMs Agreement* and Paragraph 1 of the *Annex*.⁵⁶ Pursuant to the EU interpretation, the TRIMs listed as inconsistent with Article XI:1 of the GATT, which are found in the *Illustrative List* of Article 2.2 of the *Agreement*, must necessarily fall outside the scope of Article XI:2 of the GATT.⁵⁷ However, Canada asserted that a comparison between Article XI:2 of the GATT and the measures listed in the *Annex* to the *TRIMs Agreement* shows that this would be “untenable.”⁵⁸ Thus, the interpretation of Article 2.2 of the *TRIMs Agreement* and Paragraph 1 of the *Annex* is inconsistent with the text and context of the measures.⁵⁹

When distilled, the issue warranting Appellate Body attention was whether TRIMs that fall within the scope of Article 2.2 and the *Illustrative List* of

⁵⁰ *Id.* ¶ 5.14.

⁵¹ *See id.* ¶ 5.15.

⁵² *Id.*

⁵³ *Id.* ¶ 5.17.

⁵⁴ *See* Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.17.

⁵⁵ *Id.* (quoting Canada’s appellee’s submission, ¶ 29) (emphasis added).

⁵⁶ *Id.* ¶ 5.18.

⁵⁷ *Id.* Article XI provides: “No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.” Article XI:2 lists various exceptions to Article XI:1.

⁵⁸ *See id.* (quoting Canada’s appellee’s submission, ¶ 33).

⁵⁹ *See* Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.18.

the *TRIMs Agreement* are illegal under GATT Article III:4, irrespective of whether they also fall within the scope of Article III:8(a) of GATT.⁶⁰ Put differently, does a TRIM that is within Article 2.2 and the *List*, and thus unlawful thereunder, get the benefit of protection from GATT Article III:8(a)?

The Appellate Body first recalled that Article 2.2 of the *TRIMs Agreement* refers to the national treatment obligation contained in Article III of GATT and the obligation to eliminate quantitative restrictions as envisioned in Paragraph 1 of Article XI of GATT.⁶¹ The Appellate Body also clarified that the *Illustrative List* found in the *Annex to the TRIMs Agreement* (and referred to in Article 2.2 of the *Agreement*) is a non-exhaustive tally.⁶² With regard to the *List*, the Panel found the disputed measures fell within the scope of Paragraph 1(a). Additionally, as maintained by the EU, Article 2.2 of the *Agreement* and Paragraph 1 of the *Illustrative List* are similar in that both refer expressly to obligations in Article III:4 of the GATT.⁶³

The Appellate Body disagreed with the narrow interpretation the EU advocated. Instead, the Appellate Body determined that Article 2.2 of the *TRIMs Agreement* provides further specificity with regard to the types of measures that are inconsistent with Article 2.1.⁶⁴ To be sure, the *Illustrative List* referenced in Article 2.2 of the *Agreement* provides examples of measures inconsistent with the national treatment obligation in GATT Article III:4. But, Article 2.2 and the *List* do not apply to the inconsistency of Article III as a whole.⁶⁵

The Appellate Body opted for a “harmonious”⁶⁶ interpretation, which took into account the absence of a reference to Article III:8 of GATT in Article 2.2 of the *TRIMs Agreement* and in the *Illustrative List* as indicating the neutral applicability of GATT Article III:8(a).⁶⁷ Therefore, a measure that falls within the scope of GATT Article III:8(a) is not inconsistent with Article III.⁶⁸ To the Appellate Body, accepting the argument of the EU would result in different obligations for TRIMs between those that fell within the *Illustrative List* and those that did not.⁶⁹

The Appellate Body provided additional support for its finding by citing Articles 2.1 and 3 of the *TRIMs Agreement*.⁷⁰ Those provisions qualify the obligations in Article 2.1 by suggesting that the article is not intended to inhibit the other rights that WTO Members have under the GATT.⁷¹ The practical effect

⁶⁰ *Id.* ¶ 5.21.

⁶¹ *Id.* ¶ 5.22.

⁶² *Id.*

⁶³ *Id.* ¶ 5.25.

⁶⁴ See Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.26.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.26.

⁷⁰ *Id.* ¶ 5.27.

⁷¹ *Id.*

of this interpretation, as viewed by the Appellate Body, was that – as the EU rightly warned – in some situations a measure would fall within the scope of both the *Illustrative List* of examples in the *TRIMs Agreement* and GATT Article III:8(a), but not be found inconsistent with GATT Article III:4, because of the applicability of Article III:8(a).⁷² The Appellate Body considered this outcome acceptable.⁷³

Though the envisioned situation may occur occasionally, the Appellate Body considered that most TRIMs falling under the examples in the *Illustrative List*, and thus constituting violations of national treatment, would *not* also fall within the scope of the Article III:8(a) exemption.⁷⁴ Possibly, that is because Article III:8(a) is a narrow exception for government procurement of goods, whereas the scope of measures dealt with by the *TRIMs Agreement* and *List* is far wider. Consequentially, though Article III:8(a) may occasionally trump the examples in the *Illustrative List* and the applicability of Article III:4, that outcome should be allowed. Or, as the Appellate Body put it, “the application of Article III:8(a) of the [GATT] is not precluded where the challenged measures fall within the scope of Article 2.2 and Paragraph 1(a) of the *Illustrative List* of the *TRIMs Agreement*.”⁷⁵

b. Application of GATT Article III:8(a) to the Disputed Measures

i. Arguments of the Parties

Turning to GATT Article III:8(a), Canada, the EU, and Japan each challenged different aspects of the interpretation and application of that provision by the Panel. Canada contended the Panel incorrectly found the FIT Program and related FIT and microFIT Contracts were not covered by Article III:8(a).⁷⁶ Conversely, the EU and Japan agreed with the Panel finding regarding the non-applicability of Article III:8(a) to the disputed measures, but both parties disagreed with some aspects of the Panel factual and legal interpretations that led to that finding.⁷⁷

In particular, Canada challenged the Panel finding that the purchases of electricity by the Government of Ontario that were generated from renewable sources under the disputed measures were taken with a view to commercial resale, within the meaning of GATT Article III:8(a).⁷⁸ The Canadians viewed the relevant language in Article III:8(a) to be “with a view to,” rather than the term on

⁷² *Id.* ¶ 5.28.

⁷³ *Id.*

⁷⁴ See Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.28.

⁷⁵ See *id.* ¶ 5.29.

⁷⁶ *Id.* ¶ 5.35.

⁷⁷ *Id.* ¶ 5.36.

⁷⁸ *Id.* ¶ 5.46.

which the Panel focused: “commercial resale.”⁷⁹ Canada said the evidence showed that the Government of Ontario adopted the disputed measures with a view “to help ensure the sufficient and reliable supply of electricity for Ontarians and to protect the environment.”⁸⁰ Additionally, the term “commercial resale” suggests intent to profit, and there was no evidence the Ontario Government meant to profit from its renewable energy initiatives.⁸¹

Japan chose to appeal the Panel finding that the Government of Ontario “purchases” electricity.⁸² In its view, the structure of the energy system in Ontario suggested the Ontario Government did not engage in the physical supply or sale of electricity. Instead, the relevant functions of generation, transmission, and distribution of electricity were unbundled and put within the responsibility of separate entities.⁸³ As an alternative argument, Japan alleged the Panel erred in concluding the disputed measures involved “purchase[s] for governmental purposes.”⁸⁴ Here, Japan maintained the Panel committed a logical error in finding that a government could not purchase electricity for a governmental purpose and with a view to commercial resale.⁸⁵ As a second alternative, Japan requested the Appellate Body to interpret the term “commercial resale” to mean “with a view to being sold into the stream of commerce of trade.”⁸⁶ That is, it did not matter whether the Ontario Government sought to profit from the resale; what mattered was whether the good (electricity) was to be resold into the stream of commerce or trade.⁸⁷

The EU appealed the Panel finding that the domestic content requirements in the disputed measures governed the alleged procurement of electricity within the meaning of GATT Article III:8(a).⁸⁸ The EU urged the measures analyzed under Article III:8(a) must be related to the subject matter of the products purchased for governmental purposes in order to govern such procurement.⁸⁹ Surely, the EU contended, Article III:8(a) does not cover requirements or conditions that are not connected with “intrinsic characteristics,” or the nature, of the product procured.⁹⁰ In this case, that meant the domestic content requirements regarding the equipment used to generate the electricity procured did not fall within the scope of Article III:8(a) because there was no rational link between those requirements and the attributes of the electricity

⁷⁹ See Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.46.

⁸⁰ See *id.* (quoting Canada’s appellant’s submission, ¶ 34).

⁸¹ *Id.*

⁸² *Id.* ¶ 5.49.

⁸³ *Id.*

⁸⁴ See Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.50.

⁸⁵ *Id.* ¶ 5.49.

⁸⁶ *Id.* ¶ 5.51.

⁸⁷ *Id.*

⁸⁸ *Id.* ¶ 5.52.

⁸⁹ See Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.52.

⁹⁰ *Id.* (citing European Union’s other appellant submission (DS426), ¶ 51).

procured.⁹¹ Consequently, Article III:8(a) was unavailable to save those requirements from the discipline of the national treatment obligation.

The EU also took issue with the broad nature of the Panel interpretation of the term “governmental purposes” in Article III:8(a).⁹² The Panel interpreted the term to mean “for the stated aim of the government.”⁹³ Instead, the EU requested the Appellate Body interpret the term in a narrower manner, to mean “government purchases of goods that are needed to sustain the work and functions of the government.”⁹⁴ To wit, government purposes should include only goods actually used for the consumption of the purchasing government.⁹⁵ In effect, the EU felt the Panel interpretation provided too much deference to government decisions. The Appellate Body should recognize the difference between legitimate policy objectives (present here) and the provision of an actual public service (which it argued was the intention of the scope of Article III:8(a)).

ii. Analysis of the Appellate Body

The Appellate Body began its analysis by relating the language in GATT Article III:8(a) to the general national treatment obligation in Article III.⁹⁶ This starting point is important because the first Paragraph of Article III contains a generic statement of the national treatment principle, which is a pillar of the multilateral trading system. As Article III:1 of GATT states, internal measures “should not be applied . . . so as to afford protection to domestic production.” Yet, Article III:8(a) permits derogation from national treatment for government procurement.

The Appellate Body recognized the text of Article III:8(a) contains several elements describing the terms and content of the measures falling within its scope.⁹⁷ But to interpret that scope properly, it is essential to ascertain the meaning of those terms, both individually and holistically.⁹⁸ The first of those terms includes “laws, regulations or requirements,” “governing,” and “procurement.”⁹⁹ Thus, Article III:8(a) demands “an articulated connection between the laws, regulation, or requirements and the procurement, in the sense that the act of procurement is undertaken within the binding structure of the laws, regulations, or requirements.”¹⁰⁰

⁹¹ *Id.*

⁹² *Id.* ¶ 5.53.

⁹³ *Id.*

⁹⁴ See Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.53.

⁹⁵ *Id.*

⁹⁶ *Id.* ¶ 5.54.

⁹⁷ *Id.* ¶ 5.57.

⁹⁸ *Id.* ¶ 5.58.

⁹⁹ Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.58.

¹⁰⁰ *Id.*

Turning to definitions of the first relevant terms, the Appellate Body predictably relied on the Oxford English Dictionary.¹⁰¹ First, “governing” is defined as “constitut[ing] a law or rule for.”¹⁰² Second, “procurement” refers generally to “[t]he action of obtaining something; acquisition,” or more specifically “the action or process of obtaining equipment and supplies.”¹⁰³ With regard to procurement, the Panel found the term “procurement” as used in GATT Article III:8(a) to have essentially the same meaning as “purchase.”¹⁰⁴ The Appellate Body disagreed, saying the term “procurement” refers to the more technical process and conduct of a government agency, whereas the term “purchase” describes the type of transaction used to implement procurement.¹⁰⁵ It supported its rather pedantic distinction by pointing to the use of both terms in Article III:8(a), and the assertion that equating the same meaning to the terms would not add value to the use of the terms separately.¹⁰⁶

The Appellate Body also looked to the definition of “agency,” which is “[a] business, body, or organization providing a particular service, or negotiating transactions on behalf of a person or group.”¹⁰⁷ Article III:8(a) uses the word “agency” with reference to “governmental,” and thus, it naturally embraces entities acting for or on behalf of a government.¹⁰⁸

Next, the Appellate Body examined the term “products purchased” in GATT Article III:8(a).¹⁰⁹ As it provided, “a ‘product’ in the sense of [Article III:8(a)] is something that is capable of being traded.”¹¹⁰ Relevant context for the term “product” exists in Paragraphs 2 and 4 of Article III, inasmuch as national treatment applies to the treatment of imported products that are directly competitive to or substitutable with domestic products, and imported products may not be treated less favorably than like products of national origin, respectively.¹¹¹ Thus, the obligations in Article III and the derogation in Article III:8(a) refer to the same discriminatory treatment of products.¹¹²

With regard to the term “for governmental purposes,” the Appellate Body began with the definition of “purpose.” This word means “an object in view; a determined intention or aim” or “the end to which an object or action is directed.”¹¹³ When considered in conjunction with the word “governmental,” the

¹⁰¹ See *id.* ¶¶ 5.58-5.59.

¹⁰² See *id.*

¹⁰³ *Id.* ¶ 5.59.

¹⁰⁴ Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.59.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ See *id.* ¶ 5.60.

¹⁰⁸ *Id.*

¹⁰⁹ Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.62.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² See *id.* ¶ 5.63.

¹¹³ *Id.* ¶ 5.66.

terms refer either to (1) the intentions or aims of a government or (2) government as the end to which the product purchased is directed.¹¹⁴

However, the Appellate Body found significance in the use of the qualifier “governmental” before the term “agency” as well. Government agencies fundamentally pursue governmental aims or objectives, and thus, the term “governmental purposes” must require more than a governmental aim or objective with respect to purchases by a governmental agency.¹¹⁵ The Appellate Body supported this interpretation in the official French and Spanish translations of Article III:8(a). There, the translations of “purposes” were “*besoins*” and “*necesidades*,” respectively.¹¹⁶ Those terms in English are “needs,” rather than objectives or aims.¹¹⁷

Additionally, Article XVII:2 of the GATT provides relevant context of the term “governmental purposes,” as it refers to “imports of products for immediate or ultimate consumption in governmental use.”¹¹⁸ Though Article III:8(a) does not require immediate or ultimate consumption, the Appellate Body said this context provides sufficient additional support to conclude the “phrase ‘products purchased for governmental purposes’ in Article III:8(a) refer[red] to what is consumed by government or what [was] provided by government to recipient in the discharge of its public functions.”¹¹⁹ Moreover, use of the term “for” in Article III:8(a) indicates that the provision requires a rational relationship between the product and the governmental function being discharged.¹²⁰

The last element requiring interpretation under Article III:8(a) of the GATT was derived from the phrase “and not with a view to commercial resale or with a view to use in the production of goods for commercial resale.”¹²¹ Here, the Appellate Body provided an overview of why it disagreed with the Panel reasoning when the Panel found that “where a government purchase of goods is made ‘with a view to commercial resale,’ it is for that reason also not a purchase ‘for governmental purposes.’”¹²² The Appellate Body stated:

In the context of Article III:8(a), the words “with a view to commercial resale” relate back to the “products purchased” and thus attach to the same textual element as the clause “for governmental purposes.” Both the terms “for governmental purposes” and “not with a view to commercial resale” further qualify and limit the scope of “products purchased.” These two requirements are linked by the words “and not,” which suggests

¹¹⁴ Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.66.

¹¹⁵ *Id.*

¹¹⁶ *Id.* ¶ 5.67.

¹¹⁷ *See id.* ¶ 5.67.

¹¹⁸ *Id.* ¶ 5.68.

¹¹⁹ Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.68.

¹²⁰ *Id.*

¹²¹ *Id.* ¶ 5.69.

¹²² *See id.*

that the requirement of purchases not being made with a view to commercial resale must be met in addition to the requirement of purchases being made for governmental purposes. Accordingly, a purchase that does not fulfill the requirement of being made “for governmental purposes” will not be covered by Article III:8(a) regardless of whether it complies with the requirement of being made “not with a view to commercial resale.” These are cumulative requirements.¹²³

Turning to the relevant terms, the Appellate Body first noted the term “resale” is defined as the “sale of something previously bought.”¹²⁴ But, more importantly, in the context of Article III:8(a) of the GATT, the term is associated to “products purchased.”¹²⁵

Furthermore, when considered more broadly, the “product not to be ‘resold’ on a commercial basis [was] the product ‘purchased for governmental purposes.’”¹²⁶ To the Appellate Body, a “commercial resale” is one where the product is resold at arm’s length between a willing seller and a willing buyer.¹²⁷ Looking at the transaction from the seller’s perspective includes examining whether the transaction is oriented toward generating a profit for the seller. Although in some situations a seller may not seek profit or recoupment of expenses in the short term, the analysis also should look to the long-term strategy of the seller.¹²⁸ Additionally, assessing the perspective of the buyer should include examining whether the buyer seeks to maximize its own interest.¹²⁹

Next, Article III:8(a) refers to the “use of the production of goods.” The Appellate Body noted the definition of “use” as “[t]he act of putting something to work, or employing or applying a thing, for any (*esp.* a beneficial or productive) purpose.”¹³⁰ Here, the purpose is “in the production of goods,” as stated in Article III:8(a).¹³¹ The language in the provision thus suggests that it “covers only products that are neither purchased with a view to commercial resale, nor purchased with a view to use in the production of goods for commercial sale.”¹³²

At the end of its unnecessarily dilated lexicographic analysis, much of which was unenlightening, if not mind numbing, the Appellate Body summarized its interpretation as follows:

¹²³ *Id.*

¹²⁴ Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.70.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *See id.*

¹²⁸ *Id.*

¹²⁹ Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.70.

¹³⁰ *Id.* ¶ 5.73 (alteration in original).

¹³¹ *See id.*

¹³² *Id.*

In sum, we consider that Article III:8(a) sets out a derogation from the national treatment obligation contained in Article III of the GATT 1994. The provision exempts from the national treatment obligation certain measures containing rules for the process by which government purchases products. Under Article III:8(a), the entity procuring products for the government is a “governmental agency.” We have found above that a “governmental agency” is an entity performing functions of government and acting for or on behalf of government. Furthermore, we have found that the derogation of Article III:8(a) must be understood in relation to the obligations stipulated in Article III. This means that the product of foreign origin must be in a competitive relationship with the product purchased. Furthermore, Article III:8(a) is limited to products purchased for the use of government, consumed by government, or provided by government to recipients in the discharge of its public functions Article III:8(a) does not cover purchases made by governmental agencies with a view to reselling the purchased products in an arm’s-length sale and it does not cover purchases made with a view to using the product previously purchased in the production of goods for sale at arm’s length.¹³³

Having interpreted the relevant language in Article III:8(a), the Appellate Body turned to applying its own interpretation to the facts of the dispute.

Here, the product subject to the domestic content requirements in the disputed measures was certain renewable energy equipment.¹³⁴ The product the Government of Ontario purchased under the disputed measures was electricity, not the generation equipment used to create the electricity. Accordingly, the product being purchased by a governmental agency for purposes of Article III:8(a) – namely, electricity – was not the same as the product that was treated less favorably, i.e., generation equipment, as a result of the domestic content requirements contained in the disputed measures.¹³⁵

The Panel also recognized the difference between the product subject to (1) the domestic content requirements and (2) procurement.¹³⁶ However, it found the generation equipment was needed and used to produce the electricity and therefore exhibited a sufficiently close relationship to the products affected by the domestic content requirements of the disputed measures.¹³⁷ Canada supported the Panel finding in this regard, reasoning that the domestic content requirements for electricity generation equipment were mandatory, and thus tied to the disputed

¹³³ *Id.* ¶ 5.74 (internal citations omitted).

¹³⁴ Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.75.

¹³⁵ *Id.*

¹³⁶ *Id.* ¶ 5.76 (citing Panel Reports, *supra* note 12, ¶ 7.125 & n.271).

¹³⁷ *Id.* ¶ 5.76.

measures.¹³⁸ Canada effectively was forced to agree with the Panel on this point to ensure the Article III:8(a) exception to the national treatment obligation covered both generation equipment and electricity generated by that equipment.

The Appellate Body acknowledged the connection between the (1) procurement of electricity and (2) domestic content requirements regarding generation equipment, but it pointed to other conditions in GATT Article III:8(a) that had to be met for this exception to be applicable.¹³⁹ In particular, the Appellate Body relied on its understanding that the conditions for derogation under Article III:8(a) must be considered in relation to obligations found generally in Article III.¹⁴⁰ Thus, the product allegedly being discriminated against (i.e., electricity generation equipment) must be in a competitive relationship with the product purchased (i.e., electricity).¹⁴¹

Yet, in the case at bar, the two products were not in a competitive relationship.¹⁴² Therefore, the discrimination relating to generation equipment contained in the disputed measures was not covered by Article III:8(a) derogation.¹⁴³ Accordingly, the Appellate Body reversed the Panel finding that the Minimum Required Domestic Content Levels of the FIT Program and related FIT and microFIT Contracts were laws, regulations, or requirements governing the procurement by governmental agencies of electricity within the meaning of Article III:8(a).¹⁴⁴

Given this conclusion, the Appellate Body declined to address alternative claims made by the parties. Additionally, Canada chose not to appeal the Panel finding that the disputed measures were inconsistent with Article III:4 of the GATT and Article 2.1 of the *TRIMs Agreement*. In effect, Canada conceded the measures ran afoul of the national treatment obligation, so when it lost in its argument for an Article III:8(a) exception, it lost the case. Stated differently, though the Appellate Body reversed the Panel finding relating to the relationship between electricity generation equipment and electricity itself, the underlying finding by the Panel regarding the inconsistency of the disputed measures with Article 2.1 of the *TRIMs Agreement* and Article III:4 of the GATT remained valid.¹⁴⁵ Therefore, as a whole, the EU and Japan emerged victorious, and the Appellate Body recommended Canada remove the measures in question.

¹³⁸ See *id.* ¶ 5.77.

¹³⁹ Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.78.

¹⁴⁰ *Id.* ¶ 5.79.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ See Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.79.

¹⁴⁵ *Id.* ¶ 5.85.

c. Claims Under *SCM Agreement*

i. Financial Contribution: Whether Disputed Measures are Government “Purchases [of] Goods” Under *SCM Agreement* Article 1.1(a)(1)(iii)

Japan was the only party to appeal the Panel findings regarding Article 1.1(a) of the *SCM Agreement*. In this regard, the Japanese issues with the Panel findings are interesting. Japan did not allege the disputed measures failed to satisfy the requirements of Article 1.1(a) of the *Agreement*. Instead, Japan sought only to have the disputed measures characterized as “direct transfer[s] of funds,” “potential direct transfers of funds,” or “income or price support,” rather than “purchases [of] goods” under the *Agreement*.¹⁴⁶ Thus, the Japanese appeal was strategic, as it considered the outcome relevant to subsequent arguments relating to the market benchmark analysis associated with Article 1.1(b) of the *Agreement*. Arguably, it may be inferred from this strategy that *de facto stare decisis* operates in WTO jurisprudence—otherwise, why care about an adverse “precedent”?

Japan challenged the Panel interpretation and application of Article 1.1(a)(1) of the *SCM Agreement*.¹⁴⁷ With regard to the interpretation of the relevant provision, Japan argued the Panel was incorrect when it said a disputed measure could be characterized at law as both a government “purchase [of] goods” and a “direct transfer of funds” under Article 1.1(a)(1)(i) and (iii), respectively.¹⁴⁸ Japan cited the 2012 *United States—Aircraft* case to support the assertion that a measure may be properly characterized in multiple ways under Article 1.1(a)(1) of the *Agreement*.¹⁴⁹ There, the Appellate Body found that Article 1.1(a)(1) does not preclude that a measure could fall within the scope of multiple Subparagraphs.¹⁵⁰

Canada responded that the Japanese claim lacked merit.¹⁵¹ According to Canada, Article 1.1(a)(1) does not preclude a measure from being covered by more than one subparagraph, and from a logical perspective, the same aspects of the same measures could not be simultaneously characterized as “purchases [of] goods” and “direct transfer[s] of funds.”¹⁵² Under reasoning similar to Canada’s, the Panel considered that finding in favor of Japan would require infringing upon principles of treaty interpretation.¹⁵³ Additionally, the Panel noted that the lack of

¹⁴⁶ *Id.* ¶ 5.116.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See Appellate Body Report, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R (adopted Mar. 12, 2012) [hereinafter Appellate Body Report, *United States—Aircraft*]. This dispute is treated in our *WTO Case Review 2012*, *supra* note 1.

¹⁵⁰ See Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.116 (citing Appellate Body Report, *United States—Aircraft*, *supra* note 149, n.1287).

¹⁵¹ *Id.* ¶ 5.117.

¹⁵² *Id.*

¹⁵³ *Id.* ¶ 5.118.

the word “or” between the Subparagraphs suggested that the Subparagraphs could not be found to apply simultaneously.¹⁵⁴

With regard to the mutual exclusivity of Subparagraphs (i) and (iii) of Article 1.1(a)(1) of the *SCM Agreement*, the Appellate Body disagreed with the Panel.¹⁵⁵ Instead, it favored Japan’s argument that its 2012 findings in *United States—Aircraft* supported the potential simultaneous application of multiple subparagraphs in Article 1.1(a)(1).¹⁵⁶ In the Appellate Body’s view, the complex and multifaceted nature of some disputed measures may mean that different aspects of the same transaction could fall under different types of financial contributions, all within the meaning of Article 1.1(a).¹⁵⁷ It clarified that, unlike the suggestion made by the Panel, the fact that a transaction may fall under more than one type of financial contribution does not necessarily mean that the types of financial contributions found in Article 1.1(a)(1) are the same or that the distinct legal concepts set out in the provision would become redundant.¹⁵⁸ As a result, the Appellate Body found the Panel findings in this regard to be moot and of no legal effect.¹⁵⁹

Having interpreted Article 1.1(a)(1) of the *SCM Agreement*, the Appellate Body next applied its interpretation to the facts of the dispute.¹⁶⁰ Japan had challenged the Panel finding that the disputed measures constituted government “purchases [of] goods” within the meaning of Article 1.1(a)(1)(iii), requesting instead that the Appellate Body characterize the disputed measures as “direct transfer[s] of funds,” “potential direct transfers of funds,” or “income or price support.”¹⁶¹ In the alternative, Japan asked the Appellate Body to find the disputed measures to be government “purchases [of] goods,” while concurrently classifying the disputed measures as one of its previously asserted financial contributions under Article 1.1(a).¹⁶²

The Panel characterized the disputed measures as “purchases [of] goods” within the meaning of Article 1.1(a)(1)(i) of the *SCM Agreement* because it fell within its definition of the term, namely, that the purchase of goods occurs when a government or public body obtains possession over a good by making a payment of some kind.¹⁶³ Japan attacked the Panel finding in three arguments.

First, Japan focused on the unbundled nature of the Government of Ontario’s electricity supply system.¹⁶⁴ In its view, the different functions

¹⁵⁴ *Id.*

¹⁵⁵ See Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.119.

¹⁵⁶ See *id.* ¶¶ 5.119-5.120.

¹⁵⁷ *Id.* ¶ 5.120.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.122.

¹⁶¹ See *id.*

¹⁶² *Id.*

¹⁶³ *Id.* ¶ 5.123.

¹⁶⁴ *Id.* ¶ 5.124.

delegated to separate government entities must be considered individually.¹⁶⁵ For example, Japan asserted it was significant that one government entity, the OPA, paid for electricity in Ontario, while another government entity, Hydro One, received and transmitted the electricity delivered by suppliers.¹⁶⁶ Japan maintained that OPA thus served as a financing entity, rather than a purchasing entity, because it never took possession of the electricity.¹⁶⁷

The Appellate Body disagreed with Japan as to the significance of the unbundling of functions within Ontario's electricity supply system.¹⁶⁸ Instead, it took a broader view, reasoning that the individual functions of the OPA and Hydro One still were within the umbrella of the Government of Ontario, and thus, the Government purchased electricity through the disputed measures.¹⁶⁹ The Appellate Body pointed to the Panel finding that the OPA and Hydro One were "public bodies" within the meaning of Article 1.1(a)(1) of the *SCM Agreement*.¹⁷⁰ The Panel even addressed the separate functions of the government entities, when it used the language "combined actions" of the three public bodies and found that the Government of Ontario purchased electricity under Article 1.1(a)(1).¹⁷¹

The second argument asserted by Japan also related to the distinct roles of entities operating in Ontario's electricity system.¹⁷² In this regard, Japan contended the goal of the Government of Ontario of achieving a stable supply of electricity and stimulating renewable energy was not addressed through the purchase of electricity, but instead through the allocation of separate roles by government entities and implementation of government programs.¹⁷³ The Appellate body again disagreed with Japan.

In this regard, the Appellate Body said the Japanese argument disregarded the nature of the programs the Government of Ontario uses to implement its policies, inasmuch as they involve the purchase of electricity by the government.¹⁷⁴ Again, regardless of the delegated roles of separate government entities, the Government of Ontario purchases the electricity through the disputed measures.¹⁷⁵

The final Japanese argument focused on the characterization of a measure by the respondent government itself.¹⁷⁶ According to Japan, the Panel assumed that because the disputed measures were purchases of electricity under the relevant domestic law (i.e., the Electricity Act of 1998), they were also

¹⁶⁵ Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.124.

¹⁶⁶ *See id.*

¹⁶⁷ *Id.* ¶ 5.124.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.124.

¹⁷¹ *See id.*

¹⁷² *Id.* ¶ 5.125.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.125.

¹⁷⁶ *See id.* ¶ 5.127.

purchases of electricity under WTO law.¹⁷⁷ However, the Appellate Body quickly pointed out the Panel did not consider the characterization under domestic law to be dispositive, instead considering it simply as circumstantial evidence, along with other evidence in support of its finding.¹⁷⁸ As a result, the Appellate Body sided with the Panel and upheld the finding that the disputed measures constituted “purchases [of] goods” within the meaning of Article 1.1(a)(1)(iii) of the *SCM Agreement*.¹⁷⁹

The Appellate Body then addressed whether Japan sufficiently demonstrated that, in the alternative, the disputed measures should also be characterized as “direct transfer[s] of funds” or “potential direct transfers of funds” within the meaning of Article 1.1(a) of the *SCM Agreement*.¹⁸⁰ Here, Japan argued the disputed measures were “direct transfer[s] of funds” under Article 1.1(a) because the OPA distributed the funds to renewable energy electricity generators from amounts collected from consumers.¹⁸¹ Additionally, Japan contended that because the renewable electricity generators were entitled to guaranteed payments during the contract period, the contracts constituted potential direct transfers of funds under Article 1.1(a).¹⁸² The Appellate Body did not consider these aspects of the disputed measures to be different from those used to support its finding that the disputed measures constituted the government “purchase [of] goods.”¹⁸³ Thus, it found Japan failed to establish a basis for an additional characterization of the disputed measures.¹⁸⁴ Accordingly, the Appellate Body rejected Japan’s appeal.¹⁸⁵

ii. Conferral of Benefit

The last substantive, and arguably the most interesting, claim addressed by the Appellate Body dealt with Panel findings under Article 1.1(b) of the *SCM Agreement*. In this regard, the EU and Japan appealed the Panel finding that they, the complainants, failed to establish the challenged measures “confer[red] a benefit” within the meaning of Article 1.1(b).¹⁸⁶ Ultimately, although the Appellate Body rejected the Panel analysis, the result was unchanged.

On appeal, Japan argued two claims and the EU made one. First, Japan contended the Panel erred in its interpretation of Article 1.1(b) because it limited

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* ¶ 5.128.

¹⁸⁰ Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.131.

¹⁸¹ *See id.* ¶ 5.131.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.132.

¹⁸⁶ *Id.* ¶ 5.140.

the benefit analysis to the scope of Article 14(d) of the *SCM Agreement*.¹⁸⁷ Second, Japan argued the Panel wrongly rejected the Japanese proposed benchmarks for the market analysis and that the benchmark obtained by the Panel ignored the demand-side of the market.¹⁸⁸ The EU also took issue with the market analysis by the Panel. The EU asserted the Panel should have simply recognized the “uncontested fact” that renewable energy electricity generators would not have obtained remuneration from the market in Ontario in absence of the disputed measures.¹⁸⁹

In response, Canada asserted the approaches of Japan and the EU ignored the Panel findings that the wholesale market administered by the Independent Electricity System Operator (IESO) was not a “market” appropriate for a “benefit” analysis, and absent the disputed measures, new entrants into the wind- and solar PV-generated electricity market would likely still negotiate on price.¹⁹⁰ Moreover, Canada said the complainants’ criticisms regarding the Panel’s benchmark analysis were misplaced.¹⁹¹ As viewed by Canada, the Panel discussion regarding an alternative constructed benchmark was not a legal finding by the Panel.¹⁹²

To address the first Japanese claim regarding interpretation, the Appellate Body sought guidance from relevant WTO jurisprudence to analyze the meaning of “benefit” within the meaning of Article 1.1(b) of the *SCM Agreement*. Citing the 1999 *Canada—Aircraft* case,¹⁹³ it recognized the determination of whether a benefit was conferred must include assessing whether the recipient received a financial contribution on terms more favorable than those available to the recipient on the market.¹⁹⁴ Additionally, the Appellate Body observed that in *Canada—Aircraft* in 1999 and *EC—Aircraft* in 2011,¹⁹⁵ the Appellate Body relied on Article 14 of the *Agreement* as context for the interpretation of a benefit under Article 1.1(b).¹⁹⁶

From a purely textual perspective, Article 14 of the *SCM Agreement* is directly applicable only to benefit calculations in countervailing duties cases. However, the Article does provide guidelines that may be useful for the undertaking of a benefit analysis, including Subparagraph (d) on whether a recipient is “better off.”¹⁹⁷ According to the Appellate Body, logic suggested that

¹⁸⁷ *Id.* ¶ 5.141.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* ¶ 5.142.

¹⁹⁰ Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.146.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ See Appellate Body Report, *Canada—Aircraft*, *supra* note 42.

¹⁹⁴ *Id.* ¶ 157.

¹⁹⁵ See Appellate Body Report, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R (adopted June 1, 2011) [hereinafter Appellate Body Report, *EC—Aircraft*]. This dispute is treated in our *WTO Case Review 2011*, *supra* note 1.

¹⁹⁶ See Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.163.

¹⁹⁷ *Id.*

a benchmark is necessary if one intends to determine whether a benefit was conferred.¹⁹⁸ Thus, the Appellate Body rejected Japan's first claim regarding the use of Article 14 of the *Agreement* when analyzing whether a benefit was conferred under Article 1.1(b).¹⁹⁹

Turning to the application of Article 1.1(b) of the *SCM Agreement*, the Appellate Body quickly disagreed with the Panel approach to its analysis on three fronts.²⁰⁰ First, a benefit analysis should start with a definition of the relevant market, rather than conclude with it. In its view, any market comparisons undertaken by an adjudicating body must be done in the relevant market, or else no useful information will be gained.²⁰¹

Second, though electricity is physically identical regardless of how it is generated, that does not preclude the possibility that there may be factors that limit the demand-side substitutability of electricity.²⁰² The Appellate Body said the Panel should have considered factors such as the type of contract, the size of the customer, and the type of electricity generated. Those factors, it said, may differentiate the market.²⁰³ Of particular concern to the Appellate Body were base-load and peak-load electricity needs for larger customers.²⁰⁴

Third, the Appellate Body criticized the Panel for failing to analyze supply-side factors in its discussion of the potential relevant market. The Appellate Body pointed to its 2011 *EC—Aircraft* Report, in which it stated that evidence that a supplier can switch its production from one product to another may show that the two products share a market.²⁰⁵

The Appellate Body also indicated supply-side factors suggest wind- and solar-PV producers of electricity could not compete with other, traditional, electricity producers due to differences in cost structures and operating costs and characteristics.²⁰⁶ They noted differences included high capital costs, low operating costs, fewer, if any, economies of scale, intermittent electricity production, and the inability to be used as base-load or peak-load electricity.²⁰⁷ The evidence demonstrated that conventional electricity generation was able to exercise price constraints on wind and solar power, but not vice versa.²⁰⁸ In the view of the Appellate Body, as long as the differences in costs for conventional and renewable electricity remained high, markets for wind- and solar PV-generated electricity would only exist because of government regulation.²⁰⁹ As

¹⁹⁸ *Id.* ¶ 5.164.

¹⁹⁹ *Id.* ¶ 5.166.

²⁰⁰ *Id.* ¶¶ 5.167-5.179.

²⁰¹ See Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.169.

²⁰² *Id.* ¶ 5.170.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* ¶ 5.171 (citing Appellate Body Report, *EC—Aircraft*, *supra* note 195, ¶ 1121).

²⁰⁶ Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.174.

²⁰⁷ *Id.*

²⁰⁸ *Id.* ¶ 5.174 (citing Hogan Report, at 6-8).

²⁰⁹ *Id.* ¶ 5.175.

the Appellate Body added, “the definition of a certain supply-mix by the government cannot in and of itself be considered as conferring a benefit.”²¹⁰

Expanding on its critique of the supply-side analysis by the Panel, the Appellate Body acknowledged final retail consumers may not differentiate between forms of electricity generation, but at the wholesale level, the government does differentiate in this regard.²¹¹ As it pointed out, the Government of Ontario differentiated between forms of electricity when it defined the supply-side mix based on governmental policy decisions.²¹² The Appellate Body considered some policy concerns could include reducing dependence on fossil fuels for the purpose of creating sustainable electricity markets, appeasing environmentally conscious consumers, and dealing with certain externalities associated to particular types of electricity.²¹³

This discussion is worth mentioning because it was vital to the Appellate Body’s finding regarding the appropriate benchmark. The Appellate Body continued its criticisms of the Panel analysis when it stated that had the Panel thoroughly scrutinized supply-side factors in its analysis, the proper conclusion would have been clear.²¹⁴ The Panel would have found “supply side factors suggest that important differences in cost structures and operating costs and characteristics among generating technologies prevent the very existence of windpower and solar PV generation, absent government definition of the energy supply-mix of electricity generation technologies.”²¹⁵

Having rejected the market benchmark by the Panel, the Appellate Body turned to identification of its own proper market benchmark. It began by reviewing Article 14(d) of the *SCM Agreement*, which deals with the calculation of a benefit relating to the provision of goods or services by a government, and states:

[T]he provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

The Appellate Body focused on two key aspects of Article 14(d).

²¹⁰ See *id.*

²¹¹ Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.176.

²¹² *Id.* ¶ 5.177.

²¹³ *Id.*

²¹⁴ *Id.* ¶ 5.178.

²¹⁵ See *id.*

First, it recognized the importance of the adequacy of remuneration.²¹⁶ Second, it noted the significance of the term “prevailing market conditions.”²¹⁷ Use of Article 14 is not required during the Article 1.1(b) “conferral of a benefit” analysis.²¹⁸ Instead, Article 14 is normally used once an illegal subsidy is found in order to calculate the benefit conferred.²¹⁹ However, previous WTO adjudicators have used Article 14 as context. Here, the Appellate Body said the second of the two key aspects requires comparison to a market benchmark. The Appellate Body also recalled that in its 2004 *United States—Softwood Lumber IV* Report, it found that when domestic prices are distorted, an analysis may use an out-of-country benchmark or constructed benchmark, provided adjustments are made to reflect the conditions of the market in question.²²⁰

Continuing on the topic of distorted markets, the Appellate Body said it did not think situations where governments intervened to create a market excluded the use of a market benchmark during the analysis pertaining to Article 1.1(b) of the *SCM Agreement*.²²¹ It referred to the Hogan Report, an expert report relied upon by the Panel, which emphasized the need for continuously balanced supply and demand.²²² According to the report, and the view adopted by the Appellate Body, government intervention is required for the proper functioning of large-scale electricity grids, and no relevant market (to be used for comparison) would include unconstrained forces of supply and demand.²²³

The Appellate Body then explained although renewable electricity costs more, from a monetary vantage point, it might have more value than non-renewable energy.²²⁴ Some of its positive externalities include long-term energy sustainability and less adverse impact on the environment.²²⁵ Conversely, non-renewable electricity costs less, but may include negative externalities, such as adverse impacts on human health, fossil fuel energy emissions, and nuclear waste disposal.²²⁶

Thus, the Appellate Body provided its own market benchmark, stating:

²¹⁶ Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.183.

²¹⁷ *Id.*

²¹⁸ *See id.* ¶ 5.184.

²¹⁹ *See id.*

²²⁰ *Id.* ¶ 5.184 (citing Appellate Body Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, ¶ 103, WT/DS257/AB/R (adopted Feb. 14, 2004) [hereinafter Appellate Body Report, *United States—Softwood Lumber IV*]). The *United States—Softwood Lumber IV* dispute is treated in our *WTO Case Review 2004*, *supra* note 1.

²²¹ Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.185.

²²² *See id.*

²²³ *Id.*

²²⁴ *Id.* ¶ 5.189.

²²⁵ *Id.*

²²⁶ Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.189.

[I]n view of the fact that the government's definition of the energy supply-mix for electricity generation does not *in and of itself* constitute a subsidy, we believe that benefit benchmarks for wind- and solar PV generated electricity should be found in the markets for wind- and solar PV-generated electricity that result from the supply-mix definition. Thus, where the government has defined an energy supply-mix that includes windpower and solar PV electricity generation technologies, as in the present disputes, a benchmark comparison for purposes of a benefit analysis for windpower and solar PV electricity generation should be with the terms and conditions that would be available under market-based conditions for each of these technologies, taking the supply-mix as a given.²²⁷

However, before applying its own market benchmark, the Appellate Body reviewed the arguments presented by the EU and Japan. The EU had contended that use of hypothetical market counterfactuals or proxies was unnecessary.²²⁸ In its view, the Panel conclusion should have been simple, and it should have relied on the uncontested fact that renewable energy electricity generators “would not have obtained any remuneration from the market in Ontario in view of the ‘prevailing market conditions’ where the same good (electricity) produced by using other generating technologies was much less remunerated.”²²⁹ Japan agreed with a similar assertion made in the dissenting Panel Report. In Japan’s view, a benefit was present simply because “the history of the Ontario electricity market and the design, structure, and operation of the [disputed measures] demonstrate that solar PV and windpower generators would not be able to operate in the Ontario market without the [disputed measures].”²³⁰

The Appellate Body referred to the arguments by the EU, Japan, and the dissenting Panel opinion as pleas for the use of a “but for” test.²³¹ Simply put, but for the measures in dispute, windpower and solar PV generators would be absent from the Ontario electricity market.²³² The Appellate Body rejected this test. To it, the “but for” counterfactual presented by the EU, Japan, and the dissenting Panel opinion presupposed that the relevant market is electricity generated from all energy sources. However, under the facts of this dispute, the government defined the energy supply-mix. Therefore, a separate market for wind- and solar PV-generated electricity was created.²³³

Conversely, the Appellate Body agreed in part with Canada’s definition of the market. Canada accepted that the Hourly Ontario Energy Price (HOEP) and

²²⁷ *Id.* ¶ 5.190 (alteration in original).

²²⁸ *See id.* ¶ 5.194.

²²⁹ *Id.* (citing European Union’s other appellant submission (DS426), ¶ 162).

²³⁰ *Id.* ¶ 5.195.

²³¹ *See Appellate Body Report, Canada—Renewable Energy, supra* note 2, ¶ 5.196.

²³² *Id.*

²³³ *Id.* ¶ 5.197.

its derivatives were insufficient to attract investment in new generation technology of any kind but that prospective wind- and solar PV generators would likely still negotiate a deal with the Government of Ontario.²³⁴ Even so, the Appellate Body found that the markets for wind- and solar PV-generated electricity existed in Ontario only because of government intervention.²³⁵ According to the Appellate Body, the relevant question was whether windpower and solar PV electricity suppliers would have entered the wind- and solar PV-generated electricity markets absent the disputed measures, not whether they would have entered the blended wholesale electricity market.²³⁶

Japan attempted to add support to the argument that the renewable energy electricity generators would not have existed in the market absent the disputed measures by suggesting its own relevant benchmarks based on Article 14(d).²³⁷ Japan introduced evidence regarding the weighted-average wholesale rate and the commodity portion of Ontario retail prices under the Regulated Price Plane (RPP).²³⁸ The RPP retail prices were significantly lower than the rates provided by the disputed measures, and did not depend on the HOEP because they were fixed by contract or regulation.²³⁹ The Panel rejected the benchmarks, saying that they were distorted by government intervention.²⁴⁰ Japan responded by citing the 2004 *United States—Softwood Lumber IV* case, where it was argued a market influenced by government intervention still can serve as a relevant benchmark and does not necessarily result in a circular comparison.²⁴¹ The Japanese rationale, taken from *Softwood Lumber IV*, was that the inquiry at this stage in the analysis concerned the existence of a subsidy, not its size.²⁴² Thus, though a government-influenced market might skew the prices, it did not always make it impossible to ascertain whether a subsidy existed.

Regardless, just as the Panel had done, though for different reasons, the Appellate Body rejected all of the proposed benchmarks available to it and the out-of-province benchmarks. In reality, the Appellate Body had no choice once it determined its own market benchmark. All of the proposed benchmarks were composed of blended electricity markets, and the Appellate Body found that the relevant benchmark must only include wind- and solar PV-generated electricity in a government-regulated market.²⁴³

The Appellate Body then turned to arguments put forth by the EU and Japan regarding the textual interpretation of Article 1.1(b) of the *SCM*

²³⁴ *See id.* ¶ 5.198.

²³⁵ *Id.* ¶ 5.199.

²³⁶ Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.199.

²³⁷ *Id.* ¶ 5.200.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* ¶ 5.201.

²⁴¹ Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.201.

²⁴² *Id.* (quoting Japan's other appellant's submission (DS412), ¶ 104 (referring to Appellate Body Report, *United States—Softwood Lumber IV*, *supra* note 220, ¶ 93)).

²⁴³ *Id.* ¶ 5.204.

Agreement.²⁴⁴ Japan and the EU argued the Panel erred when it chose not to equate the meaning of “advantage” in the *chapeau* of Paragraph 1(a) of the *Illustrative List* of the *TRIMs Agreement* with the meaning of “benefit” under Article 1.1(b) of the *SCM Agreement*.²⁴⁵ The Panel said on these facts, it would satisfy the standard for an advantage under the *TRIMs Agreement*, but that the meaning of “benefit” was narrower.²⁴⁶

In its 1999 *Canada—Aircraft* Report, the Appellate Body, using the Oxford English Dictionary, defined “benefit” as an “advantage, good, gift, profit, or more generally, a favorable or helpful factor or circumstance.”²⁴⁷ However, it also, as suggested by the Panel, considered the scope of “advantage” to be larger than “benefit,” as it stated, “the ordinary meaning of ‘benefit’ clearly encompasses some form of advantage.”²⁴⁸ The Appellate Body here did not waiver from this earlier jurisprudence.²⁴⁹

Lastly, in the Appellate Body’s conclusion of its analysis of the Panel Report, it clarified the burden of persuasion present in a dispute under Article 1.1(b) of the *SCM Agreement*.²⁵⁰ As it stated, it is the duty of the complainant to provide evidence and arguments for a panel to assess objectively. However, as the Appellate Body stated in its 1998 *EC—Beef Hormones* and 2003 *United States—Certain Products* cases,²⁵¹ panels are allowed to develop their own legal reasoning to support their own findings and conclusions. Using this support, the Appellate Body here criticized the Panel for limiting its analysis to the proposed benefit approach and benchmarks.²⁵² Applying these principles to this dispute, Japan and the EU had the burden to identify suitable potential benchmarks for a benefit analysis under Article 1.1(b).²⁵³ Here, in response to the Canadian benchmark suggestion, the EU did present evidence of non-blended markets containing only renewable energy.²⁵⁴ In the Appellate Body’s view, the Panel should have explored those arguments and evidence relating to non-blended electricity markets.²⁵⁵ This error was sufficient for the Appellate Body to reverse

²⁴⁴ *Id.* ¶ 5.205.

²⁴⁵ *See id.*

²⁴⁶ Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.206.

²⁴⁷ *Id.* ¶ 5.207 (quoting Appellate Body Report, *Canada—Aircraft*, *supra* note 42, ¶ 153 (quoting 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 214 (4th ed. 1993))).

²⁴⁸ *Id.* (quoting Appellate Body Report, *Canada—Aircraft*, *supra* note 42, ¶ 153).

²⁴⁹ *Id.* ¶¶ 5.208-5.210.

²⁵⁰ *Id.* ¶¶ 5.215-5.216.

²⁵¹ *See* Appellate Body Report, *EC—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS48/AB/R (adopted Feb. 13, 1998); Appellate Body Report, *United States—Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R (adopted Jan. 8, 2003). The *United States—Certain Products* dispute is treated in our *WTO Case Review 2003*, *supra* note 1.

²⁵² Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶ 5.215.

²⁵³ *Id.* ¶ 5.216.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

the Panel finding that the complainants failed to establish the existence of a benefit.²⁵⁶

Accordingly, the Appellate Body was left to decide whether sufficient factual findings and undisputed facts existed to allow it to complete the analysis and determine whether a benefit was conferred under Article 1.1(b) of the *SCM Agreement*.²⁵⁷ Relying on its previous findings regarding the appropriate relevant market benchmark, the Appellate Body reviewed the evidence to see if it could complete the analysis.²⁵⁸ Unfortunately, but predictably, the Appellate Body determined that absent any findings by the Panel regarding the adequacy of the proposed benchmarks for wind- and solar PV-generated electricity (i.e., the RES initiatives), there was insufficient evidence to complete the analysis.²⁵⁹ Therefore, although it reversed the Panel finding regarding Article 1.1(b), the result was unchanged. Canada emerged victorious in the battle under the *SCM Agreement*, but still lost the dispute under the previous findings by the Appellate Body under the GATT and the *TRIMs Agreement*.

III. CONCLUSION AND COMMENTARY

Ultimately, the *Canada—Renewable Energy* dispute amounted to a victory for the EU and Japan. The Appellate Body determined the FIT Program, with the domestic content requirements, was inconsistent with Article 2.1 of the *TRIMs Agreement* and Article III:4 of the GATT. However, two interesting aspects of the dispute emerged relating to the benefit analysis under Article 1.1(b) of the *SCM Agreement* and the potential broader implications of the dispute, respectively.

A. Practicability of Market Benchmark Test

Though it was not significant to the outcome of the case, the Panel and Appellate Body analyses under Article 1.1(b) of the *SCM Agreement* were frustrating. The parties, given the jurisprudence using Article 14 in context of Article 1.1(b), were well prepared with evidence supporting the parties' proposed market benchmarks. Yet, the Panel repeatedly rejected all of the benchmarks proposed to it. Then, after creating its own, the Panel was unable to complete its analysis because there was insufficient evidence.

When the Appellate Body examined the proposed benchmarks, and that of the Panel, it also rejected each of them and constructed its own. Again the

²⁵⁶ See *id.* ¶ 5.219.

²⁵⁷ Appellate Body Report, *Canada—Renewable Energy*, *supra* note 2, ¶¶ 5.220, 5.224.

²⁵⁸ *Id.* ¶ 5.229.

²⁵⁹ *Id.* ¶ 5.244.

outcome was unchanged, as the Appellate Body was also unable to complete its analysis. In hindsight, this underwhelming outcome is not surprising. Parties present evidence to a panel with the view of supporting their arguments. Thus, if the eventual benchmark used is not one they considered, it is unlikely there will be evidence to support an analysis, again underlying the deficiencies in a system that does not permit the Appellate Body to remand a case to the Panel for further fact-finding proceedings.

Over time, the measures at issue and the supporting evidence in WTO disputes has become increasingly complex. In an attempt to mount persuasive arguments for their claims, and provide relevant evidence to buttress them, countries spend millions of dollars per dispute (some estimates claim parties should expect to spend in the range of U.S. \$10 million each for disputes that result in an Appellate Body Report). However, in the end, do the complex economic analyses and evidence of relevant markets really provide much value?

In this dispute, the EU and Japan asserted the conferral of a benefit analysis should have been relatively simple. As they asserted, “but for” the implementation of the FIT Program in Ontario, renewable energy electricity generators would not have had the opportunity to enter the wholesale electricity market. Additionally, from an admittedly simplistic perspective, does not the fact that renewable energy generators apply and remain in the program provide some evidence of a benefit? There is no requirement that they enroll in the program to sell electricity into the grid. If they did not benefit from the program, then the generators of renewable energy would just sell electricity to the Government of Ontario and not be obligated to comply with any requirements of the FIT Program. Was the benefit analysis ever intended to be so complicated?

B. Broader Implications

Another aspect of this case is broader implications it may have for future WTO disputes. An underlying characteristic of the case, understandably not directly addressed by the adjudicators, was the sensitive nature of the subject matter. Historically, WTO Members have not been aggressive in pushing matters relating to energy grids in foreign markets. Energy systems are highly important to the economic and national security of countries. Absent reliable, consistent electricity, the digitalized electronic markets and computer systems running countries would be in jeopardy. Renewable energy, arguably, is not as sensitive, given that it is still, for the lack of a better term, a bit of a luxury. That is to say, some argue renewable energy is not yet required with the current state of fossil fuel-based energy.

Nonetheless, the parties seemed careful to maintain that management of the supply mix, and the energy grid in general, fell within the realm of legitimate government policy objectives. In some respects, it appeared the Panel and the Appellate Body were cognizant of the potential sovereignty issues and attempted

to ensure their decisions did not open the door to future disputes that could attack more significant aspects of a country's regulatory choices regarding energy.

Currently, the United States is challenging the feed-in tariff program in India, and those parties almost certainly will cite this case.²⁶⁰ For its part, India has responded by questioning, in WTO committee meetings, the American use of feed-in tariff programs with local content requirements in numerous American cities. Other countries have taken notice, including the EU, where the EU Commission officially recommended in 2013 that its Member Countries remove their feed-in tariff programs.²⁶¹ Though this case itself was not exciting, the issues it addressed may become more so as they play out in future disputes.



²⁶⁰ See Request for Consultation, *India—Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/1 (Feb. 1, 2013).

²⁶¹ See *European Commission Calls for Phasing Out of Feed-In Tariffs, Promotes Renewable Energy Auctions*, SOLAR SERVER (Nov. 11, 2013), <http://www.solarserver.com/solar-magazine/solar-news/archive-2013/2013/kw46/european-commission-calls-for-phasing-out-of-feed-in-tariffs-promotes-renewable-energy-auctions.html>.