CANADA – CERTAIN MEASURES AFFECTING THE RENEWABLE ENERGY GENERATION SECTOR
(AB-2013-1 / DS412)

CANADA – MEASURES RELATING TO THE FEED-IN TARIFF PROGRAM
(AB-2013-2 / DS426)

THIRD PARTICIPANT ORAL STATEMENT OF THE UNITED STATES OF AMERICA

March 14, 2013

1. Good morning, Mr. Chairman and members of the Division. The United States appreciates the opportunity to appear before you today. In our oral statement, the United States would like to focus on an issue of serious concern with the Panel majority's interpretation of Article 1.1(b) of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). The United States believes the majority fundamentally erred in finding that certain governmental policy objectives should be taken into account in establishing a benchmark used to determine whether a benefit exists within the meaning of Article 1.1(b) of the SCM Agreement.

2. In this dispute, the majority appears to have identified two objectives of the Government Ontario in relation to its intervention in the electricity market: ensuring a stable supply of electricity and encouraging the production of wind and solar electricity. Though the majority often discusses these objectives as interchangeable,[1] the United States believes it is necessary distinguish them and then to separate the measures employed by the Government of Ontario to achieve these distinct objectives.

3. With respect to the measures taken to ensure a stable supply of electricity, it appears Ontario has stepped into the market as a "coordinator" of supply and demand.[2] As the Panel noted, due to the physical nature of electricity, the market for electricity is unique. Because electricity is difficult to store, and because maintaining an electricity distribution system requires near instantaneous matching of supply and demand, to operate efficiently and reliably the electricity market requires a "central coordination mechanism."[3] The Government of Ontario has decided to take on a role of "central coordinator," in part, by facilitating the purchase of electricity from generators through long-term contracts, rather than leaving individual buyers to achieve a similar result through market interactions. In the absence of the government's

[1] *See*, *e.g.*, Panel Report, para. 7.311.
[2] Panel Report, para. 7.12.
[3] Panel Report, paras. 7.11-7.12.

intervention, however, private entities would fill the coordinating role to ensure a functioning electricity market.

4. In this regard, the United States notes the Panel's finding that government coordination may be "the most economically efficient way" to achieve a stable supply of electricity.[4] We agree that there is nothing inherent in the role of a "central coordinator" of supply and demand that results in subsidization. If, for instance, a government takes on a role as intermediary and procures supply through contracts based on commercial criteria, the government would be purchasing electricity from the most efficient producers, just as a rational private distributor would. In other words, the government would be fulfilling its role in a way that establishes price through "the interaction between the supply-side and demand-side considerations under prevailing market conditions."[5] In that situation, the government would not be conferring a benefit on electricity producers.

5. On the other hand, if in its role as "central coordinator" the government purchases some electricity for more than the lowest cost it can obtain, it would be conferring a benefit. The existence of a benefit could be determined by reference to a benchmark price reflective of the supply contracts with the other producers, but it would be incorrect and circular to include in that benchmark price the contracts of producers that receive more than adequate remuneration from the government.

6. In the present dispute, the role the Government of Ontario fills as the central coordinator of supply and demand appears to be quite different from the role it fills with respect to encouraging the production of wind and solar electricity. As the majority found, the Ontario electricity market as presently constituted does not provide consumers with the ability to

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[4] Panel Report, para. 7.18.

[5] Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, para. 975.

distinguish among electricity generated by different sources; therefore, there is no way to ascertain demand for solar- and wind-generated electricity in Ontario as opposed to demand for electricity without regard to source.[6] Indeed, Canada suggests there may be no consumer demand for solar- or wind-generated electricity under the prevailing market conditions in Ontario at all.[7] Thus, in stepping into the market in this situation to purchase solar- or wind-generated electricity, the Government of Ontario is not merely coordinating supply and demand, but rather is creating demand where it would not otherwise exist.

7. This conclusion is supported by the undisputed fact that solar and wind producers, due to much higher costs, would not enter the Ontario electricity market but for the FIT program.[8] By making a financial contribution that allows otherwise unviable producers to enter the market, the FIT program clearly confers a benefit. The majority's findings to the contrary are in error, and its taking into account Ontario's policy objectives to facilitate the finding that there is no "benefit," if adopted, would improperly limit the scope of the SCM Agreement and the rights and obligations contained therein.

8. In seeking to encourage the increased production of wind- and solar-electricity, the Government of Ontario may be seeking to reduce some of the external costs of the production of electricity from traditional energy sources. When a government seeks to reduce external costs, it has an array of policy options from which to choose, including regulations, taxes, mandates, and subsidies. None of these options are necessarily a breach of the WTO Agreement.[9] Nor does a finding that a benefit exists constitute a breach of the SCM Agreement. Article 1 is a definitional

[6] Panel Report, para. 7.318.
[7] Canada Appellee Submission, paras. 177-178.
[8] Panel Report, paras. 7.311, 9.18, 9.23, and fn. 614.
[9] *See*, Panel Report, para. 9.5.

provision. At this stage of the analysis, a panel is simply called upon to determine if the measure at issue is a subsidy.

9. The FIT program thus combines two different policy objectives – encouraging the production of wind and solar electricity, and localizing production in Ontario of the equipment to generate that electricity at the expense of manufacturers in the rest of Canada and the rest of the world. In the present dispute, the Panel found that the Government of Ontario imposes domestic content requirements as a condition for accessing the FIT program. In this case, where in addition to encouraging the increased production and use of green electricity, the Government of Ontario also seeks to localize production in Ontario at the expense of producers in the rest of Canada and the rest of the world, a finding of financial contribution and benefit will also result in a finding of a prohibited subsidy. In analyzing if there is a benefit, there is no basis in the text for taking into account Ontario's policy objectives in a benchmark. Conversely, absent the Government of Ontario's domestic content requirement, a proper benchmark would not appear to result in a finding that the FIT program is a prohibited subsidy.

10. Mr. Chairman, the United States strongly supports Members' efforts to meet an increasing share of their electricity demand through renewable energy sources. The United States is pursuing the same goal, and in doing so, we firmly believe that the WTO Agreement allows Members a wide range of non-discriminatory policy options to achieve our shared goal of increasing the production and use of renewable energy. Thank you for your attention. We look forward to any questions the Division may have.