1 ARTICLE 14

1.1 Text of Article 14

Article 14

Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient

For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:

(a) government provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member;

(b) a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts;

(c) a loan guarantee by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees;

(d) the 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).
1.2 General

1. In *US – Softwood Lumber IV*, the Appellate Body stated that:

"The chapeau of Article 14 requires that 'any' method used by investigating authorities to calculate the benefit to the recipient shall be provided for in a WTO Member's legislation or regulations ... The reference to 'any' method in the chapeau clearly implies that more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit to the recipient.

We agree with the Panel that the term 'shall' in the last sentence of the chapeau of Article 14 suggests that calculating benefit consistently with the guidelines is mandatory. We also agree that the term 'guidelines' suggests that Article 14 provides the 'framework within which this calculation is to performed', although the 'precise detailed method of calculation is not determined'. Taken together, these terms establish mandatory parameters within which the benefit must be calculated, but they do not require using only one methodology for determining the adequacy of remuneration for the provision of goods by a government."

2. In *Japan – DRAMS (Korea)*, the Appellate Body made the following findings regarding the requirements of the chapeau of Article 14:

"The chapeau of Article 14 sets out three requirements. The first is that 'any method used' by an investigating authority to calculate the amount of a subsidy in terms of benefit to the recipient shall be provided for in the national legislation or implementing regulations of the Member concerned. The second requirement is that the 'application' of that method in each particular case shall be transparent and adequately explained. The third requirement is that 'any such method' shall be consistent with the guidelines contained in paragraphs (a)–(d) of Article 14.

The chapeau of Article 14 provides a WTO Member with some latitude as to the method it chooses to calculate the amount of benefit. Paragraphs (a)–(d) of Article 14 contain general guidelines for the calculation of benefit that allow for the method provided for in the national legislation or regulations to be adapted to different factual situations.

We observe that the first requirement of the chapeau of Article 14 is that the method used be provided for in a WTO Member's national legislation or implementing regulations. Although the chapeau of Article 14 states that the calculation of benefit must be consistent with the guidelines in paragraphs (a)–(d) of that provision, it does not, in our view, contemplate that the method be set out in detail. The requirement of the chapeau would be met if the method used in a particular case can be derived from, or is discernable from, the national legislation or implementing regulations. We believe that this view strikes an appropriate balance between the flexibility that is needed for adapting the benefit calculation (consistent, however, with the guidelines of paragraphs (a)–(d) of Article 14) to the particular factual situation of an investigation, and the need to ensure that other Members and interested parties are made aware of the method that will be used by the Member concerned, under Article 14 of the *SCM Agreement*."

3. The Panel in *Mexico – Olive Oil* noted that certain provisions of the SCM Agreement leave considerable discretion to Members to define their own procedures:

"We also note that other provisions in the *SCM Agreement* leave considerable discretion to Members to define their own procedures; e.g. Articles 12, 14 and 23. This leads us to believe that, in general, unless a specific procedure is set forth in the

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Agreement the precise procedures for how investigating authorities will implement those obligations are left to the Members to decide."³

4. In Mexico – Olive Oil, the Panel observed that:

"By its own terms, Article 14 concerns the 'method' to be used in a countervailing duty investigation to calculate the amount of benefit to a recipient, and sets forth three basic requirements in this regard. The first has to do with the legislative framework, the second has to do with the application of the law to particular cases, and the third has to do with the general guidelines for how to determine the benefit to the recipient from four basic forms of government financial contributions: equity infusions, loans, loan guarantees, and government provision of goods or services or government purchase of goods."⁴

5. In Mexico – Olive Oil, the European Communities claimed that Mexico failed to apply the method used to calculate the benefit conferred on the recipient to each particular case in a transparent way which was adequately explained, in violation of Article 14. The Panel rejected the European Communities' claim, and found that the investigating authority provided a sufficiently adequate and transparent explanation of its method to calculate benefit in respect of the subsidy programmes at issue.⁵

6. The Panel in Mexico – Olive Oil also rejected the European Communities' related argument that the Mexican investigating authority's failure to conduct a pass-through analysis amounted to inconsistency with the transparency and explanation requirements of Article 14. The Panel explained that it saw "nothing in this provision that requires a Member to conduct a pass-through analysis." Even if Article 14 required a pass-through analysis, the Panel did not find any reason that the investigating authority had acted inconsistently, based on the evidence.⁶

1.3 Article 14(a): "usual investment practice ... of private investors"

1.3.1 General

7. The Panel in EC – Countervailing Measures on DRAM Chips observed that:

"Article 14(a) of the SCM Agreement does not provide a precise method for calculating benefit. It simply states that a benefit is conferred if the investment decision can be regarded as inconsistent with the usual investment practice – including for the provision of risk capital – of private investors in the territory of that Member."⁷

8. In EC and certain member States – Large Civil Aircraft, the Appellate Body provided the following guidance on the interpretation of Article 14(a):

"Article 14(a) states that equity capital provided by a government shall not be considered to confer a benefit unless it is inconsistent with what is termed the 'usual investment practice' of private investors in the territory of that Member. The two words 'usual' and 'practice' are in a sense reinforcing, with the former signifying 'commonly or customarily observed or practised' and the latter 'usual or customary action or performance'. Thus, we understand the term 'usual practice' to describe common or customary conduct of private investors in respect of equity investment. We also observe that Article 14(a) focuses the inquiry on the 'investment decision'. This reflects an ex ante approach to assessing the equity investment by comparing the decision, based on the costs and expected returns of the transaction, to the usual investment practice of private investors at the moment the decision to invest is undertaken. The focus in Article 14(a) on the 'investment decision' is thus critical, in our view, because it identifies what is to be compared to a market benchmark, and when that comparison is to be situated. With this understanding in mind, we turn to

³ Panel Report, Mexico – Olive Oil, fn 63.
⁴ Panel Report, Mexico – Olive Oil, para. 7.169.
⁵ Panel Report, Mexico – Olive Oil, para. 7.156.
⁶ Panel Report, Mexico – Olive Oil, paras. 7.159 and 7.168.
⁷ Panel Report, EC – Countervailing Measures on DRAM Chips, para. 7.211.
consider whether the Panel set out the proper standard under Article 1.1(b) of the SCM Agreement.

...

As we have previously noted, Article 14(a) of the SCM Agreement focuses the inquiry on the 'investment decision'. This reflects an ex ante assessment of the equity investment, taking into account the costs and expected returns of the transaction as compared to the usual investment practice of private investors at the moment the decision to invest is undertaken. As we stated, the focus of Article 14(a) on the 'investment decision' is a critical step in the analysis because it identifies what is to be compared to the market benchmark, and when that comparison is to be situated. Thus, in assessing the European Union's claims on appeal, we first seek to identify the 'investment decision' that the Panel was to compare against the market benchmark consisting of the usual investment practice.8

1.3.2 Relevance of distinction between inside investor vs. outside investor

9. In Japan – DRAMs (Korea), the Panel addressed arguments on whether the amount of benefit conferred by the restructuring of insolvent companies should be established from the perspective of inside/existing investors, or outside/new investors. Ultimately, the Panel found that there was no need for it to rule on whether or not the inside / existing investor standard was an appropriate market benchmark, since the parties agreed that it was. The Panel was reversed by the Appellate Body. The Appellate Body made the following findings on the matter:

"We do not consider the distinction between inside and outside investors to be helpful in order to determine the appropriate benchmark for calculating the amount of benefit under Articles 1.1(b) and 14 of the SCM Agreement. The terms of a financial transaction must be assessed against the terms that would result from unconstrained exchange in the relevant market. The relevant market may be more or less developed; it may be made up of many or few participants. By way of example, there are now well-established markets in many economies for distressed debt, and a variety of financial instruments are traded on these markets. In some instances, the market may be more rudimentary. In other instances, it may be difficult to establish the relevant market and its results. But these informational constraints do not alter the basic framework from which the analysis should proceed. We also do not consider that there are different standards applicable to inside and to outside investors. There is but one standard—the market standard—according to which rational investors act.

Article 14 of the SCM Agreement, entitled ‘Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient’, provides guidance as to how the relevant market shall be identified. Specifically, with respect to ‘government provision of equity capital’, Article 14(a) stipulates that such equity infusions ‘shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice of private investors in the territory of that Member’. In respect of loans, Article 14(b) provides that ‘a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market.’ In the latter case, ‘the benefit shall be the difference between these two amounts.’ Thus, under Article 14(a), the benchmark is ‘the usual investment practice of private investors’, and under Article 14(b), the benchmark is ‘the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market.’ Neither of these benchmarks makes a distinction between ‘outside’ or ‘inside’ investors. Rather, they suggest that the investigating authority calculate the amount of benefit conferred on the recipient by comparing the terms of the financial contribution to the terms that the relevant market—consisting of rational investors, be they inside or outside investors or both—would have offered. As the Appellate Body has previously said:

8 Appellate Body Report, EC and certain member States – Large Civil Aircraft, paras. 999 and 1019.
Article 14, which ... is relevant context in interpreting Article 1.1(b), supports our view that the marketplace is an appropriate basis for comparison. The guidelines set forth in Article 14 relate to equity investments, loans, loan guarantees, the provision of goods or services by a government, and the purchase of goods by a government. A 'benefit' arises under each of the guidelines if the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market.

We therefore disagree with the Panel's approach in this case, which consisted only of examining 'whether or not the JIA applied [the inside investor] standard in an appropriate manner.' As we see it, the Panel should have identified the appropriate benchmark to apply for the purpose of assessing whether the JIA calculated the amount of benefit for the October 2001 and December 2002 Restructurings consistently with Articles 1.1(b) and 14 of the SCM Agreement. Instead, the Panel held that, since the parties had agreed that the inside investor standard constituted a valid benchmark, 'there [was] no need for [the Panel] to make any findings on whether or not the inside investor perspective constituted [the] valid market benchmark' for purposes of its analysis.9

1.4 Article 14(b): loans

10. In US – Anti-Dumping and Countervailing Duties (China), the Appellate Body found that the Panel did not commit an error in the interpretation of Article 14(b) in finding that ‘inherent in Article 14(b), as in Article 14(d), is sufficient flexibility to permit the use of a proxy in place of observed rates in the country in question where no ‘commercial’ benchmark can be found’10:

"We start by considering the constituent elements of a benchmark loan under Article 14(b), that is 'comparable', 'commercial', and a 'loan which the firm could actually obtain on the market'.

A benchmark loan under Article 14(b) must be a loan that is 'comparable' to the investigated government loan. Comparable is defined as 'able to be compared', 'worthy of comparison', and 'fit to be compared (to)'. This, in our view, suggests that something can be considered 'comparable', when there are sufficient similarities between the things that are compared as to make that comparison worthy or meaningful. Thus, a benchmark loan under Article 14(b) should have as many elements as possible in common with the investigated loan to be comparable. The Panel noted that, ideally, an investigating authority should use as a benchmark a loan to the same borrower that has been established around the same time, has the same structure as, and similar maturity to, the government loan, is about the same size, and is denominated in the same currency. The Panel, however, also considered that, in practice, the existence of such an ideal benchmark loan would be extremely rare, and that a comparison should also be possible with other loans that present a lesser degree of similarity. We agree with both of these observations by the Panel. ...  

A loan only confers a benefit when and to the extent that it has been granted on terms that are not otherwise available in the marketplace.11 A key element in ensuring a meaningful comparison under Article 14(b) is that a benchmark loan be 'commercial'. The comparison between an investigated loan and a commercial loan, therefore, reveals whether a benefit has been conferred, and its amount. We observe that the term 'commercial' is defined as 'interested in financial return rather than artistry; likely to make a profit; regarded as a mere matter of business'. Thus the term 'commercial' does not speak of the identity of the provider of the loan.

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9 Appellate Body Report, Japan – DRAMs (Korea), paras. 172 -174.
11(footnote original) Appellate Body Report, Canada – Aircraft, paras. 155-158.
Although the Panel did not explicitly rule on the issue, it stated that one possible interpretation of ‘commercial’ could be that any loan made by the government would *ipso facto* not be ‘commercial’. In our view, it would not be correct to conclude that any loan made by the government (or by private lenders in a market dominated by the government) would *ipso facto* not be ‘commercial’. We see nothing to suggest that the notion of 'commercial' is *per se* incompatible with the supply of financial services by a government. Therefore, the mere fact that loans are supplied by a government is not in itself sufficient to establish that such loans are not 'commercial' and thus incapable of being used as benchmarks under Article 14(b) of the *SCM Agreement*. An investigating authority would have to establish that the government presence or influence in the market causes distortions that render interest rates unusable as benchmarks.

Finally, a benchmark loan under Article 14(b) must be a 'loan which the firm could actually obtain on the market'. The use of the conditional tense, 'could', suggests that a benchmark loan under Article 14(b) need not in every case be a loan that exists or that can *in fact* be obtained in the market. In this respect, we agree with the Panel that this refers 'first and foremost' to the borrower's risk profile, that is, whether the benchmark loan is one that could be obtained by the borrower receiving the investigated government loan. Thus, we consider that Article 14(b) does not preclude the possibility of using as benchmarks interest rates on commercial loans that are not actually available in the market where the firm is located, such as, for instance, loans in other markets or constructed proxies.  

11. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body upheld the Panel's conclusion that the Appellate Body's interpretation of benchmarks under Article 14(d) in *US – Softwood Lumber IV* (i.e. as permitting the rejection of in-country private prices as benchmarks in certain circumstances) was in some respects equally applicable to Article 14(b). The Appellate Body reasoned as follows:

“We observe that, under Article 14(b), the benchmark to measure benefit is 'the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market', while, under Article 14(d), it is the 'prevailing market conditions for the good or service in question in the country of provision or purchase'. In contrast to Article 14(d), which clearly connects the relevant 'market' to 'the country of provision or purchase', Article 14(b) does not specify expressly any geographical or national scope for what is the relevant 'market' within which a comparable commercial loan should be identified.  

We, therefore, agree with China that the relevant question under Article 14(b) is not whether an investigating authority may resort to an 'out-of-country' benchmark as opposed to an 'in-country' benchmark. It is, rather, to what extent Article 14(b) requires strict and formalistic compliance with *all* of the conditions specified therein, even when doing so would frustrate the purpose of that provision and prevent any calculation of the benefit. Thus, the relevant question is whether there is enough flexibility in Article 14(b), as the Appellate Body found that there is in Article 14(d), to allow for the use of a benchmark other than one that is always, and in every respect, 'a comparable commercial loan which the firm could actually obtain on the market'.

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It seems to us that, notwithstanding the differences between Article 14(b) and (d), there may also be under Article 14(b) limited circumstances where an excessively formalistic interpretation of this provision could frustrate its purpose and prevent the calculation of the benefit. Reading Article 14(b) as always requiring a comparison

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13 (footnote original) We consider that Article 14(b) may well accommodate, in any given case, a conception of the relevant market as one defined on the basis of the particular product or service (a loan), as well as one defined on a geographic basis. In some cases, the product market may be a national market, such as when loans in a particular currency are available only within a particular country. It seems to us that the word "comparable", and some of the factors that the Panel identified as indications of comparability—the timing, structure, maturity, and currency of loans—may equally well be factors relevant to the identification of the product market as well as the geographic market for the loan.
with loans denominated in the same currency as the investigated loans, even in
circumstances where all loans in the same currency are distorted by government
intervention, would lead to a comparison with government distorted loans, thus
frustrating the purpose of Article 14(b). If loans in a given market and in a given
currency are distorted by government intervention, an investigating authority should
be permitted, in certain circumstances also under Article 14(b), to use a benchmark
other than ‘a comparable commercial loan which the firm could actually obtain on the
market’. However, such a benchmark would have to approximate ‘a comparable
commercial loan which the firm could actually obtain on the market’.

We observe that the Panel reasoned that the identification of an appropriate
benchmark under Article 14(b) can be seen as a ‘series of concentric circles’, where
the investigating authorities should first seek commercial loans to the same borrower
that are identical or nearly identical to the investigated loan. As the Panel stated, it is
not reasonable to assume that, when there is no actually obtainable commercial loan
that is comparable in every respect, an investigating authority must conclude that
there is no benchmark, and that, therefore, no benefit amount can be determined. In
the absence of an identical or nearly identical loan, an investigating authority should
seek, in turn, other similar commercial loans held by the same borrower, then similar
commercial loans granted to another borrower with a similar credit risk profile to the
investigated borrower. In this process, an investigating authority will need to make
adjustments to reflect differences from investigated loans, such as date of origination,
size, maturity, currency, structure, or borrower’s credit risk. Yet, there may be
situations where the actual differences between any of the existing commercial loans
and the investigated government loan are so significant that it is not realistically
possible to address them through adjustments. In such situations, the Panel
considered that an investigating authority should be allowed to use proxies as
benchmarks.

We agree that selecting a benchmark under Article 14(b) involves a progressive
search for a comparable commercial loan, starting with the commercial loan that is
closest to the investigated loan (a loan to the same borrower that is nearly identical to
the investigated loan in terms of timing, structure, maturity, size and currency) and
moving to less similar commercial loans while adjusting them to ensure comparability
with the investigated loan.

We see no inherent limitations in Article 14(b) that would prevent an investigating
authority from using as benchmarks interest rates on loans denominated in currencies
other than the currency of the investigated loan, or from using proxies instead of
observed interest rates, in situations where the interest rates on loans in the currency
of the investigated loan are distorted and thus cannot be used as benchmarks. In
fact, to read Article 14(b) as imposing such limitations on the selection of a
benchmark would potentially frustrate the purpose of that provision, as no suitable
benchmarks could be identified in situations where the interest rates on loans in a
given currency were distorted by government presence or influence in the market and
no loan in that currency exists in other markets. We further note that, as already
discussed above, the possibility of resorting to a proxy under Article 14(b) is
consistent with the use of the conditional tense: ‘would pay’ and ‘could actually obtain
on the market’. In the absence of an actual comparable commercial loan that is
available on the market, an investigating authority should be allowed to use a proxy
for what ‘would’ have been paid on a comparable commercial loan that ‘could’ have
been obtained on the market.

We also consider that the further away an investigating authority moves from the
ideal benchmark of the identical or nearly identical loan, the more adjustments will be
necessary to ensure that the benchmark loan approximates the ‘comparable
commercial loan which the firm could actually obtain on the market’ specified in Article
14(b). As discussed above, we consider this to be consistent with, and parallel to, the
requirement affirmed by the Appellate Body in US – Softwood Lumber IV under Article
14(d), that, in situations where an investigating authority does not use the private
prices in the market of the country of provision, it should nevertheless select a
method for calculating the benefit that relates or refers to, or is connected with, the prevailing market conditions in the country of provision.\footnote{14}

In sum, we consider that, in spite of the different formulations used in Article 14(b) and (d), some of the reasoning of the Appellate Body in \textit{US – Softwood Lumber IV} concerning the use of out-of-country benchmarks and proxies under Article 14(d) is equally applicable under Article 14(b). In particular, we are of the view that a certain degree of flexibility also applies under Article 14(b) in the selection of benchmarks, so that such selection can ensure a meaningful comparison for the determination of benefit. At the same time, when an investigating authority resorts to a benchmark loan in another currency or to a proxy, it must ensure that such benchmark is adjusted so that it approximates the 'comparable commercial loan'. Moreover, in accordance with the chapeau of Article 14, any such method, as well as how it approximates the loan in another currency or the proxy to a 'comparable commercial loan which the firm could actually obtain on the market', must be transparent and adequately explained.\footnote{15}

12. In \textit{EC and certain member States – Large Civil Aircraft}, the Appellate Body noted that the Panel characterized the LA/MSF measures as "unsecured loans" and that neither participant had challenged this characterization on appeal, and stated "[a]ccordingly, the most relevant 'guideline' of Article 14 of the \textit{SCM Agreement} is that provided in subparagraph (b)".\footnote{16} The Appellate Body then proceeded to provide further guidance on the interpretation and application of Article 14(b):

"A panel relying on Article 14(b) would thus examine whether there is a difference between the amount that the recipient pays on the government loan and the amount the recipient would pay on a comparable commercial loan, which the recipient could have actually obtained on the market.\footnote{17} There is a benefit—and therefore a subsidy—where the amount that the recipient pays on the government loan is less than what the recipient would have paid on a comparable commercial loan that the recipient could have obtained on the market. There is no benefit—and therefore no subsidy—if what the recipient pays on the government loan is equal to or higher than what it would have paid on a comparable commercial loan. The amount the recipient would have paid on a commercial loan is a function of the size of the loan, the interest rate, the duration, and other relevant terms of the transaction. The participants agreed at the oral hearing that Article 14(b) of the \textit{SCM Agreement} provides useful guidance for purposes of the assessment of whether the LA/MSF measures confer a benefit.

Article 14(b) of the \textit{SCM Agreement} calls for a comparison of the 'amount the firm receiving the loan pays on the government loan' with 'the amount the firm would pay on a comparable commercial loan which the firm could actually obtain in the market'. As we have already discussed in general terms above, we read this as suggesting that the comparison is to be performed as though the loans were obtained at the same time. In other words, the comparable commercial loan is one that would have been available to the recipient firm at the time it received the government loan.

Because the assessment focuses on the moment in time when the lender and borrower commit to the transaction, it must look at how the loan is structured and how risk is factored in, rather than looking at how the loan actually performs over time. Such \textit{ex ante} analysis of financial transactions is commonly used and appropriate financial models have been developed for these purposes. The analysis from a financial perspective proceeds as follows. The investor commits resources to an investment in the expectation of a future stream of earnings that will provide a

\footnote{15} Appellate Body Report, \textit{US – Anti-Dumping and Countervailing Duties (China)}, paras. 482-489.
\footnote{16} Appellate Body Report, \textit{EC and certain member States – Large Civil Aircraft}, para. 834.
\footnote{17} (footnote original) Article 14(b) of the \textit{SCM Agreement} says that the comparison should be to a comparable commercial loan that the recipient 'could actually obtain on the market.' This suggests that where the recipient could not have obtained a commercial loan, then the granting of a loan by the government would be deemed to confer a benefit irrespective of the terms of that loan. As the European Union underscored at the oral hearing, the United States did not argue before the Panel that Airbus would have been unable to obtain a commercial loan. Instead, the United States premised its case on Airbus having to pay less for the LA/MSF than it would have paid for a commercial loan.
positive return on the investment made. In deciding whether to commit resources to a particular investment, the investor will consider alternative investment opportunities. The investor will make its decision to invest on the basis of information available at the time the decision is made about market conditions and projections about how those economic conditions are likely to develop (future demand and price for the product, future costs, etc.). The information available will be, in most cases, imperfect. The investor does not have perfect foresight and thus there is always some likelihood, in some instances a sizeable one, that the investor's projections will deviate significantly from what actually transpires. Hence, determining whether the investment was commercially rational is to be ascertained based on the information that was available to the investor at the time the decision to invest was made.\(^\text{18}\) The commercial rationality of an investment cannot be ascertained on the basis of how the investment in fact performed because such an analysis has nothing useful to say about the basis upon which the investment was made. The investment could have earned a rate of return that exceeded, or was less than, the going market rate, but it was not predetermined to do so.

We note, moreover, that from a practical perspective, a requirement to look at the actual performance of a loan would mean that such measures could not be challenged until performance is fully completed. In the case of long-term loans, this would mean that any challenge of such measures would have to be deferred for years. Requiring a WTO Member to wait so long to mount a challenge would limit the effectiveness of Part II and Part III of the SCM Agreement also in the light of the prospective nature of WTO remedies.\(^\text{19}\)

Therefore, in our view, the assessment of benefit must examine the terms and conditions of a loan at the time it is made and compare them to the terms and conditions that would have been offered by the market at that time. The European Union and the United States agreed at the oral hearing with this approach.\(^\text{20}\)

13. In US – Carbon Steel (India), the Appellate Body disagreed with the Panel's view that a benefit is conferred, within meaning of Article 14(b), when there is a difference between the amount the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan on the market, and that no other credits or adjustments are required:

"[A] proper assessment under Article 14(b) examines what the total cost of the investigated loan is to the loan recipient, and whether there is a difference between that and the total cost of a comparable commercial loan. The distinction that the Panel draws between costs associated with the interest or repayment terms of a loan, and other costs arising from entry or administrative charges, does not seem to reflect accurately the cost of the relevant loans from the perspective of the recipient. Moreover, depending on the manner in which a particular commercial loan is structured, the costs associated with obtaining a loan could be significant and should be factored into a market assessment of that loan. In this respect, failing to take into account a cost that potentially alters a commercial actor's valuation of a loan simply because it does not relate to interest or repayment terms appears unduly artificial and contrary to the requirements of Article 14(b). Thus, we do not agree with the Panel's conclusion that investigating authorities are not required to take account of the costs incurred by recipients in participating in the programme under which the loans are provided.

Article 14(b) entails a 'progressive search' for a comparable loan that begins with the commercial loan that is 'closest' to the investigated loan and moves to 'less similar' commercial loans. In examining whether the particular terms of a loan programme are

\(^{18}\) (footnote original) Such an ex ante approach is wholly consistent with the manner in which financial methods have been developed to test projections through sensitivity analysis and scenario building.

\(^{19}\) (footnote original) It may also affect the ability of Members to apply countervailing measures under Part V of the SCM Agreement.

\(^{20}\) Appellate Body Report, EC and certain member States – Large Civil Aircraft, paras. 834-838.
in accordance with market terms, a benchmark must be selected that ensures that there are sufficient similarities between the investigated loan and the benchmark 'as to make that comparison worthy or meaningful'. To the extent that the terms associated with a loan programme are determined by the conditions of funding for the programme, such terms should also be taken into account if a failure to do so would render the comparison meaningless."21

1.5 Article 14(c): loan guarantees

14. In Canada – Aircraft Credits and Guarantees, the Panel noted the relevance of Article 14(c) of the SCM Agreement for the purpose of establishing the existence of a "benefit" in the framework of equity guarantees. It noted that a "benefit" could arise if there was a difference between the cost of equity with and without an equity guarantee programme, to the extent that such difference was not covered by the fees charged by the programme for providing the equity guarantee. If it is established that the programme's fees were not market-based, the Panel said, such a cost difference would not be covered by the programme's fees:

"[A]lthough Article 14(c) is expressly concerned with 'benefit' in the context of loan guarantees, there are perhaps sufficient similarities between the operation of loan guarantees and equity guarantees for it to be appropriate to rely on Article 14(c) for the purpose of establishing the existence of 'benefit' in the context of equity guarantees in certain circumstances. Thus, a 'benefit' could arise if there is a difference between the cost of equity with and without an IQ equity guarantee, to the extent that such difference is not covered by the fees charged by IQ for providing the equity guarantee. In our opinion, it is safe to assume that such cost difference would not be covered by IQ's fees if it is established that IQ's fees are not market-based."22

15. Regarding the loan guarantee programmes under consideration, the Panel in Canada – Aircraft Credits and Guarantees also referred to the findings of the Panel and the Appellate Body in Canada – Aircraft23 and considered that Article 14(c) of the SCM Agreement provided "contextual guidance for interpreting the term 'benefit' in the context of loan guarantees." On this basis, the Panel stated that there would be a "benefit" when the cost-saving for the company's customer for securing a loan with a loan guarantee programme is not offset by the programme's fees, for example, if it was established that the programme's fees were not market-based.24 The Panel stated:

"In our view, and taking into account the contextual guidance afforded by Article 14(c), we consider that an IQ loan guarantee will confer a 'benefit' when there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by [IQ] and the amount that the firm would pay on a comparable commercial loan absent the [IQ] guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees."25

1.6 Article 14(d): provision of goods or services and purchases of goods

16. The Panel in US – Coated Paper (Indonesia) described the relationship between the first and second sentences of Article 14(d) as follows:

"The first sentence of Article 14(d) establishes that the provision of goods by a government shall not be considered as conferring a benefit unless the goods are provided for 'less than adequate remuneration'. How to determine whether adequate remuneration was paid is dealt with in the second sentence of Article 14(d), which provides that the adequacy of remuneration shall be determined in relation to prevailing market conditions in the country of origin. The second sentence of Article 14(d) thus makes clear that a benchmark for adequate remuneration must be

22 Panel Report, Canada – Aircraft Credits and Guarantees, para. 7.345.
23 Appellate Body Report, Canada – Aircraft, para. 155, regarding the contextual relevance of Article 14 for the purpose of determining the existence of "benefit".
24 Panel Report, Canada – Aircraft Credits and Guarantees, para. 7.397.
25 Panel Report, Canada – Aircraft Credits and Guarantees, para. 7.398.
determined 'in relation to prevailing market conditions', and that the relevant conditions are those existing 'in the country of provision'. Prevailing market conditions in the country of provision is thus the standard for assessing the adequacy of remuneration.'  

1.6.1 "the 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"

17. The Panel in US – Carbon Steel (India) explained the comparative analysis to determine whether remuneration is "less than adequate" under Article 14(d):

"[T]he comparative analysis envisaged by Article 14(d) concerns the question of whether the remuneration is 'less than' adequate. The phrase 'less than' is comparative in nature, requiring a comparison between the government price and a price that is representative of adequate remuneration in the market, as determined in relation to the prevailing market conditions. The fact that Article 14(d) does not use the term 'difference' does not detract from the comparative nature of the analysis inherent in the first sentence of Article 14(d)."  

18. Further, in US – Carbon Steel (India), the Appellate Body stated that a determination of whether remuneration is "less than adequate" involves the selection of a comparator, or a benchmark price, to be compared with the government price for the good in question:

"[A] determination of whether remuneration is 'less than adequate' within the meaning of Article 14(d) involves the selection of a comparator – i.e. a benchmark price – with which to compare the government price for the good in question. If the result of this comparison is that the government price is less than the benchmark price, the difference between the two prices reflects the benefit conferred under Article 14(d)."

19. The Appellate Body, in upholding the Panel’s conclusions, in US – Carbon Steel (India), rejected India's argument that, under Article 14(d) an investigating authority must, as a threshold matter, address the adequacy of remuneration prior to an examination of benefit. The Appellate Body stated:

"[W]e consider that Article 14(d) of the SCM Agreement establishes the adequacy of remuneration as the lens through which 'benefit', within the meaning of that provision, must be assessed. Thus, Article 14(d) prescribes a unitary assessment in which a determination of benefit is reached through an analysis of the adequacy of remuneration for government-provided goods. Accordingly, we consider that, contrary to India’s assertions, separate analyses of 'benefit' and 'remuneration' are not required under Article 14(d) of the SCM Agreement."  

20. Further, the Appellate Body in US – Carbon Steel (India) agreed with the Panel that, under Article 14(d), "the adequacy of remuneration is to be assessed from the perspective of the recipient, rather than the government provider of the good in question." Based on the title of Article 14(d) (i.e., "Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient") and the text of its second sentence, the Appellate Body concluded that "[a]lthough the concept of 'remuneration' reflects a payment for goods or services that could be viewed from the perspective of either the person providing or receiving the payment, other interpretative

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27 (footnote original) The comparative analysis required by Article 14(d) is similar to that required by Article 14(a) which, while not using the term "difference", nevertheless requires a comparison of the "investment decision" with "usual investment practice".
28 Panel Report, US – Carbon Steel (India), para. 7.32.
30 Appellate Body Report, US – Carbon Steel (India), para. 4.117.
31 Appellate Body Report, US – Carbon Steel (India), para. 4.126.
elements lead us to consider that this assessment must properly be conducted from the perspective of the recipient."32

21. In US – Countervailing Measures (China), the Appellate Body did "not consider that the fact that the SCM Agreement establishes a single definition for the term 'government' means that, under Article 14(d), a proper analysis for selecting a benefit benchmark is dependent on an examination of whether any relevant entities in the market fall within the definition of 'government', including on the basis of a finding that [a state owned enterprise] is a public body."33 The Appellate Body explained:

"We observe ... that the term 'government' appears only in the first sentence of Article 14(d), which establishes that 'the provision of goods ... by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration'. The first sentence of Article 14(d) thus provides guidance for assessing whether the provision of goods confers a benefit, following a previous affirmative determination that such provision of goods constitutes a financial contribution under Article 1.1(a)(1)(ii) that was carried out by a 'government' as defined in Article 1.1(a)(1)."34

22. Acknowledging that there is no single definition of the term "government" for purposes of the SCM Agreement, the Appellate Body in US – Countervailing Measures (China) emphasized "it does not follow that, in determining the appropriate benefit benchmark under Article 14(d), investigating authorities are required to limit their analysis to an examination of the role played in the market by government-related entities that have been properly found to be government in the narrow sense or public bodies." The Appellate Body continued:

"[T]he selection of a benchmark for the purposes of Article 14(d) cannot, at the outset, exclude consideration of in-country prices from any particular source, including government-related prices other than the financial contribution at issue. This is because the issue of 'whether a price may be relied upon for benchmarking purposes under Article 14(d) is not a function of its source, but rather, whether it is a market-determined price reflective of prevailing market conditions in the country of provision.' As a consequence, prices of government-related entities other than those of the entity providing the financial contribution at issue need to be examined to determine whether they are market determined and can therefore form part of a proper benchmark."35

23. Recalling the Appellate Body's statement in US – Carbon Steel (India) that a government, in its role as a provider of a good, may distort in-country prices by setting an artificially low price, the Appellate Body in US – Countervailing Measures (China) explained:

"In such circumstances, those prices cannot be said to be market determined. We emphasize that the ability of a government provider to have such an influence on in-country private prices presupposes that it has sufficient market power to do so.36 The Appellate Body explained that, in such a situation, 'the government's role in providing the financial contribution [may be] so predominant that it effectively determines the price at which private suppliers sell the same or similar goods, so that the comparison contemplated by Article 14 would become circular.' Because this would lead to a calculation of benefit that is artificially low, or even zero, the right of Members to countervail subsidies could be undermined or circumvented in such a scenario."37

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32 Appellate Body Report, US – Carbon Steel (India), paras. 4.127-4.129.
33 Appellate Body Report, US – Countervailing Measures (China), para. 4.43.
34 Appellate Body Report, US – Countervailing Measures (China), para. 4.43.
35 Appellate Body Report, US – Countervailing Measures (China), para. 4.64.
36 (footnote original) Appellate Body Report, US – Carbon Steel (India), para. 4.155 (referring to Appellate Body Report, US – Anti-Dumping and Countervailing Duties (China), para. 444). We also do not exclude the possibility that the government may distort in-country prices through other entities or channels than the provider of the good itself.
"in relation to prevailing market conditions for the good or service in question in the country of provision"

24. In US – Softwood Lumber IV, the Appellate Body concluded that, in certain circumstances, an investigating authority may use a benchmark, under Article 14(d) of the SCM Agreement, other than private prices in the country of provision for determining if goods have been provided by a government for less than adequate remuneration. Regarding the threshold issue of whether a benchmark other than private prices may be used, the Appellate Body found:

"Although Article 14(d) does not dictate that private prices are to be used as the exclusive benchmark in all situations, it does emphasize by its terms that prices of similar goods sold by private suppliers in the country of provision are the primary benchmark that investigating authorities must use when determining whether goods have been provided by a government for less than adequate remuneration. In this case, both participants and the third participants agree that the starting-point, when determining adequacy of remuneration, is the prices at which the same or similar goods are sold by private suppliers in arm's length transactions in the country of provision. This approach reflects the fact that private prices in the market of provision will generally represent an appropriate measure of the 'adequacy of remuneration' for the provision of goods. However, this may not always be the case. As will be explained below, investigating authorities may use a benchmark other than private prices in the country of provision under Article 14(d), if it is first established that private prices in that country are distorted because of the government's predominant role in providing those goods."38

25. As for the issue of when investigating authorities may use a benchmark other than private prices, the Appellate Body in US – Softwood Lumber IV reasoned:

"In analyzing this question, we have some difficulty with the Panel's approach of treating a situation in which the government is the sole supplier of certain goods differently from a situation in which the government is the predominant supplier of those goods. In terms of market distortion and effect on prices, there may be little difference between situations where the government is the sole provider of certain goods and situations where the government has a predominant role in the market as a provider of those goods. Whenever the government is the predominant provider of certain goods, even if not the sole provider, it is likely that it can affect through its own pricing strategy the prices of private providers for those goods, inducing the latter to align their prices to the point where there may be little difference, if any, between the government price and the private prices. This would be so even if the government price does not represent adequate remuneration. The resulting comparison of prices carried out under the Panel's approach to interpreting Article 14(d) would indicate a 'benefit' that is artificially low, or even zero, such that the full extent of the subsidy would not be captured, as the Panel itself acknowledged.

As a result, the subsidy disciplines in the SCM Agreement and the right of Members to countervail subsidies could be undermined or circumvented when the government is a predominant provider of certain goods.

It appears to us that the language found in Article 14(d) ensures that the provision's purposes are not frustrated in such situations. Thus, while requiring investigating authorities to calculate benefit 'in relation to' prevailing conditions in the market of the country of provision, Article 14(d) permits investigating authorities to use a benchmark other than private prices in that market. When private prices are distorted because the government's participation in the market as a provider of the same or similar goods is so predominant that private suppliers will align their prices with those of the government-provided goods, it will not be possible to calculate benefit having regard exclusively to such prices.

We emphasize once again that the possibility under Article 14(d) for investigating authorities to consider a benchmark other than private prices in the country of provision is very limited. We agree with the United States that '[t]he fact that the

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government is a significant supplier of goods does not, in itself, establish that all prices for the goods are distorted. Thus, an allegation that a government is a significant supplier would not, on its own, prove distortion and allow an investigating authority to choose a benchmark other than private prices in the country of provision. The determination of whether private prices are distorted because of the government's predominant role in the market, as a provider of certain goods, must be made on a case-by-case basis, according to the particular facts underlying each countervailing duty investigation.\(^{39}\)

26. The Appellate Body in *US – Softwood Lumber IV* recalled that the USDOC had constructed an alternative benchmark based on prices of stumpage in bordering states of the northern United States, adjusted to take into account market conditions prevailing in Canada. Having reversed the Panel's interpretation of Article 14(d) of the SCM Agreement, the Appellate Body concluded that there were insufficient factual findings by the Panel and undisputed facts in the Panel record to enable it to examine the WTO-consistency of the benchmark used by USDOC.\(^{40}\) The Appellate Body observed:

"[W]hen choosing an alternative method for determining the adequacy of remuneration, it has to be kept in mind that prices in the market of a WTO Member would be expected to reflect prevailing market conditions in that Member; they are unlikely to reflect conditions prevailing in another Member. Therefore, it cannot be presumed that market conditions prevailing in one Member, for instance the United States, relate or refer to, or are connected with, market conditions prevailing in another Member, such as Canada for example. Indeed, it seems to us that it would be difficult, from a practical point of view, for investigating authorities to replicate reliably market conditions prevailing in one country on the basis of market conditions prevailing in another country. First, there are numerous factors to be taken into account in making adjustments to market conditions prevailing in one country so as to replicate those prevailing in another country; secondly, it would be difficult to ensure that all necessary adjustments are made to prices in one country in order to develop a benchmark that relates or refers to, or is connected with, prevailing market conditions in another country, so as to reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale in that other country.

It is clear, in the abstract, that different factors can result in one country having a comparative advantage over another with respect to the production of certain goods. In any event, any comparative advantage would be reflected in the market conditions prevailing in the country of provision and, therefore, would have to be taken into account and reflected in the adjustments made to any method used for the determination of adequacy of remuneration, if it is to relate or refer to, or be connected with, prevailing market conditions in the market of provision. This is because countervailing measures may be used only for the purpose of offsetting a subsidy bestowed upon a product, provided that it causes injury to the domestic industry producing the like product. They must not be used to offset differences in comparative advantages between countries."\(^{41}\)

27. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body upheld the Panel's finding that China had not established that the investigating authority's rejection of in-country private prices as benchmarks was inconsistent with Article 14(d).\(^{42}\)

28. In *US – Carbon Steel (India)*, the Appellate Body interpreted the phrase "prevailing market conditions" in the context of Article 14(d) to consist of "generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices", based on a textual analysis and by reference to Article 6.3(c) of the SCM Agreement.\(^{43}\) Further, the Appellate Body, recalling its statement in *EC and certain member States – Large Civil Aircraft*, emphasized the "market orientation" of the inquiry under Article 14(d):


\(^{43}\) Appellate Body Report, *US – Carbon Steel (India)*, para. 4.150.
"As the Appellate Body stated in EC and certain member States – Large Civil Aircraft, the language found in the second sentence of Article 14(d) ‘highlights that a proper market benchmark is derived from an examination of the conditions pursuant to which the goods or services at issue would, under market conditions, be exchanged’. 44,45

29. The Appellate Body in US – Carbon Steel (India) elaborated on the use of benchmark prices for the purposes of Article 14(d). It noted that, while prices at which the same or similar goods are sold by private suppliers in arm’s length transactions constitute the primary benchmark and a starting point of the analysis, there is no “hierarchy” between in-country prices that may be relied upon in arriving at a benchmark:

“We emphasize that whether a price may be relied upon for benchmarking purposes under Article 14(d) is not a function of its source but, rather, whether it is a market-determined price reflective of prevailing market conditions in the country of provision. Accordingly, while the prices at which the same or similar goods are sold by private suppliers in the country of provision may serve as a starting point of analysis, this does not mean that, having found such prices, the analysis must necessarily end there. For example, prices on record of government-related entities other than the entity providing the financial contribution at issue also need to be considered to assess whether they are market determined and can therefore form part of a proper benchmark. Article 14(d) establishes no legal presumption that in-country prices from any particular source can be discarded in a benchmark analysis. Rather, Article 14(d) requires an analysis of the market in the country of provision to determine whether particular in-country prices can be relied upon in arriving at a proper benchmark.

...[

[W]hat an investigating authority must do in conducting the necessary analysis for the purpose of arriving at a proper benchmark will vary depending upon the circumstances of the case, the characteristics of the market being examined, and the nature, quantity, and quality of the information supplied by petitioners and respondents, including such additional information an investigating authority seeks so that it may base its determination on positive evidence on the record.”46

30. The Appellate Body in US – Carbon Steel (India) addressed India’s argument that the Panel's reliance on "isolated import transactions" on an "as delivered basis" to establish that these transactions reflect the "prevailing market conditions" in India was based on an incorrect understanding of the term "prevailing market conditions" of Article 14(d). The Appellate Body explained that “[t]he crux of India’s claim is that ‘prevailing market conditions’, within the meaning of Article 14(d) of the SCM Agreement, refers to the conditions prevailing in the market in general, as opposed to isolated acts of individual players in the market in question.”47 The Appellate Body then recited its findings that "an assessment of 'prevailing market conditions' necessarily involves an analysis of the market generally and that "any [adjustments for delivery charges] must reflect the generally applicable delivery charges for the good in question in the country of provision."48 Based on these considerations, the Appellate Body concluded that "in order to assess the adequacy of remuneration in relation to prevailing market conditions in the country of provision ... it may be necessary for an investigating authority to seek, and engage with, evidence concerning the prevailing market conditions for the good in question, including the generally applicable delivery charges for that good.”49 Turning to India's contention that one isolated transaction cannot be expanded to reflect general market conditions in India, the Appellate Body agreed that, while the price inclusive of international delivery charges may "as an evidentiary matter, provide some indication as to the generally applicable delivery charges for that good in the country of provision", it cannot be "inferred, without more, that a single, isolated

44 (Footnote original) Appellate Body Report, EC and certain member States – Large Civil Aircraft, para. 975. (emphasis added).
45 Appellate Body Report, US – Carbon Steel (India), para. 4.151; see also Appellate Body Report, US – Countervailing Measures (China), para. 4.44.
47 Appellate Body Report, US – Carbon Steel (India), para. 4.304.
48 Appellate Body Report, US – Carbon Steel (India), para. 4.304.
import transaction for a particular good reflects or relates to prevailing market conditions for that
good in the country of provision."\(^{50}\)

31. The Appellate Body in US – Countervailing Measures (China) observed that "[t]he second
sentence of Article 14(d) ... clarifies that the relevant benchmark must be determined 'in relation
to prevailing market conditions', and that such conditions are those existing 'in the country of
provision'."\(^{51}\)

32. Further, the Appellate Body in US – Countervailing Measures (China) clarified the sources of
benchmark prices for the purposes of establishing "prevailing market conditions" under Article
14(d):

"Proper benchmark prices would normally emanate from the market for the good in
question in the country of provision. To the extent that such in-country prices are
market determined, they would necessarily have the requisite connection with the
prevailing market conditions in the country of provision that is prescribed by the
second sentence of Article 14(d). Such in-country prices could emanate from a variety
of sources, including private or government-related entities."\(^{52}\)

33. In US – Countervailing Measures (21.5 - China), the Panel recognized that the disagreement
between the parties concerned 'the USDOC's determination that in-country prices in China are not
'market-determined' and thus cannot be used as a benchmark for the purpose of determining the
adequacy of remuneration under Article 14(d)."\(^{53}\) The Panel rejected China's argument that an
investigating authority may resort to an out-of-country benchmark only when it has established
that in-country prices are effectively determined by the government, de jure or de facto. Relying
on earlier jurisprudence, the Panel found that there is no defined, exhaustive set of circumstances
in which an authority may reject in-country prices and resort to an out-of-country benchmark:

"Consistent with our understanding that Article 14(d) requires a comparison of the
terms of the financial contribution provided to the producer/exporter under
investigation and the terms 'that would have been available to the recipient on the
market', we consider that the 'other circumstances' contemplated by the Appellate
Body [in US – Carbon Steel (India)] refer to the multiplicity of situations in which in-
country prices might not be suitable for determining the terms on which the goods at
issue are offered on the domestic market. This may encompass a variety of situations
in which in-country prices for the goods at issue are either not available or not
verifiable or cannot, for other reasons, be used to determine 'whether the recipient is
better off absent the financial contribution'. These circumstances, even if very limited,
in our view go beyond the sole circumstance in which prices are determined, de jure or
de facto, by the government."\(^{54}\)

34. The Panel in US – Countervailing Measures (China) (Article 21.5 – China) stated that an
"investigating authority may reject in-country prices if there is evidence of price distortion, and not
only if there is evidence that a government effectively determines the prices of goods at issue
...because the existence of price distortion may well ... preclude a proper comparison of the terms
of the financial contribution with market terms. This may be the case when the government is the
sole or predominant provider of a good, but it may also be the case in other circumstances
that render the comparison equally impossible or irrelevant."\(^{55}\)

35. In discussing the recourse to out-of-country prices as a benefit benchmark in the event of
price distortion, the Appellate Body in US – Countervailing Measures (China) (Article 21.5 – China)
rejected China's interpretation that limits such recourse to circumstances "in which the
government effectively determines the price at which the good is sold, either de jure or
de facto."\(^{56}\)\(^{57}\) Instead, the Appellate Body agreed with the Panel and stated that an investigating

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\(^{50}\) Appellate Body Report, US – Carbon Steel (India), para. 4.309.

\(^{51}\) Appellate Body Report, US – Countervailing Measures (China), para. 4.45.

\(^{52}\) Appellate Body Report, US – Countervailing Measures (China), para. 4.46.

\(^{53}\) Panel Report, US – Countervailing Measures (Article 21.5 – China), para. 4.46.

\(^{54}\) Panel Report, US – Countervailing Measures (Article 21.5 – China), para. 7.158.


\(^{56}\) (footnote original) China's other appellant's submission, para. 189.
authority may reject in-country prices in the case of government intervention that does not directly determine in-country prices but "may have similar distortive impact on those prices, such that they no longer represent a proper benchmark for adequate remuneration."58

36. Therefore, the Appellate Body concluded that "[c]entral to the inquiry under Article 14(d) of the SCM Agreement in identifying an appropriate benefit benchmark is the question of whether in-country prices are distorted as a result of government intervention."59 The Appellate Body further explained that price distortion does not encompass "any impact on prices as a result of any government intervention,"60 that recourse to out-of-country prices may be warranted where the investigating authority finds evidence of "price distortion resulting from government intervention",61 and that "[t]he determination must be made case by case, based on the relevant evidence in the particular investigation, and taking into account the characteristics of the market being examined, and the nature, quantity, and quality of the information on the record."62

37. The Appellate Body went on to discuss the type of analysis and evidence required for a finding of price distortion and considered that these will vary "depending upon a number of factors, including the circumstances of the case and the characteristics of the market."63 The Appellate Body found that quantitative assessment, price comparison methodology, or a counterfactual analysis, as well as qualitative analysis may be appropriate,64 but "in the absence of evidence of a direct impact of the government intervention on prices, ... a more detailed analysis and explanation may be required" as to how price distortion actually results from government intervention in the market.65

38. The Appellate Body clarified that for the purposes of establishing whether prices are market-determined, the investigating authority's analysis must take into account the following:

"[I]ndependently of the method chosen by the investigating authority, it has to engage with and analyse the methods, data, explanations, and supporting evidence put forward by interested parties, or collected by the investigating authority, in order to ensure that its finding of price distortion is supported, and not diminished or contradicted, by evidence and explanations on the record. In turn, it is the role of panels to assess whether the investigating authority's explanation for its determination is reasoned and adequate by critically reviewing that explanation, in depth, and in light of the facts and explanations presented by the interested parties."66

39. The Appellate Body in US – Countervailing Measures (China) (Article 21.5 – China) agreed with the Panel's view that various forms of government intervention could lead to price distortion, and that whatever method, type of analyses or evidence is chosen, the investigating authorities must provide an adequate explanation as to how price distortion actually results from government intervention in the market.67

40. In this light, the Appellate Body rejected the United States' contention that prices in China cannot be used as benefit benchmarks, and found that the Panel correctly considered that the USDOC did not provide a "reasoned and adequate explanation" on "how" the government of China's interventions described in the Benchmark Memorandum "influenced pricing decisions regarding the inputs at issue and actually resulted in price distortion with respect to the determinations at hand."68 Instead, the United States' argument concerning the rejection of in-country prices was based on country-wide findings about market distortion throughout the entire

60 Appellate Body Report, US – Countervailing Measures (China) (Article 21.5 – China), para. 5.146.
steel sector and "did not engage sufficiently with the price data on the record, which appeared on its face relevant to the analysis of price distortion and was specific to the three inputs at issue."  
According to the Appellate Body, it would have been relevant to take into account the inputspecific Mysteel pricing data on the record and examine the extent to which it affected its overall inference of price distortion.  

41. In a separate opinion in US – Countervailing Measures (China) (Article 21.5 – China), one Division member disagreed with the Appellate Body's finding that the USDOC did not provide an "explanation of how government intervention actually results in price distortion", noting that the US "sufficiently explained why it considers the respective government interventions to have distorted domestic prices" and should not have been "required to rely on or further analyse such in-country prices in the context of a benchmarking analysis." The Division member considered the majority's application of the standard for recourse to out-of-country prices as requiring a quantification of the impact of government intervention and thus as being "overly narrowed", and pointed out:

"In endorsing the Panel's standard, the majority appears also to have required an analysis of in-country prices as a condition for recourse to an alternative benchmark, even in cases where in-country prices are not available on the record. In this way, the result of the majority's analysis contradicts its stated understanding of Article 14(d) as allowing for different types of analysis and evidence for purposes of arriving at a proper benchmark, depending on the circumstances of the case."  

42. In US – Coated Paper (Indonesia), Indonesia alleged that the USDOC had acted inconsistently with Article 14(d) by not using domestic prices of standing timber as the basis to calculate the benchmark price. The Panel rejected this claim. The Panel observed that the Indonesian government was the "predominant supplier of timber harvested during the [period of investigation] – with over 93% of the market", which "made it likely that private prices would be distorted and that owners of private land would align their prices for the harvesting of standing timber to those established by the [government of Indonesia]. From this fact, the Panel found that the position of the Indonesian government was closer to that of a "sole supplier" than a "significant supplier" of this good." According to the Panel, "in such a situation, other evidence would carry limited weight."  

1.6.3 Prior subsidization in the relevant market

43. In Japan – DRAMs (Korea), the Panel determined that prior subsidization of the relevant sector did not necessarily negate the commercial (i.e., "market") nature of subsequent transactions by commercial actors within that sector:

"We begin by acknowledging that there may be circumstances in which the market is distorted to such an extent that the pricing in that market may not be used for the purpose of establishing benefit. Thus, the Appellate Body found in US – Softwood Lumber IV that 'in certain situations where government involvement in the market is substantial, the prices of private suppliers may be artificially suppressed because of the prices charged for the same goods by the government'. This is 'because the government's role in providing the financial contribution is so predominant that it effectively determines the price at which private suppliers sell the same or similar goods, so that the comparison contemplated by Article 14 would become circular'. Furthermore, several panels have recognised that private participation in restructuring programmes might be influenced by government / public participation in those programmes. Thus, the panel in EC – Countervailing Measures on DRAM Chips found that 'the behaviour of ... market players [could be] so distorted by the government's intervention that they can no longer serve as the benchmark against which to measure the alleged government distortion'. Similarly, the panel in Korea –
Commercial Vessels found (with express reference to the Appellate Body's findings in US – Softwood Lumber IV) that 'there could be circumstances in which a government influences the market to such an extent that it becomes distorted, so that private entities no longer operate pursuant to purely commercial principles'.

Japan has referred to the US – Softwood Lumber IV case in support of the JIA's reliance on prior subsidization. However, none of the Appellate Body or panel findings referred to above concerned the role of prior subsidization in distorting markets. Instead, they were concerned with distortion caused by present, or contemporaneous, government involvement and intervention in markets. These cases therefore do not provide support for the JIA's determination.

In our view, prior subsidization of an object does not necessarily mean that the market price for that object is distorted. A buyer may be said to have paid a market price even though the object only exists because of prior subsidies. Indeed, this is the basic premise of consistent WTO rulings to the effect that the payment of fair market value for privatized entities does not confer a benefit. In US – Countervailing Measures on Certain EC Products, the Appellate Body confirmed that '[p]rivatization at arm's length and for fair market value may result in extinguishing the benefit.' Implicit in this finding is the notion that a privatization might take place 'for fair market value'. The fact that a state-owned entity, which only exists because of prior subsidization, may be privatized, or sold, 'for fair market value' undermines Japan's argument that there can be no (fair) market price for an entity that existed, in the JIA's view, only because of prior subsidization.\footnote{Panel Report, Japan - DRAMs (Korea), paras. 7.295-7.297.}