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CANADA – CERTAIN MEASURES AFFECTING THE RENEWABLE ENERGY GENERATION SECTOR

CANADA – MEASURES RELATING TO THE FEED-IN TARIFF PROGRAM

Reports of the Panels

Addendum

This *addendum* contains Annexes A to C to the Reports of the Panels to be found in document WT/DS412/R-WT/DS426/R.

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ANNEX A-1

INTEGRATED EXECUTIVE SUMMARY OF JAPAN

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I. INTRODUCTION[1]

1. This dispute concerns the discriminatory treatment affecting imports of parts and equipment utilized in facilities that generate electricity from wind and solar photovoltaic ("PV") sources (referred to hereafter as "renewable energy generation equipment"[2]) by the Canadian Province of Ontario ("Ontario") pursuant to its feed-in tariff ("FIT") program (the "FIT Program")[3] established on 24 September 2009. Specifically, the FIT Program provides subsidies to generators of renewable energy in Ontario, and it requires that in order to receive those subsidies, wind and solar PV generators use renewable energy generation equipment made in Ontario (the "domestic content requirement").

2. Thus, the Government of Ontario grants and maintains subsidies contingent upon the use of domestic over imported renewable energy generation equipment and accords less favorable treatment to imports of such equipment than that accorded to such equipment produced domestically. Accordingly, Japan submits that the FIT Program, as well as individually executed FIT and microFIT contracts for wind and solar PV projects, are inconsistent with Canada's obligations under: (i) Articles 3.1(b) and 3.2 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"); (ii) Article III:4 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"); and (iii) Article 2.1 of the Agreement on Trade-Related Investment Measures ("TRIMs Agreement").

3. To be clear, Japan challenges the FIT Program, and individually executed FIT and microFIT contracts, *not* because they have the effect of promoting investment in renewable energy generation, but rather because, in light of the domestic content requirement, they discriminate against imports of renewable energy generation equipment in favor of Ontario-made renewable energy generation equipment. Japan does not take issue with Ontario's stated goal of enhancing renewable energy generation. On the contrary, the domestic content requirement, which would have the effect of limiting generators' access to the best available technology from the global marketplace, is inconsistent with that goal. Thus, the claims advanced by Japan cannot properly be characterized as a "trade and environment" dispute; rather, this is a "trade and investment" dispute.

4. In this regard, Canada's recurrent theme throughout its submissions that it is necessary for governments to secure the supply of electricity for the benefit of the public welfare, and particularly renewable electricity for the benefit of the environment, serves only to divert the Panel's attention. Japan shares the view that governments may have a certain role in securing a stable electricity supply and that FIT programs can play a critical role in promoting renewable energy generation. However, the domestic content requirement in Ontario's FIT Program is a *de jure* discriminatory measure that is designed to promote the production of renewable energy generation equipment in Ontario rather than to promote the generation of renewable energy, and this *de jure* discrimination in international trade is not and cannot be justified by the public policy goals on which Canada places such emphasis.

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[1] At the outset, Japan notes that it incorporates its arguments from DS426 into DS412, where applicable.

[2] The term "renewable energy generation equipment" is used to refer to the goods that are listed in the Domestic Content Grids provided in Exhibit D to the FIT Contract, Exhibit JPN-127, and Appendix C to the microFIT Contract, Exhibit JPN-164.

[3] References to the "FIT Program" include both projects over 10 kW (i.e., FIT projects) and projects of 10 kW or less (i.e., microFIT projects). Further, unless specified, terms such as "FIT contracts", "FIT generators", etc. should be understood to refer to "FIT and microFIT contracts", "FIT and microFIT generators", etc., even where the conjunctive term "FIT and microFIT" is not utilized. Similarly, terms such as "FIT contract", "FIT generator", etc. should be understood to refer to "FIT or microFIT contract", "FIT or microFIT generator", etc.

5. Notably, Canada does not contest certain essential facts and legal conclusions presented by Japan, namely: (i) the existence and operation of the FIT Program's domestic content requirement; (ii) the conclusion that, should the FIT Program and contracts be considered to provide "subsidies", those subsidies are "contingent … upon the use of domestic over imported goods", and therefore "prohibited", within the meaning of Article 3.1(b) of the SCM Agreement; and (iii) the conclusion that, should the exemption under Article III:8(a) of the GATT 1994 not apply, the FIT Program and contracts are inconsistent with the terms of Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement. Thus, the principal issues in dispute between the parties are: (i) the proper characterization of FIT contracts under Article 1.1(a) of the SCM Agreement;[4] (ii) whether a "benefit" exists under Article 1.1(b) of the SCM Agreement; and (iii) whether FIT contracts fit within the scope of the government "procurement" exemption under Article III:8(a) of the GATT 1994.

II. FACTUAL BACKGROUND

6. This section provides the factual basis for the claims raised by Japan in this dispute. It discusses, first, the history and operation of Ontario's electricity market in which the FIT Program is established, and second, the history and operation of the FIT Program within the Ontario market. The primary focus of this section is the supply-side and wholesale market within Ontario's electricity market, as it is the FIT Program's impact on this portion of the market that gives rise to violations of Canada's WTO obligations. Moreover, Japan's discussion focuses on the "commodity charge" portion of wholesale and retail prices, as it is that portion of the prices paid by consumers that serves as payment for the electricity itself, rather than payment for services associated with the delivery of that electricity to consumers.

A. THE ONTARIO ELECTRICITY MARKET

7. Historically run by a state-owned monopoly called Ontario Hydro, the Ontario electricity market underwent a series of reforms between 1998 and 2004 that separated the functions of generation, transmission and distribution, and regulation and administration of the electricity market.[5] At present, the Ontario electricity market is a partly liberalized market, with generation, transmission, and distribution involving a mixture of public and private entities, and regulation and administration conducted by several public entities.[6]

1. History of the Ontario Electricity Market

8. The Ontario electricity market began its transition away from a state-owned monopoly system in 1998 with the *Electricity Act* and the *Ontario Energy Board Act*, collectively enacted as the *Energy Competition Act, 1998*.[7] The *Electricity Act, 1998* separated the state-owned monopoly Ontario Hydro into a number of new entities with different functions, including: (i) Ontario Power Generation ("OPG"), which assumed Ontario Hydro's generation assets; (ii) Hydro One Inc. ("Hydro One"), which assumed responsibility for much of the transmission and rural distribution systems; (iii) the Independent Electricity Market Operator ("IMO"), which assumed administrative responsibility for

[4] Japan, however, submits that the particular characterization under Article 1.1(a) is not really a relevant question that the Panel needs to address given the Appellate Body's finding in *US – Large Civil Aircraft (2nd Complaint*) that a transaction may be covered by multiple subparagraphs of Article 1.1(a)(1) and Canada's concession that FIT contracts satisfy this element of the definition of a subsidy. *See* Japan's second written submission, Section III; Japan's opening statement at the second meeting of the Panel, para. 7; Japan's response to Panel question No. 22 after the second meeting.

[5] Japan's first written submission, Appendix I.

[6] Japan's first written submission, Section III.A.

[7] Japan's first written submission, Appendix I.

the electricity grid and electricity markets, and was renamed the Independent Electricity System Operator ("IESO") in 2005; and (iv) the Ontario Electricity Financial Corporation ("OEFC"), which assumed all liabilities and residual assets of Ontario Hydro and administered contracts with a small number of private generators. In addition, the *Ontario Energy Board Act, 1998* designated the Ontario Energy Board ("OEB") as the regulator of the new market, with the authority to, *inter alia*, approve certain rates and prices applicable in the Ontario market.

9. Following three years of reorganization of the industry, a liberalized electricity market opened on 1 May 2002. The IMO assumed the roles of operating and administering this new market, including operation of a computer-automated "stack system" to establish market prices and accommodate the existence of numerous generators and consumers. However, this liberalized market did not invite the sufficient entry of new generators, and the Government of Ontario was forced to further restructure the electricity market in order to facilitate investment in new generation.[8] Accordingly, the Government of Ontario enacted the *Electricity Restructuring Act, 2004*, amending the *Electricity Act, 1998*. Significantly, the *Electricity Restructuring Act, 2004* established the Ontario Power Authority ("OPA"), giving this agency the mandate to ensure a long-term, adequate supply of electricity by entering into contracts with electricity generators in the liberalized electricity supply market. It was pursuant to this mandate that the OPA, on 1 October 2009, established the FIT Program.

2. Operation of the Ontario Electricity Market

10. In this section, Japan describes the various entities relevant to its claims that presently operate in the Ontario electricity market, addressing entities responsible for: first, electricity generation; second, transmission, distribution, and consumption; and third, regulation and administration. Japan then discusses how the prices paid by consumers are determined in order to settle the rates received by electricity generators. Diagrams depicting the basic flows of electricity and money in the Ontario electricity market are provided as Attachment 1 to Japan's first written submission.

(a) Generation

11. Electricity is generated in Ontario by three groups of generators: (i) the government-owned assets of OPG, which are the former generation assets of Ontario Hydro; (ii) non-utility generators ("NUGs"), which are private generators that had contracts to supply to Ontario Hydro prior to the electricity market's partial liberalization, and now supply electricity under contracts with the OEFC or the OPA; and (iii) independent power producers ("IPPs"), which comprise all the other generators in Ontario that have entered the market since its partial liberalization, including FIT generators, and typically supply electricity under contracts with the OPA.[9]

12. The majority of generators receive rates that are either established by government regulations as set forth by the OEB or through electricity supply contracts. In particular, OPG's assets may be divided into "regulated" and "unregulated" assets. "Regulated" OPG assets are those for which OPG receives rates set by the OEB for the electricity OPG generates with those assets. OPG's remaining assets are "unregulated"; however, like many other generators in Ontario, OPG may supply electricity generated from its unregulated assets to the market via contracts with the OPA. Because OPG is the dominant generator in Ontario, the rates provided to OPG's facilities, primarily through OEB regulations, are established in order to prevent OPG from exercising its dominant market position to

[8] *See also* Japan's comment on Canada's response to Panel question No. 1 after the second meeting.
[9] Japan's first written submission, Section III.A.1.

impose excessive prices on consumers, while the rates provided to other generators, such as FIT generators, are aimed at supporting their very entry into and existence in the Ontario market.[10]

13. Generators with assets that receive a regulated or contracted rate (i.e., OPG's regulated assets, OPG's unregulated assets with OPA contracts, NUGs, and most IPPs) will receive that rate regardless of the market rate, known as the hourly Ontario energy price ("HOEP"). These generators will receive the difference between HOEP and their regulated/contracted rate where HOEP is lower than the regulated/contracted rate, and on rare occasions, will be charged the difference between HOEP and their regulated/contracted rate where HOEP is higher than the regulated/contracted rate. This difference between HOEP and the regulated/contracted rate is accounted for through a charge to the consumer called the Global Adjustment ("GA"). By contrast, generators with assets whose rates are not regulated or contracted (i.e., OPG's unregulated assets with no OPA contracts, and IPPs with no OPA contracts) will simply receive the market rate of HOEP.

14. The following table summarizes the known facts regarding the capacity, delivered electricity, and rates received by generators in Ontario's electricity market.

Generator		Year-End 2010 Capacity (MW)	2010 Delivered Electricity (TWh)	Rate (Average Or Range) (¢/kWh)
OPG Assets	Regulated Nuclear	6,606	45.8	5.59
	Regulated Hydro	3,312	18.9	3.41
	Unregulated Hydro	3,684	11.7	3.7
	Unregulated Thermal	6,327	12.2	4.3
NUGs with OEFC Contracts		1,652	59.8	8.0
IPPs with OPA Contracts	Non-FIT/Non-RESOP	11,659.5		5.0 - 23.9
	RESOP	424.2		11.04 - 42.0
	FIT	30.3		10.3 - 80.2
TOTAL		34,710	150.8	N/A

Capacity, Delivered Electricity, and Rates Received By Ontario Electricity Generators

(b) Transmission, Distribution, and Consumption

15. Depending on their generation capacity, generators typically connect to the transmission system or to the distribution system.[11] Specifically, generators with capacity greater than 10 MW (including large-capacity FIT generators) typically connect to the transmission system, while generators with capacity of 10 MW or less (including small-capacity FIT and microFIT generators) typically connect to the distribution system via a local distribution company ("LDC"). Whether a generator is transmission-connected or distribution-connected is relevant because the process for settling payments for generated electricity, including electricity generated under the FIT Program, differs based upon how a generator is connected to the grid.

16. As for consumption, large industries generally connect directly to the transmission system, while other consumers (i.e., residences, businesses, and governmental entities) connect to the distribution system.[12]

[10] Japan's comment on Canada's response to Panel question No. 5, para. 7.
[11] Japan's first written submission, Section III.A.2.
[12] Japan's first written submission, Section III.A.3.

17. The manner in which generators connect to the grid, and by which electricity flows to consumers, is depicted in the Flow of Electricity diagram provided as Attachment 1 to Japan's first written submission.

(c) Regulatory and Administrative Entities

18. For purposes of the present dispute, the OPA, IESO, and OEB are the key entities regulating and administering the current market for electricity supply in Ontario.[13]

19. The OPA was established by the *Electricity Restructuring Act, 2004*, amending the *Electricity Act, 1998*. It was created because the liberalized market structure established after the dissolution of Ontario Hydro in 1998 did not invite the sufficient entry of new generators, particularly generators using alternative and renewable energy sources. The Government delegated to the OPA responsibility for medium- and long-term system development, i.e., forecasting demand for and reliability of electricity resources, and contracting with electricity generators to meet this demand. The Government also delegated to the OPA authority to impose charges on consumers to recover its costs of contracting with electricity generators. Thus, the OPA enters into contracts with generators for the supply of electricity, which includes FIT contracts, and charges consumers the amounts promised to generators in excess of market rates.

20. The IESO is responsible for administering the electricity market (i.e., determining how much electricity is produced and consumed, by whom, when, and at what market rate) and conducting the operation of the electricity grid to ensure real-time coordination between electricity supply and demand.[14] It imposes market rules for the operation of the electricity grid, pursuant to which it operates a computer-automated settlement mechanism that uses supply and demand "stacks" to determine for every five-minute interval: (i) which generators supply electricity and which consumers consume electricity; (ii) the amount of electricity to be supplied and consumed; and (iii) the market rate (i.e., HOEP) for that electricity. Further, the IESO settles payments among participants in the IESO-administered wholesale market. It does so by collecting funds from wholesale consumers and distributing them to electricity generators in accordance with the rates owed to each generator (whether the market rate or a regulated/contracted rate).

21. The OEB is the agency that regulates Ontario's electricity sector in conformity with the public interest. It does so through its authority to set transmission and distribution rates, and license all market participants. The OEB determines the payments to be made to the "regulated" assets of OPG and also maintains the Regulated Price Plan ("RPP"), which establishes the prices paid by most retail consumers to their LDCs for the electricity they consume (i.e., for the electricity commodity, excluding service charges). In addition, the OEB is responsible for establishing, *inter alia*, codes for the transmission system, distribution system, and retail settlement.

(d) Price Determination and Settlement of Payments

22. The *prices paid* by consumers at the wholesale and retail levels in Ontario must be distinguished from the *rates received* by electricity generators, which may be the market rate of HOEP or a regulated or contracted rate generally higher than HOEP.[15]

23. At the wholesale level, the total wholesale price charged to consumers consists of: (i) the hourly Ontario energy price (i.e., HOEP), which is the entire rate owed to generators that do not have

[13] Japan's first written submission, Section III.A.4.
[14] *See also* Japan's first written submission, Appendix II.
[15] Japan's first written submission, Sections III.A.5 and III.A.6.

regulated or contracted rates; (ii) the Global Adjustment, which is distributed only to generators with regulated or contracted rates, in order to make up the difference between HOEP and the regulated/contracted rate; and (iii) various service charges.

24. The first component of the electricity price, HOEP, is set in the IESO-administered market by the IESO's matching of electricity supply and demand through a computer-automated "stack system" to determine the market price owed to all Ontario generators. The second component comprises the additional amounts owed to generators that receive regulated/contracted rates (i.e., OPG regulated assets that have rates set by the OEB, OPG unregulated assets that have contracts with the OPA, NUGs that have contracts with the OPA or OEFC, and the vast majority of IPPs that have contracts with the OPA). These additional amounts are collected from consumers through the Global Adjustment. While the GA can either be positive or negative, depending on whether the market rate of HOEP is lower or higher than the fixed rates, it has been consistently positive since at least 2009, as the OPA has entered into additional contracts for electricity supply at rates higher than HOEP.

25. At the retail level, prices paid by retail consumers are generally determined by adding to the wholesale price – i.e., the total of HOEP, GA, and other fees and charges – an additional distribution charge to cover the cost of delivering electricity to the consumer. Residential and small business consumers that purchase electricity from their LDCs based on use pay RPP prices set by the OEB. Retail consumers not under the RPP (generally larger businesses) may enter into a retail contract with an LDC or licensed electricity reseller, paying a contracted price for electricity for a fixed period, plus the GA.

26. Importantly, the Government of Ontario purchases electricity from LDCs like any other retail customer in Ontario – i.e., by paying market prices based on HOEP plus the GA. Notably, energy use in government-owned facilities in 2008-09 was approximately 0.307 TWh, which is a mere fraction of the amount of electricity that could be expected to be generated in a given year under wind and solar PV FIT contracts.[16]

27. The manner in which the payments made by consumers for electricity consumed flow to electricity generators is depicted in the Flow of Money diagram provided as Attachment 1 to Japan's first written submission, and is addressed in greater detail in the discussion of the settlement process under the FIT Program in Section II.B.2.c below.

B. THE FIT PROGRAM

28. The FIT Program was established on 1 October 2009 as the Government of Ontario's current program to encourage the entry of renewable energy generators into the market by guaranteeing those generators, through the execution of a contract with the OPA, a specified above-market rate for a specified term up to a specified contract capacity.[17]

29. The FIT Program is divided into two streams: FIT and microFIT. The FIT stream refers to facilities with a capacity over 10 kW, and the microFIT stream refers to facilities with a capacity of 10 kW or less. FIT and microFIT contracts are available for facilities using the following technologies: biomass, biogas, waterpower, landfill gas, solar PV, and wind. However, only wind facilities with capacity greater than 10 kW (i.e., FIT), solar PV facilities with capacity greater than 10 kW (i.e., FIT), and solar PV facilities with capacity less than or equal to 10 kW (i.e., microFIT) must satisfy a domestic content requirement in order to receive a contract, and ultimately payments, under the FIT Program.

[16] *See* Japan's second written submission, Section IV.A.
[17] Japan's first written submission, Section III.B.

1. History of the FIT Program

30. On 14 May 2009, the Government of Ontario enacted the *Green Energy and Green Economy Act, 2009*, which, *inter alia*, added Section 25.35 to the *Electricity Act, 1998*, providing the legal basis for the FIT Program.[18] This law was intended to promote entry into the market of renewable energy generators, which otherwise did not have sufficient incentive to enter the market. Subsequently, on 24 September 2009, the Minister of Energy issued a directive instructing the OPA to create the FIT Program.

31. At issue in this dispute is the FIT Program's domestic content requirement, which the Government of Ontario instituted in order to encourage investment in Ontario in facilities that manufacture renewable energy generation equipment. In doing so, the provincial government aimed to move the manufacturing of renewable energy generation equipment into Ontario, to the detriment of imports of such goods. This domestic content requirement impedes Canada's asserted objective of increasing renewable energy generation in the Ontario electricity supply.

2. Operation of the FIT Program

32. The FIT Program is governed and administered by several key documents issued by the OPA.[19] The FIT Rules set out the requirements around project eligibility, application process, connection availability assessment, and contract issuance. The model FIT Contract is used to execute individual FIT contracts, and provides the standard terms and conditions applicable to all FIT projects, as well as technology-specific conditions that must be reviewed prior to participation in the Program. In addition, the OPA issues Standard Definitions that apply to the FIT Rules and FIT Contract. It also makes available a FIT Program Overview for applicants that explains the requirements of the FIT Rules and model FIT Contract. With regard to the microFIT stream, the OPA similarly issues the microFIT Rules, model microFIT Contract, and microFIT Program Overview.

33. In the IESO Market Manual, the FIT Program is categorized as a "Standard Offer Program", which means that the Program "provides a 'standard price' that eligible generators receive simply by complying with the eligibility criteria". In other words, upon a generator's satisfaction of some basic eligibility requirements, the OPA becomes obligated under a FIT contract to pay the generator the above-market contract rate for electricity produced throughout the contract term.

(a) Domestic Content Requirement

34. For purposes of this dispute, the most important requirement that a wind or solar PV FIT generator must satisfy is the domestic content requirement.[20] Pursuant to Section 6.4(b) of the FIT Rules, FIT generators that do not satisfy the domestic content requirement are in default under the FIT contracts, while for microFIT generators, an offer of a microFIT Contract is strictly conditional on compliance with the microFIT domestic content requirement.

35. The Domestic Content Level of a FIT or microFIT project is determined by reference to a "Domestic Content Grid" provided in Exhibit D to the FIT Contract and Appendix C to the microFIT Contract, which lists the goods and services that may be utilized to satisfy the Minimum Required Domestic Content Level for a particular generation facility, and specifies the qualifying percentage that each good or service may contribute toward the Domestic Content Level of a particular project. In order for solar PV (FIT and microFIT) or wind (FIT) generators to receive the guaranteed, long-

[18] Japan's first written submission, Section III.B.1.
[19] Japan's first written submission, Section III.B.2.
[20] Japan's first written submission, Section III.B.3.

term rates under the FIT Program, they must utilize a sufficient amount of the Ontario-origin goods and services listed in the applicable Domestic Content Grid to satisfy the applicable Minimum Required Domestic Content Level. This, by itself, establishes an incentive for such generators to utilize goods of Ontario origin in preference to goods of other origins in their solar PV or wind generation facilities; however, the Domestic Content Grids in fact *require* that for *all* project types, *at least some* goods manufactured, formed, or assembled in Ontario *must* be utilized in order to satisfy the Minimum Required Domestic Content Levels, evidencing the particularly pernicious nature of the domestic content requirement at issue in this dispute. The following table summarizes the Minimum Required Domestic Content Levels for FIT and microFIT contracts.

	Wind (FIT)		Solar PV (FIT)		Solar PV (microFIT)	
Milestone Date For Commercial Operation	2009-2011	2012-	2009-2010	2011-	2009-2010	2011-
Minimum Required Domestic Content Level	25%	50%	50%	60%	40%	60%

Minimum Required Domestic Content Levels for Wind and Solar PV FIT Contracts

(b) FIT Contract Rates and Terms

36. All FIT projects other than waterpower projects have a set term of 20 years. Pursuant to the FIT or microFIT Contract, a generator is guaranteed payment of the contract rate for all the electricity it produces (or could have produced but was instructed by the IESO not to) up to its project's contract capacity throughout the term of the contract.[21]

37. Rates under the FIT Program vary by the type of renewable fuel, contract capacity and, in certain cases, the category of applicant or other project characteristics. The following table summarizes the applicable rates for wind and solar PV projects (including FIT and microFIT) as of 3 June 2011.

Renewable Fuel	Size Tranches	Contract Rate (cents/kWh)	Escalation Percentage
Solar PV			
Rooftop	≤ 10 kW	80.2	0%
Rooftop	> 10 ≤ 250 kW	71.3	0%
Rooftop	> 250 ≤ 500 kW	63.5	0%
Rooftop	> 500 kW	53.9	0%
Ground Mounted	≤ 10 kW	64.2	0%
Ground Mounted	> 10 kW ≤ 10 MW	44.3	0%
Wind			
Onshore	Any size	13.5	20%
Offshore	Any size	19.0	20%

Contract Rates for Wind and Solar PV FIT Projects

(c) Settlement Process

38. The settlement process for electricity generators, including FIT and microFIT generators, varies depending on whether the generation facility is connected to the transmission system or the distribution system.[22] The primary difference is that, generators that are connected to the transmission system settle the HOEP with the IESO and the Global Adjustment with the OPA, while generators

[21] Japan's first written submission, Sections III.B.2.a.ii, III.B.2.b.
[22] Japan's first written submission, Sections III.B.2.a.iii, III.B.2.b.

connected to the distribution system settle their entire contract rate (i.e., HOEP and the GA) with their local distributor, which in turn settles the GA with the OPA through the IESO. The IESO's active role in collecting the Global Adjustment from electricity consumers and the OPA's active role in transferring to FIT generators the portions of the Global Adjustment due to them as a result of FIT contracts is well established in various Ontario statutes and regulations.

39. For transmission-connected projects, the FIT generator receives the HOEP from the IESO through the IESO settlement system (or pays the HOEP if it is negative), and then settles the difference between the contract rate and the HOEP (or zero, whichever is greater) with the OPA. The OPA receives the funds to settle this difference from the IESO's collection of the Global Adjustment from electricity consumers, and uses those funds to pay the FIT generators the difference between the contract rate and the HOEP.

40. For distribution-connected projects, the generator settles the entire contract rate (i.e., the full amount owed to the generator under the contract) with the LDC, which then settles with the OPA through the IESO settlement system discussed above to ensure that the LDC pays only the wholesale price for electricity.

41. Importantly, however, regardless of whether a project is transmission-connected or distribution-connected, ultimate liability for payments under FIT contracts and microFIT contracts lies with the OPA.

3. Individually Executed FIT and microFIT Contracts for Wind and Solar PV Projects

42. The measures at issue in this dispute include not only the domestic content requirement of the FIT Program as such, but also the domestic content requirements contained in individually executed FIT and microFIT contracts for wind and solar PV projects as applied.[23] These individually executed contracts serve not only as evidence of the operation of the domestic content requirement in the FIT Program, but also as measures unto themselves that are challenged by Japan as inconsistent with Canada's WTO obligations.

43. Data provided by the OPA confirm the existence of hundreds of executed wind FIT, solar PV FIT, and solar PV microFIT contracts as of 24 March 2011. In addition, statistics made publicly available by the OPA indicate that as of 30 September 2011 (i.e., in the first two years of the FIT Program), OPA had executed 1,786 solar PV contracts (including microFIT) worth 1,240 MW and 71 wind contracts worth 2,575 MW, and it has likely continued to execute additional such contracts since that date. Each of these contracts contains Minimum Required Domestic Content Levels in accordance with the applicable versions of the FIT or microFIT Rules and Contracts, and a large number of these contracts have been provided with a Connection Date and/or are already in commercial operation.

44. Thus, an objective assessment of the available facts pursuant to Article 11 of the DSU should lead the Panel to conclude that all the wind FIT, solar PV FIT, and solar PV microFIT contracts that are already in commercial operation have satisfied their Minimum Required Domestic Content Levels, and FIT payments are currently being made under these contracts.

[23] Japan's first written submission, Section III.B.4.

III. LEGAL ARGUMENT

A. ORDER OF ANALYSIS OF JAPAN'S CLAIMS AND JUDICIAL ECONOMY

45. In this dispute, Japan raises claims and arguments under: (1) the SCM Agreement; (2) the GATT 1994; and (3) the TRIMs Agreement. Japan submits that the Panel should begin its analysis with Japan's SCM Agreement arguments, then proceed to Japan's GATT 1994 arguments, and finally conclude with Japan's TRIMs Agreement arguments. The Panel may not, however, exercise judicial economy with respect to any of Japan's claims; rather, the Panel must reach findings on all three sets of claims.[24]

46. The Panel should begin with Japan's SCM Agreement arguments for three principal reasons. First, the Appellate Body stated in *EC – Bananas III* that the provisions from the agreement that "deals specifically, and in detail" with the measures at issue should be analyzed first,[25] and in the present case, the FIT Program precisely provides subsidies to FIT generators contingent on their use of domestic over imported goods. Second, if Japan's SCM Agreement arguments are successful, they would allow for a remedy under Article 4.7 of the SCM Agreement, which would resolve this dispute more promptly than the remedy under Article 19.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") that would result from a violation of the GATT 1994 or the TRIMs Agreement. Third, a favorable finding under Japan's GATT 1994 and TRIMs Agreement arguments would not allow the Panel to exercise judicial economy with respect to Japan's SCM Agreement arguments, so the Panel would not be able to eliminate this part of its assessment by beginning with the GATT 1994 and TRIMs Agreement arguments.

47. As between Japan's arguments under the GATT 1994 and TRIMs Agreement, Japan submits that the Panel should examine the GATT 1994 arguments first for four principal reasons. First, both Japan and Canada have presented their GATT 1994 arguments before their TRIMs Agreement arguments. Second, there are no disagreements between the parties that the measures at issue are trade-related investment measures ("TRIMs") or that they are inconsistent with the terms of Article III:4 of the GATT 1994; the only dispute between the parties is whether the measures are excluded from the scope of GATT Article III by virtue of Article III:8(a). Third, prior WTO panels have not uniformly analyzed one of these agreements before the other. Fourth, a particular mandatory sequence of analysis is not required unless failure to follow such a sequence "would amount to an error in law",[26] and here analyzing the GATT 1994 arguments prior to the TRIMs Agreement arguments would not amount to an error in law.

48. Finally, the Panel may not exercise judicial economy with respect to any of Japan's claims because violations of the SCM Agreement result in recommendations and rulings pursuant to Article 4.7 of the SCM Agreement, while violations of the GATT 1994 and TRIMs Agreement result in recommendations and rulings pursuant to Article 19.1 of the DSU. The Panel is required to make all findings that "will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements" pursuant to Article 11 of the DSU, so as to "secure a positive solution to a dispute" in accordance with Article 3.7 of the DSU. Because recommendations and rulings solely pursuant to Article 4.7 of the SCM Agreement or solely pursuant to Article 19.1 of the DSU may be insufficient to resolve the present dispute, the Panel must consider all of Japan's claims and arguments.

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[24] *See* Japan's response to Panel question No. 24 after the first meeting.

[25] Appellate Body Report, *EC – Bananas III*, para. 204.

[26] Panel Reports, *China – Auto Parts*, para. 7.99, citing Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 109.

B. THE FIT PROGRAM, AND FIT AND MICROFIT CONTRACTS, PROVIDE SUBSIDIES CONTINGENT UPON THE USE OF DOMESTIC OVER IMPORTED GOODS INCONSISTENT WITH CANADA'S OBLIGATIONS UNDER ARTICLES 3.1(B) AND 3.2 OF THE SCM AGREEMENT

1. Article 1.1(a) of the SCM Agreement: "financial contribution by a government or any public body" or "any form of income or price support"

49. Japan begins by establishing that the guaranteed electricity rates provided under the FIT Program and contracts satisfy the first element of the definition of a subsidy under Article 1.1(a) of the SCM Agreement.[27] Japan argues principally that the guaranteed rates that the OPA pays and contractually commits itself to pay under the FIT Program and contracts result in a "financial contribution by a government or any public body" as defined under Article 1.1(a)(1) because they involve a "direct transfer of funds" or "potential direct transfer of funds" from the Government of Ontario. Japan further submits that these guaranteed rates are a form of income or price support for FIT generators within the meaning of Article 1.1(a)(2).

50. The FIT Program and contracts constitute "a government practice [that] involves a direct transfer of funds" because, under the FIT Rules and contracts, the OPA is "liable to the Supplier for the Contract Payments". As defined in the FIT Standard Definitions, "Contract Payments" refer to "all payments to a Supplier under a FIT Contract … determined for each Settlement Period in accordance with Exhibit B of the FIT Contract". Generally speaking, Exhibit B of the FIT Contract operates to provide that:

- in the general case where a FIT generator delivers electricity to the grid, the Contract Payment on a per kWh basis is equal to the contract rate minus the HOEP; and

- in the special case where a FIT generator is instructed not to deliver electricity to the grid, the Contract Payment on a per kWh basis is equal to the entire contract rate.

The Government of Ontario delegates to the OPA the authority to "establish and impose charges to recover from consumers its costs and payments under procurement contracts".[28] Pursuant to this authority, the OPA collect these Contract Payments from consumers through the Global Adjustment, and then distributes them to FIT generators pursuant to the terms of their FIT contracts. Japan submits these payments are most appropriately characterized as "direct transfer[s] of funds".[29]

51. Independent of the actual payment of FIT contract rates, the OPA's commitments in FIT contracts to provide these rates over a fixed term also result in a "potential direct transfer of funds". Under a FIT contract, a FIT generator becomes entitled to guaranteed payments for all electricity generated (or foregone per IESO instruction) to the extent of its contracted capacity for the contract term, which is 20 years in the case of wind and solar PV contracts. The OPA's execution of FIT contracts, which commits the agency to disburse these payments, is thus a government practice involving a "potential direct transfer of funds".[30]

52. These financial contributions are "by a government or any public body" because the OPA, which is ultimately liable for all FIT payments, is a "public body". The OPA is unmistakably a public

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[27] *See* Japan's first written submission, Section IV.A.1; Japan's response to Panel question No. 5 after the first meeting.

[28] *Electricity Act, 1998*, Exhibit JPN-005, Section 25.20.

[29] Japan's first written submission, paras. 189-191; Japan's response to Panel question No. 5 after the first meeting, paras. 2-3.

[30] Japan's first written submission, paras. 192-194.

body because it possesses and exercises governmental authority, expressly vested in it by statute and directives of the Minister of Energy, and because the Government of Ontario exercises meaningful control over the agency and its conduct.[31]

53. Even if the Panel finds that the OPA's payments to FIT generators and payment commitments under FIT contracts are not financial contributions by a public body, Japan submits that the FIT Program and contracts provide a form of "income or price support" to electricity generators in the sense of Article XVI of the GATT 1994. An interpretation of the term "income or price support" in accordance with the customary international law rules of treaty interpretation shows that the FIT Program and contracts would constitute such "income or price support" if they contributed to the income or prices of FIT generators, thereby operating to reduce imports of any products into Ontario and distorting international trade. Here, by paying guaranteed above-market rates to renewable energy generators, as well as committing itself to providing these rates over a 20-year term for wind and solar PV generators, the Government of Ontario contributes to the prices and income enjoyed by FIT generators and incentivizes the production of renewable energy. Moreover, because the Government of Ontario makes this contribution subject to a domestic content requirement (i.e., receipt is contingent on the FIT generator's use of renewable energy generation equipment made in Ontario), it incentivizes the production of such equipment in Ontario, and reduces imports of such equipment into Ontario. For these reasons, the FIT Program and contracts constitute a form of "income or price support".[32]

54. Canada's argument that the FIT Program and contracts are properly characterized as "purchases [of] goods" by the OPA, and not as "direct transfer[s] of funds", "potential direct transfers of funds", or "income or price support" is without merit.[33]

55. Canada's argument is without merit because "purchase[] [of] goods" is not even a plausible characterization of these measures. The verb "purchase" means broadly "[t]o *obtain*; to gain *possession* of", and more narrowly "[t]o *acquire* in exchange for *payment* in money or an equivalent; to buy".[34] However, the FIT Program is not aimed at promoting renewable energy generation in order to supply electricity solely to the OPA or other agencies of the Government of Ontario, but to all electricity consumers in Ontario. Nor is the FIT Program designed to allow the Government of Ontario to sell electricity generated under FIT contracts to local distributors and/or consumers. The defining aspect of FIT contracts is that they ensure renewable energy generators payments in excess of those that they would receive but for the FIT Program, and accordingly, the OPA never has possession of or exercises control over obtaining of the electricity supplied under the FIT Program.[35] The OPA does not have any interest in obtaining the possession of such electricity, given that it does not consume the electricity for its own use, does not seek profit from its re-sale, and does not manage or control the production and transmission of electricity in Ontario.[36] In fact, the OPA does not obtain, gain possession of, or acquire the electricity delivered under FIT contracts; rather, that electricity is injected into the grid and goes straight to consumers.

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[31] Japan's first written submission, paras. 195-204.

[32] Japan's first written submission, paras. 205-214.

[33] *See* Japan's opening statement at the first meeting of the Panel, Section III.B.1; Japan's second written submission, Section III; Japan's opening statement at the second meeting of the Panel, Section II.A; Japan's response to Panel question No. 25 after the second meeting; Japan's comment on Canada's response to Panel question No. 24 after the second meeting.

[34] *The Oxford English Dictionary*, OED Online, Oxford University Press, http://www.oed.com/view/Entry/154832 (emphases added).

[35] Japan's opening statement at the first meeting of the Panel, para. 23.

[36] *See* Japan's comment on Canada's response to Panel question No. 47, para. 60.

56. Canada argues that the characterization of FIT contracts as "purchases" under the text of its domestic measures shows that they are "purchases" for purposes of WTO law, but this argument has been rejected by the Appellate Body.[37] Most recently, in *US – Large Civil Aircraft (2nd Complaint)*, the Appellate Body said in no uncertain terms: "we note that the classification of a transaction under municipal law is not 'determinative' of whether that measure can be characterized as a financial contribution under Article 1.1(a)(1) of the *SCM Agreement*".[38] Thus, the characterization and treatment of a measure under domestic law is not determinative of its status under WTO law. A conclusion to the contrary would be tantamount to enabling Canada, the responding Member, to determine whether its measures are consistent with its WTO obligations, which "clearly, cannot be so".[39]

57. Canada also argues that the presence of conditions for FIT payments, such as the delivery of electricity to the grid, serves as evidence that they are "purchases" of electricity, and not "direct transfer[s] of funds". However, the Appellate Body has explained that "what is captured in [Article 1.1(a)(1)(i)] is a government's provision … of funds, *irrespective of whether this is done gratuitously or in exchange for consideration*",[40] noting that a "conditional grant" (which is analogous to the situation of FIT payments) is an indisputable example of a "direct transfer of funds". Thus, the conditions attached to FIT payments are neutral or irrelevant to whether FIT contracts may be legally characterized as "direct transfer[s] of funds".[41]

58. The Appellate Body has explained that under Article 1.1(a) of the SCM Agreement, a panel must, first, gain a proper understanding of the relevant characteristics of a measure, and second, assess whether and where that measure falls under Article 1.1(a).[42] Japan submits that the relevant characteristics of the FIT Program with respect to wind and solar PV generators are as follows:

- the FIT generator must build a generation facility while satisfying a requirement to use Ontario-made wind and solar PV generation equipment in constructing the facility;

- in return, the OPA promises to pay an above-market rate that guarantees the recovery of costs plus a reasonable return on investment over a 20-year period;

- the OPA pays that rate to the generator upon the generator delivering electricity to the grid, or upon the generator withholding such delivery pursuant to instructions from the IESO, up to the contract capacity; and

- the electricity injected into the grid goes straight to consumers, without the OPA or any other government agency taking possession of the electricity, having the right to take possession of the electricity, using or intending to use the electricity, or seeking any profit from the resale of the electricity.

These relevant characteristics reveal that the nature of FIT contracts may be summarized as a program to finance the construction of renewable energy generation facilities in Ontario, where such facilities that use wind and solar PV technologies are required to use locally made generation equipment in

[37] Japan's second written submission, Section III.A.

[38] Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 586 (quoting Appellate Body Report, *US – Softwood Lumber IV*, para. 56). *See also id.* paras. 593, 604.

[39] Appellate Body Report, *India – Patents (US)*, para. 66.

[40] Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 618 (emphasis added).

[41] Japan's second written submission, paras. 43-45.

[42] *See* Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, paras. 585-586.

their production of electricity.[43] Accordingly, FIT contracts are properly characterized as "direct transfer[s] of funds", "potential direct transfers of funds", or "income or price support" – and not as "purchases [of] goods" – under Article 1.1(a) of the SCM Agreement.

59. However, even if FIT contracts may be characterized as "purchases [of] goods", the Panel may still find them to be characterized as "direct transfer[s] of funds", "potential direct transfers of funds", or "income or price support". This is because the Appellate Body in *US – Large Civil Aircraft (2nd Complaint)* made clear that a transaction may be covered by multiple subparagraphs of Article 1.1(a)(1),[44] and moreover, the presence of "or" between Articles 1.1(a)(1) and 1.1(a)(2) does not preclude a measure from being plausibly characterized under both of those provisions. Thus, the Panel may determine whether FIT payments confer any benefit to FIT generators on the premise that FIT payments are "direct transfer[s] of funds" (or alternatively "potential direct transfers of funds" or "income or price support"), even if FIT contracts may also be characterized as "purchases" of electricity.[45]

60. Finally, if the Panel were to find that FIT contracts should be characterized *only* as government purchases of goods (*quod non*), Japan has still met its burden in this dispute. This is because purchases of goods are explicitly listed in Article 1.1(a)(1)(iii), and therefore, Canada's argument for "purchases of goods" should be deemed as its admission that FIT contracts satisfy the first element of the definition of a subsidy, i.e., "a financial contribution by a government or a public body". Further, the benefit analysis for FIT contracts characterized as purchases of goods would be no different than the benefit analysis for FIT contracts characterized as direct transfers of funds – i.e., the benefit may be assessed, on a per unit basis, by taking the difference between the FIT rate and the market rate for electricity in Ontario. Thus, if the Panel were to find that FIT contracts should be characterized *only* as government purchases of goods, the Panel should still find that FIT contracts are subsidies under Article 1.1 of the SCM Agreement, and prohibited subsidies under Articles 3.1(b) and 3.2 of that Agreement.[46]

2. Article 1.1(b) of the SCM Agreement: "benefit"

61. Next, Japan establishes that the FIT Program and contracts confer a "benefit" on FIT generators, fulfilling the second element of the definition of a subsidy under Article 1.1(b) of the SCM Agreement.[47] Because Japan has raised a prohibited subsidy claim under Articles 3.1(b) and 3.2 of the SCM Agreement, it is sufficient for Japan to show only the *existence* of a benefit; no precise quantification of the benefit is necessary.

62. A "benefit" is to be assessed from the perspective of the recipient of a financial contribution with reference to a market benchmark. In particular, the Appellate Body and WTO panels have found that a "financial contribution" confers a "benefit" when it is provided on terms that are better than those that would have been available to the recipient on the market. Thus, "it is necessary to determine whether the financial contribution *places the recipient in a more advantageous position*

[43] Japan's second written submission, para. 36; Japan's response to Panel question No. 25 after the second meeting, para. 9.

[44] *See* Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 613 and note 1287.

[45] Japan's opening statement at the first meeting of the Panel, para. 28; Japan's opening statement at the second meeting of the Panel, para. 7; Japan's comment on Canada's response to Panel question No. 24 after the second meeting.

[46] Japan's response to Panel question No. 22 after the second meeting, para. 7.

[47] *See* Japan's first written submission, Section IV.A.2; Japan's opening statement at the first meeting of the Panel, Section III.B.2; Japan's second written submission, Section II; Japan's opening statement at the second meeting of the Panel, Section II.B; Japan's response to Panel question No. 28 after the second meeting.

than would have been the case but for the financial contribution …. Accordingly, a financial contribution will only confer a 'benefit', *i.e.*, an advantage, if it is *provided on terms that are more advantageous than those that would have been available to the recipient on the market*".[48]

63. Because each form of "financial contribution" confers a different type of "benefit", a "benefit" must be examined in relation to the provision of Article 1.1(a) at issue. Therefore:

- The benefit conferred with respect to the direct transfer of funds, on a per unit basis, may be assessed by examining the difference between the rate guaranteed by the OPA under the FIT contract and the rate that the FIT generator would have received for its electricity in the wholesale market where the rate is established at the point where electricity supply matches demand.

- The benefit conferred with respect to the potential direct transfer of funds may be assessed by examining the market value of the commitments under a FIT contract compared to what a FIT generator has given up or "paid" to obtain the FIT contract, or by comparing the commitments under a FIT contract with the terms that a FIT generator may be able to obtain in a hypothetical contract from a market-based purchaser of electricity.

- With respect to price support, because FIT generators' prices are supported by the difference between the market rate and FIT contract rate, a benefit analysis would correspond closely to the benefit analysis for a direct transfer of funds.

- And with respect to income support, because FIT generators' incomes are supported by the difference between the income stream promised by the OPA under a FIT contract and the income stream that the generators would receive on the market, a benefit analysis would involve taking the income stream derived from FIT contract rates and subtracting the income stream derived from a market rate, thus following in part from the benefit analysis for potential direct transfers of funds.[49]

64. Given the facts of this dispute, each of these analyses requires subtraction of the market value of electricity in Ontario (which is, of course, dependent on the market price of electricity in Ontario) from the amounts provided under FIT contracts.[50] Because it is sufficient for Japan to show only the existence of a benefit, and no precise quantification of the benefit is necessary, Japan offers the Panel several possible benchmarks for the market price of electricity in Ontario, each of which clearly demonstrate the existence of a benefit under the FIT pricing scheme.

65. In particular, the Panel should consider Japan's proposed benchmarks as follows:

- HOEP: The most appropriate market benchmark because it is: (i) the rate that is determined based on supply and demand in Ontario; and (ii) the rate a renewable energy generator in Ontario *would actually receive* but for the FIT Program;

- Japan's calculated wholesale rate: Japan's calculation of the weighted average rate for the electricity commodity in Ontario provided to generators other than renewable energy generators in Ontario;

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[48] *See* Appellate Body Report, *Canada – Aircraft*, para. 149 (emphasis added); Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 849. *See also* Panel Report, *Brazil – Aircraft*, para. 7.24; Panel Report, *Korea – Commercial Vessels*, para. 7.427.

[49] Japan's first written submission, Sections IV.A.2.a, IV.A.2.b, and IV.A.2.c.

[50] Japan's response to Panel question No. 21 after the first meeting, para. 2.

- The RPP commodity charge: The OEB's calculation under the RPP of the weighted average rate for the electricity commodity in Ontario, which acts as the *ceiling* for the amount that Ontario consumers pay for the electricity commodity in Ontario, taking into account the rates provided to *all* electricity generators in Ontario, meaning Ontario generators should be unable to enter the market and expect to receive a rate higher than this rate; and

- Out-of-jurisdiction wholesale rates: Average wholesale rates in deregulated/competitive electricity markets outside Ontario – specifically the close-proximity markets of Alberta, New York, New England, and the Mid-Atlantic United States – which the Panel may turn to *if* it determines that the aforesaid in-jurisdiction rates are distorted in any way.[51]

66. For HOEP, Japan notes that any generator in Ontario, including a renewable energy generator, may participate in the wholesale market administered by the IESO and sell electricity at HOEP without any kind of long-term electricity supply contract, provided that the generator satisfies all technical and regulatory requirements.[52] For the RPP commodity charge, Japan notes that consumers in Ontario will continue to pay the same rate for the electricity commodity as they are currently paying, and therefore, but for the FIT Program, the OPA may enter into a supply contract with a new generator that can supply electricity at that rate or less, because it will not require the OPA to increase the amount of the Global Adjustment, and consequently, the rate consumers will pay. In determining the market benchmark, it would be unreasonable to assume that the OPA could enter into a supply agreement with a generator that can supply electricity at a rate higher than the rate Ontario consumers currently pay, because that would force consumers to pay more than they are currently paying.[53]

67. Japan's proposed benchmarks, and a comparison with FIT rates showing the existence of a benefit, are summarized in the following table.

Benchmark Rates	
Benchmark	**Rate (cents/kWh)**
Weighted Average HOEP	3.79
Weighted Average wholesale rate for generators in Ontario other than FIT and RESOP generators (by capacity)	7.02
Weighted Average wholesale rate for generators in Ontario other than FIT and RESOP generators (by delivery)	7.13
Average wholesale rate in Alberta	5.2
Average wholesale rate in New York ISO	6.1
Average wholesale rate in New England ISO	5.3
Average wholesale rate in Mid-Atlantic US	4.9
Ontario RPP retail prices established by OEB (conventional meters)	7.1 (low-tier) 8.3 (high-tier)
Ontario RPP retail prices established by OEB (smart meters)	6.2 (off-peak) 9.2 (mid-peak) 10.8 (on-peak)
FIT Rates	
FIT Generator	**Rate (cents/kWh)**

[51] Japan's response to Panel question No. 7 after the first meeting, paras. 10-16; Japan's second written submission, paras. 8-12; Japan's opening statement at the second meeting of the Panel, paras. 14-19; Japan's response to Panel question No. 31 after the second meeting.

[52] Japan's second written submission, para. 10. *See also* Japan's comment on Canada's response to Panel question No. 2 after the second meeting, para. 3.

[53] Japan's response to Panel question No. 26 after the second meeting, para. 15.

Benchmark Rates	
Benchmark	**Rate (cents/kWh)**
Solar PV, Rooftop, ≤ 10 kW	80.2
Solar PV, Rooftop, > 10 ≤ 250 kW	71.3
Solar PV, Rooftop, > 250 ≤ 500 kW	63.5
Solar PV, Rooftop, > 500 kW	53.9
Solar PV, Ground Mounted, ≤ 10 kW	64.2
Solar PV, Ground Mounted, > 10 kW ≤ 10 MW	44.3
Wind, Onshore, Any size	13.5 + 20% escalation
Wind, Offshore, Any size	19.0 + 20% escalation

Comparison of FIT Rates with Benchmark Rates

68. Japan also submits that the Panel may confirm the existence of a benefit in this case by examining the history of the Ontario electricity market, and the objective design and structure of the FIT Program.

69. The history of the Ontario electricity market demonstrates that Ontario established its present market structure, including the OPA and ultimately the FIT Program, because the liberalized market that operated in 2002 did not attract sufficient electricity supply, including from renewable sources, to the province. The Government of Ontario therefore decided to internalize the positive externalities of renewable energy by guaranteeing payments that cover the production costs and reasonable profits for these generators, which payments these generators otherwise would not be able to obtain in the market. In other words, the history of the Ontario electricity market shows that, but for the FIT Program, these generators would not operate in the market today.[54]

70. Further, the objective design and structure of the FIT Program confirms that FIT contracts confer a "benefit" upon FIT generators. FIT contracts offer terms that guarantee a price that covers a FIT generator's production costs *and* provides a reasonable profit for a period of 20-years for the wind and solar PV generators of interest in this dispute. It should be self-evident that no producer participating generally in the market would have such certainty in recovering its production cost and a reasonable profit over such a long period of time. In other words, the FIT Program removes the risk that wind and solar PV generators would otherwise face if they were to operate under normal market conditions. This again shows that wind and solar PV generators obtain more preferable treatment under their FIT contracts than they would obtain in the market, and is therefore also indicative of the conferral of a benefit.[55]

71. Because the benefit analysis requires comparison with a "market benchmark", and not a specific market *price*,[56] the history of Ontario's electricity market and the objective design and structure of the FIT Program may be useful in assessing whether the terms received by FIT generators at the time they enter into their FIT contracts with the OPA are more advantageous than the terms they could have obtained in the Ontario market at that time.[57]

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[54] Japan's second written submission, paras. 3-7; Japan's opening statement at the second meeting of the Panel, paras. 10-13; Japan's comments on Canada's responses to Panel question Nos. 1 and 42 after the second meeting.

[55] Japan's second written submission, paras. 13-16; Japan's opening statement at the second meeting of the Panel, para. 20; Japan's response to Panel question No. 32 after the second meeting.

[56] *See* Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, paras. 641, 647.

[57] *See* Japan's comment on Canada's response to Panel question No. 1, note 8. Indeed, Japan presented evidence of the terms that might be available to FIT generators in the Ontario market under private contracts, and those terms are clearly less advantageous than the terms offered under FIT contracts. *See* Japan's response to Panel question No. 28 after the second meeting, para. 41.

72. Canada's argument that the proper market benchmark in this case should be a price that reflects the higher costs of production of renewable electricity is without merit.[58] Canada misunderstands the benefit analysis that is required under Article 1.1(b) of the SCM Agreement. This analysis requires a comparison between an *actual* (what the world looks like in the presence of the measure at issue) and a *counterfactual* (what the world would have looked like in the absence of *that measure*).[59] It therefore requires a benchmark that reflects "the conditions pursuant to which the goods … at issue *would under market conditions, be exchanged*".[60] Thus, a market price for purposes of the benefit analysis "is not determined solely by reference to either supply-side or demand-side considerations without reference to the other"; rather, "[t]he price of a good or service must reflect the interaction between the supply-side and demand-side considerations under prevailing market conditions."[61] Accordingly, the views of end-users of electricity in Ontario, and the conditions that those end-users of electricity consider in their transactions when purchasing electricity from generators in the Ontario market, are very relevant to an assessment of the proper counterfactual market benchmark with which to compare the subsidy measures at issue. The relevant question is: what rate would wind and solar generators receive for their electricity from consumers in the Ontario market absent the existence of the FIT Program?[62]

73. Canada has not established that distinct markets for renewable and non-renewable electricity exist in Ontario, where suppliers and consumers exchange renewable electricity at a higher price that reflects the higher costs of production of renewable electricity. This should not be surprising, because as Canada agrees, electricity is a commodity, and therefore one unit of electricity is indistinguishable from another unit of electricity in Ontario. Japan further notes that Ontario's FIT Program does not give consumers the option to choose a renewable source for the electricity they use, and to pay a higher rate for that electricity. Rather, the higher rates owed to FIT generators are distributed across all consumers via the Global Adjustment to establish a single price paid by consumers for electricity.

74. Absent a distinct market for renewable electricity in Ontario, there can be no distinct market rate for renewable electricity to serve as a market benchmark; rather, the market rates for the electricity commodity as a whole (which reflect the full supply mix of renewable *and* non-renewable electricity), as advanced by Japan, serve as the proper comparators because those are the rates under which electricity "would … be exchanged" between consumers and suppliers in the Ontario market.[63]

75. In this regard, the Panel should note the distinction between: (i) *regulated* prices that cover production costs plus reasonable profit; and (ii) *subsidized* prices that cover production costs plus reasonable profit. In a market environment, the most efficient producer of electricity (for example due to economies of scale) should be able to sell its electricity at a price covering its production cost plus reasonable profit, and should be the dominant generator. The market may even support this generator charging a higher price, but this generator may not be permitted to sell at any higher price by virtue of government *regulation*. By contrast, in a market environment, less cost-efficient generators, such as renewable energy generators, would be unable to survive competition with the dominant generator. In order to enable such less cost-efficient generators to survive in the market

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[58] *See* Japan's opening statement at the first meeting of the Panel, Section III.B.2; Japan's second written submission, Section II; Japan's opening statement at the second meeting of the Panel, Section II.B.

[59] *See* Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 973.

[60] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 975 (emphasis added).

[61] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 981-982.

[62] Japan's second written submission, para. 22. *See also* Japan's opening statement at the second meeting of the Panel, para. 16

[63] Japan's opening statement at the first meeting of the Panel, paras. 43-44.

despite their inferior cost-efficiency, the government must *subsidize* these generators. The FIT Program represents such an example in Ontario.[64]

76. Japan draws the Panel's attention to the fundamental difference in the objectives behind the rates provided to OPG and the rates provided to other generators (including FIT generators) in the Ontario market. Because OPG is the dominant generator in Ontario, the rates provided to OPG's facilities, primarily through OEB regulations, are established in order to prevent OPG from exercising its dominant market position to impose excessive prices on consumers. By contrast, the rates provided to other generators, such as FIT generators, are aimed at supporting their very entry into and existence in the Ontario market, by guaranteeing them rates of return that they could not otherwise obtain in the market.[65]

3. Article 2 of the SCM Agreement: specificity

77. Turning to the question of specificity, Article 1.2 of the SCM Agreement provides that "[a] subsidy as defined in paragraph 1 shall be subject to the provisions of Part II … only if such subsidy is specific in accordance with the provisions of Article 2". The subsidies provided by the FIT Program and contracts are prohibited subsidies under Article 3 of the SCM Agreement, and therefore are deemed to be specific pursuant to Article 2.3.[66]

4. Article 3.1(b) of the SCM Agreement: "subsidies contingent … upon the use of domestic over imported goods"

78. The subsidies provided to renewable energy generators under the FIT Program and contracts are subsidies "contingent … upon the use of domestic over imported goods", which are prohibited under Article 3.1(b) of the SCM Agreement.[67] Canada does not contest that, should the FIT Program and contracts be considered to provide "subsidies", those subsidies are inconsistent with Article 3.1(b).

79. The Appellate Body has found "contingent" to mean "conditional" or "dependent for its existence on something else", and it has interpreted Article 3.1(b) as addressing both subsidies contingent "in law" and "in fact".[68] The FIT subsidies are: (i) "contingent" because they are conditional or dependent upon satisfying the domestic content requirement (specifically, a Minimum Required Domestic Content Level for wind and solar PV projects, ranging between 25%-60% for FIT projects and between 40%-60% for microFIT projects); and (ii) contingent "in law" or "in fact" because this requirement is expressly stated in, *inter alia*, the *Green Energy and Green Economy Act, 2009*, Minister's FIT Directive of 24 September 2009, every version of the FIT and microFIT Rules and FIT and microFIT Contracts, and every executed solar PV (FIT and microFIT) and wind (FIT) contract.

80. The Domestic Content Level of a FIT or microFIT project is determined by reference to a "Domestic Content Grid", which lists the goods and services that may be utilized to satisfy the Minimum Required Domestic Content Levels. These Grids create incentives for solar PV (FIT and microFIT) and wind (FIT) generators to utilize goods of Ontario origin in preference to goods of other origins in their solar PV or wind generation facilities. Such incentives, in and of themselves, render

[64] Japan's response to Panel question No. 33 after the second meeting, para. 57.
[65] Japan's comment on Canada's response to Panel question No. 5 after the second meeting, para. 7.
[66] *See* Japan's first written submission, Section IV.A.3.
[67] *See* Japan's first written submission, Section IV.A.4.
[68] *See* Appellate Body Report, *Canada – Aircraft*, paras. 139, 166; Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 111.

the FIT Program subsidies, as such, contingent upon the use of domestic over imported goods, inconsistent with Article 3.1(b).

81. The detailed provisions for FIT and microFIT projects in the Rules and Contracts confirm that receipt of the FIT subsidies is contingent on the use of domestically produced renewable energy generation equipment over imported varieties of those goods. The Domestic Content Grids require that, for *all* project types, *at least some* goods manufactured, formed, or assembled in Ontario *must* be utilized in order to achieve the Minimum Required Domestic Content Level for that project.

82. In short, to satisfy the FIT Program's domestic content requirement and benefit from the subsidized rates that it accords to participants, any solar PV (FIT and microFIT) or wind (FIT) generator is incentivized to use goods that are manufactured within Ontario, and must necessarily do so. This establishes that the subsidies provided by the FIT Program and contracts are subsidies contingent upon the use of domestic over imported goods inconsistent with Canada's obligations under Article 3.1(b) of the SCM Agreement.

5. Article 3.2 of the SCM Agreement: "neither grant nor maintain subsidies"

83. Finally, in granting and maintaining prohibited subsidies contingent upon the use of domestic over imported goods, Canada is in violation of its obligations under Article 3.2 of the SCM Agreement.[69]

C. THE FIT PROGRAM, AND FIT AND MICROFIT CONTRACTS, ARE INCONSISTENT WITH CANADA'S NATIONAL TREATMENT OBLIGATION UNDER ARTICLE III:4 OF THE GATT 1994

1. Inconsistency with Article III:4 of the GATT 1994

84. The FIT Program, and FIT and microFIT contracts, violate Canada's national treatment obligation under Article III:4 of the GATT 1994, because they impose "requirements" on renewable energy generators "affecting" the "internal" "sale", "purchase", and "use" of renewable energy generation equipment, and accord imported equipment treatment "less favourable" than "like products" of Ontario origin.[70] Canada does not contest that, should Article III:8 of the GATT 1994 not apply, the FIT Program and contracts are inconsistent with Canada's obligations under Article III:4.

85. First, renewable energy generation equipment manufactured domestically in Ontario and imported from Japan are "like products". These products are in a directly competitive relationship in the market. There is no substantial difference between domestic and imported equipment in terms of their physical properties, end-uses, consumer perceptions, and tariff classifications – i.e., they share all four categories of "characteristics" identified by the Appellate Body as relevant in an analysis of "likeness".[71]

86. Second, the domestic content rules of the FIT Program and contracts are "requirements". A renewable energy generator that wishes to obtain the subsidized rates offered by the FIT Program voluntarily accepts, through the application for and execution of a FIT contract, the obligation to comply with a variety of conditions, including the minimum required domestic content level relevant to its solar PV (FIT and microFIT) or wind (FIT) project. In other words: (i) the FIT Program creates obligations to comply with a variety of conditions, including achievement of a minimum required

[69] *See* Japan's first written submission, Section IV.A.5.
[70] *See* Japan's first written submission, Section IV.B.1.
[71] *See* Appellate Body Report, *EC – Asbestos*, paras. 99, 101.

domestic content level for solar PV (FIT and microFIT) or wind (FIT) generating facilities, which are (ii) voluntarily undertaken by FIT generators entering into a FIT contract with the OPA. These obligations should therefore be considered to constitute a "requirement" within the second situation identified by the panel in *India – Autos*.[72]

87. Third, the domestic content rules of the FIT Program and contracts "affect[]" the "internal" "sale", "purchase" or "use" of these goods. This is because the domestic content rules incentivize Ontario-based wind and solar PV energy generators to choose renewable energy generation equipment manufactured in Ontario over such equipment produced abroad. These rules thereby modify the conditions of competition in favor of such goods made in Ontario, and have "an effect on" the sale, purchase or use of those goods in Ontario.[73] The Appellate Body and WTO panels have found measures that "create an incentive" for domestic over imported goods to "affect", *inter alia*, the internal "use", "purchase" or "sale" of those goods.[74] Moreover, the effect on the sale, purchase, or use of the equipment should be considered "internal" because the requirements apply only inside the customs territory of Canada (in particular, the Province of Ontario) and not at the border.[75]

88. Finally, the domestic content rules of the FIT Program and contracts accord "less favourable" treatment to imported renewable energy generation equipment than that accorded to like products of Ontario origin. The focus of this analysis is whether the FIT Program and contracts *modify the conditions of competition* in the relevant market to the *detriment* of imported products.[76] By requiring the use of goods or services of Ontario origin in order to obtain subsidized electricity rates, the FIT Program necessarily creates incentives, or a purchasing preference, among Ontario-based wind and solar PV energy generators for renewable energy generation equipment produced within Ontario, which in turn stimulates domestic production of such equipment. The detailed Domestic Content Grids go further to require that any such generator use *at least some* Ontario-origin goods to achieve the Minimum Required Domestic Content Level, thereby confirming the preference for locally-produced goods over goods of foreign origin. In *India – Autos*, the panel found that "the very nature of [an] indigenization requirement generates an incentive to purchase and use domestic products and hence creates a disincentive to use like imported products", and therefore, an indigenization requirement clearly modifies the conditions of competition in favor of domestic products.[77] The situation in Ontario is similar.

89. In sum, because the FIT Program and contracts impose a domestic content requirement on wind and solar PV electricity generators that affects the internal sale, purchase, or use of renewable energy generation equipment, according less favorable treatment to like products of Japanese origin, they are inconsistent with Canada's national treatment obligation under Article III:4 of the GATT 1994.

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[72] *See* Panel Report, *India – Autos*, para. 7.184.

[73] *See* Panel Report, *Turkey – Rice*, paras. 7.221-22. *See also* Panel Report, *Canada – Autos*, para. 10.80 and Appellate Body Report, *Canada – Autos*, para. 158.

[74] *See* Appellate Body Reports, *China – Auto Parts*, para. 196; Panel Report, *India – Autos*, paras. 7.195-98 & 7.305-09; Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 212.

[75] *See* Panel Report, *Brazil – Retreaded Tyres*, para. 7.418.

[76] *See* Appellate Body Report, *Korea – Various Measures on Beef*, para. 135. *See also* Panel Report, *Turkey – Rice*, para. 7.232; Panel Report, *China – Publications and Audiovisual Products*, para. 7.1532.

[77] *See* Panel Report, *India – Autos*, paras. 7.201-7.202.

2. Inapplicability of Article III:8 of the GATT 1994

(a) Article III:8(a) Does Not Apply

90. Canada's only defense to Japan's claim under Article III:4 of the GATT 1994, as well as to its claim under Article 2.1 of the TRIMs Agreement discussed in Section III.D below, is that the FIT Program and contracts are not subject to GATT Article III by falling within the government procurement exemption under Article III:8(a). Canada's argument lacks merit.[78]

91. First, FIT contracts are not "procurement by governmental agencies of products purchased". To begin, FIT contracts do not fall within GATT Article III:8(a) for the simple reason that they are not "purchases", while Article III:8(a) requires that products be "purchased" in order for a measure to fall within its scope.[79]

92. The real question is whether the OPA, not the Government of Ontario, "purchases" electricity under FIT contracts "for governmental purposes". Here, the OPA *does not*. This observation is confirmed by the history of the liberalization of the Ontario electricity market. In 1999, the Government separated the state-owned monopoly Ontario Hydro into a number of new entities with different functions. Canada has clarified the roles that each of these government agencies and other entities serve for the purpose of ensuring the stable supply of electricity in Ontario as follows: (i) OPG produces and sells electricity; (ii) Hydro One and other transmission/local distribution companies transmit and distribute electricity to consumers, including selling it to consumers; (iii) IESO serves as a regulator, including operating the grid; and (iv) OPA and OEFC manage contracts with various generators, and provide settlement services to them. With the establishment of the FIT Program, FIT generators (which are private entities) also now produce and sell electricity, with the OPA assuming the additional role of providing them with financial assistance.

93. Japan understands that the Government of Ontario chose this allocation of roles among these different entities, rather than the concentration of these roles into a single entity like Ontario Hydro, because it believes the former helps achieve the objective of ensuring the stable supply of electricity in Ontario. In light of this decision, the Government of Ontario has no need to assign to the OPA the role of purchasing electricity from FIT generators and selling it to transmission/local distribution companies or consumers to fulfill its objective to achieve a stable supply of electricity.

94. Given its role, the OPA has no interest in obtaining the possession of the electricity generated pursuant to its FIT contracts, and therefore should not be deemed as "purchas[ing]" such electricity "for governmental purposes" under Article III:8(a) of the GATT 1994. This is evident from several facts, including: (i) the OPA does not consume the electricity delivered pursuant to FIT contracts for its own use; (ii) the OPA does not seek profit (i.e., fiscal revenue) from such electricity by re-selling it to consumers; (iii) the OPA does not manage or control the production and transmission of such electricity, which is conducted by other entities (e.g., IESO, Hydro One or other transmission/local distribution companies); and (iv) FIT generators sell their electricity directly to transmission/local distribution companies, with the OPA only serving the role of settling payments to those generators. Thus, even given the legitimacy of the Government of Ontario's policy of ensuring the stable supply

[78] *See* Japan's first written submission, Section IV.B.2.a; Japan's opening statement at the first meeting of the Panel, Section IV.B; Japan's second written submission, Section IV; Japan's opening statement at the second meeting of the Panel, Section III.B; Japan's responses to Panel question Nos. 45, 47 and 48 after the second meeting; Japan's comments on Canada's responses to Panel question Nos. 45, 47 and 48 after the second meeting.

[79] Japan's second written submission, para. 56; Japan's opening statement at the second meeting of the Panel, para. 27.

of electricity, the steps taken by the Government to achieve that objective – specifically, the separation of Ontario Hydro into a number of entities with different functions – confirms that the OPA is not "purchas[ing]" electricity under FIT contracts "for governmental purposes".

95. In this regard, Japan notes that the present case should be distinguished from cases where, in order to ensure the stable supply of electricity, the government chooses to assign all functions of electricity supply (i.e., production, transmission and distribution to consumers) to a single government agency, and that government agency "purchases" electricity generated by other generators for supply to consumers. In that case, the government agency obviously has an interest in obtaining the possession over such electricity, for example to manage the physical electricity supply, and therefore may be deemed as "purchas[ing]" such electricity "for governmental purposes".

96. Here, given the policy decisions by the Government of Ontario, the OPA does not have to "purchase" electricity generated under FIT contracts as discussed above. If Canada's argument that the OPA's role, as established by the Government of Ontario, qualifies for the government procurement exemption set forth in GATT Article III:8(a) is accepted, this would enable all Members to circumvent the national treatment requirements under GATT Article III:4 by using a government agency to intervene between market participants under the pretext of "purchas[ing]" a product to pursue a "governmental purpose" of ensuring the stable supply of that product, when "purchase" of that product by the government agency is not required to achieve that purpose. For this reason, Canada's interpretation cannot stand.[80]

97. Japan notes that Canada's response to a question of the Panel further highlights the risk of circumvention of the GATT's national treatment disciplines that will arise if Canada's arguments on Article III:8(a) of the GATT 1994 are accepted. Canada indicates that "Hydro One is required to operate as a 'commercial enterprise'",[81] and "[t]he 77 publicly owned Local Distribution Companies (LDCs) … receive rates for the distribution of electricity that allow for cost recovery and *a rate of return that is 'just and reasonable'*".[82] Canada therefore confirms that these entities obtain profit by selling electricity to consumers (or distributors). In this connection, Japan notes that Canada has argued, in the alternative, that "when a FIT supplier injects its renewable electricity into the grid, the vast majority of that electricity is transferred to the physical possession of the Government of Ontario", and thus, "the Government of Ontario is still purchasing renewable energy".[83] However, the Government of Ontario would not be permitted to impose local content requirements on the purchase of FIT electricity by it, or more specifically, by Hydro One or the 77 publicly-owned LDCs, by virtue of GATT Article III:4, and further would not be exempted from that obligation by virtue of GATT Article III:8(a) because Hydro One and the LDCs would be purchasing FIT electricity indisputably for commercial resale. Thus, under Canada's alternative argument, if FIT contracts were executed with Hydro One and/or the LDCs, rather than with the OPA, they would be inconsistent with Canada's national treatment obligations. Canada's position is therefore tantamount to arguing that the local content requirements on the alleged purchase of FIT electricity are exempted from Canada's national treatment obligations as a result of GATT Article III:8(a) by merely placing the OPA in between the FIT generators, on the one hand, and Hydro One and/or the LDCs, on the other hand. Such an interpretation cannot stand because of the loophole it would create in the GATT's national treatment obligations.[84]

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[80] Japan's comment on Canada's response to Panel question No. 47 after the second meeting, paras. 57-62.

[81] Canada's response to Panel question No. 13 after the second meeting, para. 41.

[82] Canada's response to Panel question No. 13 after the second meeting, para. 42 (emphasis added).

[83] Canada's opening statement at the second meeting of the Panel, para. 27.

[84] Japan's comment on Canada's response to Panel question No. 13 after the second meeting, paras. 21-22.

98. Further, even if products could be considered as "purchased" under FIT contracts, such contracts still do not constitute "procurement by governmental agencies". A proper interpretation of the term "procurement" in accordance with the customary international law rules of treaty interpretation reveals that an analysis of whether "procurement" exists under Article III:8(a) requires consideration of four general elements, none of which alone may be decisive: (i) government *payment* for the procurement; (ii) government *use, consumption, or benefit* (where "benefit" refers to the benefit of the use of a product not in the government's possession); (iii) government *obtainment, acquisition, or possession*; and (iv) government *control* over the obtaining of the product. Consideration of whether "procurement" exists must necessarily be done on a case-by-case basis, taking into account all relevant facts in a holistic analysis.[85]

99. Here, Ontario consumers in general, and not the Government of Ontario, are the ones that use, consume, and benefit from the electricity delivered under FIT contracts; and they do so for their own purposes, and not for the benefit of or on behalf of the government. This follows from the fact that FIT payments are made for electricity that is *delivered into the grid*. The Government of Ontario acquires the electricity it actually consumes in the same manner as other retail consumers, and not through the FIT Program or contracts.

100. Next, the Government of Ontario does not obtain, acquire, or possess the renewable electricity delivered pursuant to FIT contracts, nor does it have any interest or right in doing so. Notably, the Government does not take title to or retain any ownership interest in the electricity delivered under FIT contracts. Canada fails to explain how the OPA possesses or obtains – and thereby acquires – renewable electricity that is delivered under FIT contracts *to the grid* for ultimate use by Ontario consumers.

101. Finally, the Government of Ontario has no control over the obtaining of the electricity that is delivered to the grid pursuant to FIT contracts. Rather, electricity is withdrawn from the grid at the direction of Ontario consumers when they turn on or off their electronic devices, and this withdrawal is "almost instantaneous" with no possibility of control by the government.

102. For all these reasons, considering the facts of the present case, and all of the elements of the procurement analysis taken together, none of which alone could be decisive, the only logical conclusion is that the Government of Ontario is *not* engaged in the "procurement" of renewable electricity under the FIT Program and contracts.[86]

103. Second, FIT contracts are not entered into "for governmental purposes". Properly interpreted in accordance with the customary international law rules of treaty interpretation, the term "for governmental purposes" means *for government use, consumption, or benefit*, where again "benefit" refers to the benefit of using a product that may not be in the government's possession.[87] Here, the Government of Ontario does not use, consume, or benefit from the electricity delivered pursuant to FIT contracts as already discussed, so that electricity is not "for governmental purposes".

[85] Japan's opening statement at the first meeting of the Panel, paras. 49-58; Japan's opening statement at the second meeting of the Panel, para. 28.

[86] Japan's opening statement at the first meeting of the Panel, paras. 59-66; Japan's second written submission, paras. 57-60; Japan's opening statement at the second meeting of the Panel, paras. 29-32.

[87] Japan's opening statement at the first meeting of the Panel, paras. 69-75; Japan's opening statement at the second meeting of the Panel, paras. 30, 33; Japan's responses to Panel question Nos. 45 and 47 after the second meeting; Japan's comments on Canada's responses to Panel question Nos. 45 and 47 after the second meeting.

104. Canada's argument that "for governmental purposes" simply means "for an aim of the government" – such as securing the supply of renewable electricity – cannot stand, because it would render the national treatment obligations in Article III completely ineffective. Canada suggests that, "to fall within the scope of Article III:8(a), a purchase must be for an aim of the government other than discrimination, itself, even if, when purchasing a product for such an aim, the government chooses to impose discriminatory conditions".[88] If Members understood that to be the meaning of "for governmental purposes", then Members that wished to take discriminatory measures could simply do so by masking the discriminatory measure under an allegedly principal non-discriminatory aim behind its purchase of products, such as the aim to secure the stable supply of that product. This would make the government procurement exemption under Article III:8(a) limitless, and render the remainder of Article III obsolete.[89]

105. Moreover, even accepting Canada's stated objective of securing the supply of renewable electricity, the OPA – which is the entity Canada alleges to be purchasing electricity under FIT contracts for governmental purposes – has no need to purchase such electricity given the Government of Ontario's policy decision to establish the OPA as an entity that manages contracts with various generators and provides settlement services to them, while other entities (e.g., IESO, Hydro One or other transmission/local distribution companies) manage or control the production and transmission of electricity in Ontario. Under such circumstances, considering the OPA's role to qualify for the government procurement exemption in Article III:8(a) would again enable all Members to circumvent the national treatment requirements under Article III:4 by using a government agency to intervene between market participants under the pretext of pursuing a "governmental purpose" of ensuing the stable supply of a certain product, when "purchase" of that product by the government agency is not required to achieve that purpose.[90]

106. Calling the government's intervention in the market to become the supplier of a particular product to its citizenry a "public service" is entirely artificial and clearly distinguishable from the provision of legitimate services such as health or education. In this circumstance, the government is not providing a "public service", but rather stepping into the market in order to become the supplier of a good. Products purchased by the government for the purpose of supplying that product to its citizenry cannot be considered "for governmental purposes" within the meaning of Article III:8(a) because such an interpretation would render the remainder of Article III ineffective, as Japan has previously explained.[91]

107. Third, FIT contracts are entered into "with a view to commercial resale". A proper interpretation of this term in accordance with the customary international law rules of treaty interpretation shows that it means *with a view to being sold into the stream of commerce or trade* (as opposed to being used or consumed by the government).[92] Importantly, the negotiating history of Article III:8(a) demonstrates that the term "commercial" was included in this provision to distinguish a government's introduction of goods into the stream of commerce after use by the government from a government's introduction of goods into the stream of commerce without such use by the

[88] Canada's second written submission, para. 58.
[89] Japan's opening statement at the second meeting of the Panel, para. 34.
[90] Japan's comment on Canada's response to Panel question No. 47 after the second meeting, paras. 57-62.
[91] Japan's response to Panel question No. 47 after the second meeting, para. 70.
[92] Japan's opening statement at the first meeting of the Panel, paras. 78-85; Japan's second written submission, paras. 66-68.

government.[93] Here, again, because the electricity delivered pursuant to FIT contracts is injected into the transmission grid and delivered almost instantaneously to Ontario consumers for their use, to the extent renewable electricity can be considered to have been purchased by the Government of Ontario under FIT contracts, that renewable electricity is purchased "with a view to commercial resale".

108. Canada's interpretation of "commercial" resale as requiring a profit element would render all of Article III ineffective. This argument suggests that, whenever a government desires to do so, it could simply insert itself as the middle man, pay a domestic producer to deliver goods to a consumer, and recover from the consumer the amount paid to the producer (i.e., without profit, or even with a loss), all while taking protectionist measures that would otherwise violate Article III, such as a requirement that the domestic producer utilize solely local content in its production. For this reason, Canada's interpretation of "commercial" resale cannot stand.[94]

109. However, even if the term "commercial" requires a profit element, that element is satisfied here. This is because, even under Canada's interpretation, Article III:8(a) would simply require that the government not have "*a view to*" having profit generated from the resale of a product – i.e., it would not require that the profit from the resale go to the government. FIT rates are designed precisely to allow FIT generators to recover their costs and *earn a reasonable profit* on the electricity that they deliver into the grid. Therefore, FIT contracts are certainly entered into by the OPA "with a view to commercial resale".[95]

110. To conclude, Japan emphasizes the implication of Canada's position on GATT Article III:8(a). If the local content requirement that serves as a condition for receiving FIT payments is exempted by Article III:8(a) on any of the grounds alleged by Canada, a Member could require that commerce in *any* goods be conducted through a government agency for the alleged government purpose of ensuring the stable supply of those goods, while at the same time enacting protectionist measures such as local content requirements in connection with the production and supply of those goods. Canada's arguments would totally eviscerate the national treatment requirements set forth in GATT Article III, thereby indicating that Canada's interpretation of GATT Article III:8(a) directly contradicts its immediate context, i.e., the entirety of GATT Article III, and accordingly, cannot be supported under Article 31 of the Vienna Convention on the Law of Treaties.

111. Thus, in Japan's view, the question before the Panel is not *whether* FIT contracts fall within the exemption provided by GATT Article III:8(a) – *they do not*. Rather, the real question before the Panel is: at what point under Article III:8(a) do FIT contracts fall outside the scope of that provision? Japan's principal argument is that FIT contracts fall outside the scope of Article III:8(a) because they are not "procurement by governmental agencies of products purchased". However, Japan also argues alternatively that FIT contracts fall outside the scope of Article III:8(a) because they are not entered into "for governmental purposes", or because they are entered into "with a view to commercial resale".

[93] Japan's opening statement at the second meeting of the Panel, para. 36; Japan's response to Panel question No. 48 after the second meeting; Japan's comment on Canada's response to Panel question No. 48 after the second meeting.

[94] Japan's second written submission, para. 69; Japan's opening statement at the second meeting of the Panel, paras. 37-39.

[95] Japan's second written submission, paras. 70-71; Japan's opening statement at the second meeting of the Panel, para. 39.

(b) Article III:8(b) Does Not Apply

112. Article III:8(b) of the GATT 1994 is also inapplicable to this dispute because Japan does not claim that the payment of subsidized rates under the FIT Program is made exclusively to domestic producers. Rather, Japan argues that the FIT Program's domestic content requirement discriminates against imported renewable energy generation equipment in favor of such equipment produced in Ontario.[96]

D. THE FIT PROGRAM, AND FIT AND MICROFIT CONTRACTS, ARE TRADE-RELATED INVESTMENT MEASURES INCONSISTENT WITH CANADA'S OBLIGATION UNDER ARTICLE 2.1 OF THE TRIMS AGREEMENT

113. The FIT Program, and FIT and microFIT contracts, are also inconsistent with Article 2.1 of the TRIMs Agreement because they are TRIMs that are inconsistent with the provisions of Article III of the GATT 1994.[97] Canada does not contest that, should Article III:8 of the GATT 1994 not apply, the FIT Program and contracts are inconsistent with Canada's obligations under Article 2.1 of the TRIMs Agreement.

114. Japan has already established that the FIT Program and contracts are inconsistent with Article III of the GATT 1994 (including that Article III:8 does not apply), so the key question is whether the measures at issue may be considered "investment measures related to trade in goods" – i.e., TRIMs. There should be little doubt that these measures qualify as TRIMs because: (i) they encourage investment in the production of renewable energy and associated equipment in Ontario, and are therefore "investment measures"; and (ii) they affect trade in wind and solar energy generation equipment, which is without question "trade in goods".

115. Should there be any doubt that the FIT Program and contracts are inconsistent with Article 2.1 of the TRIMs Agreement, one need only turn to the Illustrative List contained in the Annex to the TRIMs Agreement. Since the domestic content rules of the FIT Program and contracts require wind and solar energy producers in Ontario to use Ontario-produced equipment to generate their electricity in order to take advantage of the rates offered by the FIT Program, these measures are WTO-inconsistent TRIMs under the terms of Annex 1(a).

IV. CONCLUSION

116. For the above reasons, Japan requests that the Panel make the following findings:

- through the FIT Program, as well as individually executed FIT and microFIT contracts for wind and solar PV projects, Canada grants and maintains prohibited subsidies that are contingent upon the use of domestic over imported goods, in violation of Articles 3.1(b) and 3.2 of the SCM Agreement;

- the domestic content requirement of the FIT Program, as well as individually executed FIT and microFIT contracts for wind and solar PV projects, accords less favorable treatment to Japanese renewable energy generation equipment than accorded to like products of Ontario origin, in violation of Article III:4 of the GATT 1994; and

- the FIT Program, as well as individually executed FIT and microFIT contracts for wind and solar PV projects, constitute trade-related investment measures inconsistent with the

[96] *See* Japan's first written submission, Section IV.B.2.b.
[97] *See* Japan's first written submission, Section IV.C.

provisions of Article III of the GATT 1994, and are therefore in violation of Article 2.1 of the TRIMs Agreement.

117. Accordingly, Japan asks the Panel to recommend that Canada:

- withdraw its prohibited subsidies without delay, as required by Article 4.7 of the SCM Agreement, by eliminating the domestic content requirement of the FIT Program, as well as that of individually executed FIT and microFIT contracts for wind and solar PV projects; and

- bring the FIT Program, as well as individually executed FIT and microFIT contracts for wind and solar PV projects, into conformity with the GATT 1994 and the TRIMs Agreement, as required by Article 19.1 of the DSU.

ANNEX A-2

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I. INTRODUCTION

1. At issue in the present dispute are the domestic content requirements included in the FIT Program (including the microFIT Program) issued by the Government of Ontario in 2009. To be clear, the European Union does not bring claims against other elements included in the FIT Program; nor does the European Union contest the general purpose of the FIT Program, as helping promote electricity supply from renewable energy sources. Such a purpose is legitimately valid and, in the European Union's view, WTO Members can and should actively support it, for instance, by granting subsidies, insofar as they are consistent with the covered agreements. However, WTO Members cannot use FIT programs in order to achieve other trade-distorting purposes, such as the protection of its domestic industries to the detriment of others, by including domestic content requirements.

2. The European Union notes that the measures at issue in this dispute have been taken by one of Canada's provinces, and in particular by the Government of Ontario. Domestic content requirements are completely unnecessary and even alter the proper achievement of the legitimate objectives pursued by FIT programs. Indeed, by imposing a protectionist requirement to benefit from Ontario's FIT Program, Ontario is rendering it more difficult and expensive to generate electricity from renewable sources, as it curtails the ability of generators to install the best available equipment at competitive prices. This step – i.e. the trade barriers and distortions introduced by the Ontario measures – defeats the logic of favouring the deployment of renewable energy equipment, as a category of environmental goods.

3. The European Union considers that the domestic content requirements in Ontario's FIT Program, and the protectionist interest they serve, are contrary to the fundamental national treatment principle and, thus, are inconsistent with the covered agreements. After going through the procedural background, the measures at issue and the factual background of this dispute, most of them identical to the dispute in DS412, the European Union will examine its claims under the SCM Agreement, the TRIMs Agreement and the GATT 1994.

4. The European Union requests the Panel to examine and provide recommendations and rulings on all fundamental aspects of this dispute, that is, the prohibited subsidy and the national treatment aspects. Only by making findings and recommendations with respect to both our claims against prohibited subsidies and our claims on the breach of national treatment obligations under the TRIMs Agreement and the GATT 1994, would the Panel be "giving the rulings provided for in the covered agreements" in accordance with the aim of the dispute settlement mechanism "to secure a positive solution to a dispute". The European Union also invites the Panel to examine the EU claims in the order as presented in this submission.

II. FACTUAL BACKGROUND

5. The European Union incorporated the factual description, including all exhibits, of Japan's first written submission in DS412 as well as in subsequent submissions.

III. LEGAL ARGUMENT

6. The European Union submits that Ontario's FIT Program (including the microFIT Program) as well as individual contracts executed pursuant to that Program (referred to "the FIT Program and its related contracts") are inconsistent with Canada's obligations under the SCM Agreement, the TRIMs Agreement and the GATT 1994 since they constitute a prohibited subsidy, and also discriminate against imports of equipment and components for renewable energy generation facilities.

A. THE MEASURES AT ISSUE ARE SUBSIDIES CONTINGENT UPON THE USE OF DOMESTIC OVER IMPORTED GOODS: ARTICLES 3.1(B) AND 3.2 SCM AGREEMENT

7. The European Union submits that the measures at issue are inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement, because the measures are subsidies within the meaning of Article 1.1 of the SCM Agreement that are provided contingent upon the use of domestic over imported goods, namely contingent upon the use of equipment and components for renewable energy generation facilities produced in Ontario over such equipment and components imported from other WTO Members, including the European Union.

1. The first element of the definition of subsidy is met: income/price support and financial contribution

(a) Income or price support: Article 1.1(a)(2) of the SCM Agreement

8. In the present case, the EU primarily submits that the measures at issue amount to a form of income or price support for the FIT Generators. The European Union considers that the measures at issue amount to a form of income or price support in the sense of Article XVI of the GATT 1994 and thus fall under Article 1.1(a)(2) of the SCM Agreement. The FIT Program operates as a price support system whereby the Government of Ontario, through its agency, the OPA, contractually agrees with the FIT Generators a rate and then pays such a rate directly (through another agency, the IESO) or indirectly (through LDCs) to the FIT Generators. Canada argues that the measures at issue must be characterised as "purchases of goods" and not as "income or price support" because of the nature of the transaction between the OPA and the FIT Generators (i.e., the OPA paying the FIT Generators in exchange for their delivery of renewable electricity into Ontario's electricity grid). However, the alleged characterisation of the measures at issue as a "purchase" is, in and of itself, no obstacle for such measures to be characterised as "any form of income or price support". Thus, even assuming *arguendo* that each contract or payment under the FIT Program could be characterised as a "purchase of goods" (*quod non*), the fact that there is a *program* in place aimed at guaranteeing rates to generators implies that the measures at issue should be characterised as "income or price support". The EU considers that the Panel should follow the analytical steps suggested by the Appellate Body in *US – Large Civil Aircraft* and identify which features are the most central to the measures at issue *as a whole* and which of those features are to be accorded the most significance for purposes of characterising them under Article 1.1(a) of the SCM Agreement.

9. Moreover, there is income or price support "in the sense of Article XVI of GATT 1994". Importantly, "in the sense of Article XVI of GATT 1994" in Article 1.1(a)(2) of the SCM Agreement in relation to the concept of "income or price support" does not carry with it the requirement of a finding of "serious prejudice" referred to in the second sentence in Article XVI:1. Article 1.1 of the SCM Agreement is not concerned with *effects* arising from subsidies, but only with the concept (that is, the "definition") of subsidies. The terms "*in the sense*" (that is, "in the meaning") confirm that the reference to Article XVI of GATT 1994 is limited to the concept of income or price support, as a scope/definitional issue, not to the applicable disciplines.

10. In the present case, the FIT Program contains local content requirements which, by their own nature, reduce or even eliminate imports of equipment and components for renewable energy generation facilities into Ontario. Consequently, the European Union submits that the FIT Program and its related contracts provide a form of income or price support to the FIT Generator through long term, guaranteed, above-market rates in the sense of Article 1.1(a)(2) of the SCM Agreement.

(b) Financial contribution: Article 1.1(a)(1) of the SCM Agreement

11. The European Union maintains that the use of the term "or" between paragraphs (1) and (2) in Article 1.1(a) of the SCM Agreement does not exclude the possibility that a measure can fall at the same time under one or the other sub-element. It merely provides for a choice or alternative characterisations to meet the first element of the definition of "subsidy". This contrasts with the use of the term "and" in between the first and second subparagraphs (a) and (b) in Article 1.1, which require that the first (in any of the alternatives) and second elements (i.e., benefit) be present for the definition to be met. The EU also notes that Article 1.1(a)(2) of the SCM Agreement, and the terms "any form", are also capable of addressing the case of domestic programmes involving *a combination of* various forms of financial contribution, bundled together with other features.

12. The European Union argues that the guaranteed electricity rates that the OPA contractually commits to under the FIT Program and its related contracts result in a "financial contribution by a government or any public body" as defined under Article 1.1(a)(1) because they involve a "direct transfer of funds" from the Government of Ontario. The financial contribution is granted once the OPA signs the FIT Contract with the FIT Generator and agrees to provide the guarantee rates, either through disbursements made by the IESO or through LDCs. In the alternative, the European Union argues that the guaranteed electricity rates that the OPA contractually commits to under the FIT Program and its related contracts result in a "financial contribution by a government or any public body" as defined under Article 1.1(a)(1) because they involve a "potential direct transfer of funds" from the Government of Ontario or a situation where the government "purchases goods". Moreover, in the alternative, the European Union argues that the disbursements made by other private operators (LDCs) paying the guaranteed electricity rates that the OPA contractually commits to under the FIT Program result in a "financial contribution by a government or any public body" as defined under Article 1.1(a)(1) because they involve entrustment or direction in the sense of Article 1.1(a)(1)(iv) of the SCM Agreement.

13. The European Union considers that the contractual commitments undertaken by the OPA pursuant to the FIT Contract are better characterised as a "direct transfer of funds" in the sense of Article 1.1(a)(1)(i) of the SCM Agreement because future payments are made unconditionally (other than the nature of the contract, i.e. the expected delivery of electricity in exchange of the payment). Indeed, under the FIT Contract, the FIT Generators commit to supply the generated electricity into the grid in exchange of a payment at the agreed rates. Such generation electricity is expected in order to obtain the advantageous guaranteed rate. Thus, for the purpose of the financial contribution determination, the payments committed under legally binding contracts should be considered as "granted" or "transferred", even though physically those payments have not yet occurred or have not been made.

14. The European Union submits that the legal commitment to transfer the difference between the market rate of electricity that a generator would receive through the standard operation of the market (i.e. MCP/HOEP) and the rate enjoyed by a generator under a FIT Contract to the FIT Generator amounts to "a government practice [that] involves a direct transfer of funds" in the sense of Article 1.1(a)(1)(i) of the SCM Agreement. Indeed, the FIT Rules and the FIT Contract contain the binding commitment by the OPA to pay the guaranteed rates if and when the FIT Generator supplies the electricity into the grid. Moreover, no matter what happens, the OPA is ultimately liable to make those payments. Thus, the OPA's role is more of the nature of an intermediary (like an agent or a clearing house) where the OPA does not actually purchase electricity. Rather, electricity is purchased by other market operators (either at market rates or above, i.e., at "regulated" rates), while the OPA pays the above-market rates agreed contractually with the FIT Generator. Thus, in the European Union's view, the transfer of the guaranteed, above-market rates to the FIT Generators is better characterised as a "direct transfer of funds". Should the Panel consider that the measures at

issue are not "direct transfers of funds", the European Union maintains that the Panel can find that the measures at issue amount to a "potential direct transfer of funds"

15. In any event, should the Panel consider that the OPA actually "purchases" electricity pursuant to the FIT Contract, the European Union considers that this would amount to a financial contribution in the form of purchases of goods under Article 1.1(a)(1)(iii) of the SCM Agreement.

16. In the alternative, the European Union also argues that the disbursements made by other private operators (LDCs) paying the guaranteed electricity rates that the OPA contractually commits itself to pay under the FIT Program result in a "financial contribution by a government" as defined under Article 1.1(a)(1), in any of the forms discussed above, because they involve entrustment or direction in the sense of Article 1.1(a)(1)(iv) of the SCM Agreement. However, the fact that under Section 8.4 of the FIT Rules, the OPA is ultimately liable for the payments agreed under the FIT Contracts reinforces the European Union's view that the FIT Program and its related contracts are better characterised as a "direct transfer of funds" by the government.

17. In sum, no matter how the Panel addresses this question, the European Union considers that the FIT Program and its related contracts amount to a "financial contribution" in the sense of Article 1.1(a)(1) of the SCM Agreement. Indeed, the EU invites the Panel to make alternative findings in this respect.

2. The second element of the definition of subsidy is met: benefit

18. The European Union submits that the FIT Program and its related contracts provide a "benefit" to the recipient, i.e. the FIT Generator, in the sense of Article 1.1(b) of the SCM Agreement.

(a) Article 14(d) of the SCM Agreement is not applicable in the present case and, in any event, Canada's suggested benchmark is inappropriate

19. The European Union considers that Article 14(d) of the SCM Agreement is not applicable in the present case since, for the reasons explained before, the OPA does not purchase electricity from the FIT Generators.

20. In any event, applying Article 14(d) to the facts of this case, Canada considers that the Panel should compare the FIT rates to a benchmark located from an examination of the conditions on which wind and solar electricity are normally exchanged in Ontario. In the European Union's view, Canada is asking the Panel to compare the FIT rates with the FIT rates themselves since wind and solar electricity in Ontario is only produced under the umbrella of the FIT Program. In other words, the FIT Program, including the FIT Price Schedule, and as implemented through each FIT Contract, determines the price for electricity from wind and solar electricity generators. There is no other price in Ontario for that electricity as potential generators would never give up the generous conditions automatically offered to them by the FIT Program. Thus, Canada is asking for a circular and thus meaningless comparison.

21. At most, Canada's suggested benchmark unveils the market reality for the generation of wind and solar electricity in Ontario, i.e., that there would be no generator ready to make the necessary investments in Ontario, absent the FIT Program. In other words, the conditions on which wind and solar electricity are normally exchanged in Ontario are those of the FIT (subsidised) program, absent which no exchanges would take place in Ontario, as the incentive nature of the FIT Program itself shows.

(b) The existence of benefit under Article 1.1(b) of the SCM Agreement has to be determined by reference to the marketplace

22. The European Union submits that the existence of benefit in this case has to be determined by reference to the marketplace, i.e., what the FIT Generators would have obtained from the market in Ontario absent the FIT Program.

23. In *Canada – Aircraft*, the Appellate Body noted that "the ordinary meaning of 'benefit' clearly encompasses some form of advantage" and that "the second element in Article 1.1 is concerned with the 'benefit… conferred' on the recipient by [the] governmental action". Thus, in order to determine whether "benefit" exists within the meaning of Article 1.1(b) of the SCM Agreement, the government action, regardless of its form (i.e., financial contribution or income/price support) has to confer some form of advantage to the recipient.

24. The Appellate Body also noted that, in order to identify whether such an advantage exists, some kind of comparison or counterfactual is required: in particular whether the government action makes the recipient "better off" than it would otherwise have been, absent that government action. According to the Appellate Body, "the marketplace provides an appropriate basis for comparison … because the trade-distorting potential of a [government action] can be identified by determining whether the recipient has received [a form of "financial contribution" or income/price support] on terms more favourable than those available to the recipient in the market". According to the Appellate Body, "Article 14, which we have said is relevant context in interpreting Article 1.1(b), supports our view that the marketplace is an appropriate basis for comparison [since 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". Thus, the essence of the determination of the existence of benefit under Article 1.1(b) is to compare, on the one hand, what the recipient obtained from the government action with, on the other hand, what the recipient would have obtained from the market, absent the government action.

25. In *Japan – DRAMs* the Appellate Body recalled the reference to the market standard in the following terms: "The relevant market may be more or less developed; it may be made up of many or few participants. ... 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. ... There is but one standard—the market standard". In E*C and Certain Member States – Large Civil Aircraft*, the Appellate Body observed that: "The marketplace to which the Appellate Body referred *in Canada – Aircraft* reflects a sphere in which goods and services are exchanged between willing buyers and sellers. A calculation of benefit (…) demands an examination of behaviour on both sides of a transaction, and in particular in relation to the conditions of supply and demand as they apply to that market". Similarly, in *US – Softwood Lumber IV*, the Appellate Body noted that: "[t]he text of Article 14 (d) [of the] SCM Agreement does not qualify in any way the 'market' conditions which are to be used as the benchmark … [a]s such, the text does not explicitly refer to a 'pure' market, to a market 'undistorted by government intervention', or to a 'fair market value'." Thus, the existence of benefit has to be determined by reference to the market as it is, the market where the government action takes place, in this case Ontario.

26. The main features of the FIT Program and its related contracts with respect to the benefit analysis are that, pursuant to them, the OPA (i) guarantees rates that the FIT Generators could not obtain from the market; and (ii) provides such above-market rates for a period of 20 years, including generous price escalation conditions, thereby shielding the FIT Generators from any market risks. Those conditions are provided regardless of the scale or generation capacity of the project.

27. The FIT Program and its related contracts are the result of the OPA's efforts to facilitate new generation investment by private producers that the wholesale market was incapable of encouraging. They are, as Canada qualifies them, "incentives for long-term investment to meet forecasted demand". Thus, absent the FIT Program, the FIT Generators would not be able to participate on the market. This shows, in the European Union's view, that absent the government measure, the FIT Generators would not have been able to secure the FIT rates and the other favourable conditions included in the FIT Contracts.

28. The Panel may find the existence of benefit on this basis alone, since the Panel is not required to determine the amount of benefit under Article 1.1(b) of the SCM Agreement (merely its existence). Indeed, in other cases, panels and the Appellate Body have determined the existence of benefit in view of evidence showing that, absent the government action, the recipient would have obtain nothing from the market. This is the case, for instance, of equity infusions or funds provided to rescue companies in economic difficulties where no rational investor (i.e., the market) would have provided the same funds on the same terms.

(c) The proper market benchmark should relate to the market conditions for electricity in Ontario, regardless of how it is generated

29. Should the Panel consider that further analysis is required to determine the existence of benefit in the present case, the European Union considers that the proper benchmark in this case should relate to the market conditions for electricity in Ontario, regardless of how it is generated. Electricity is a commodity, physically alike in all respects. One kilowatt-hour of electricity is perfectly substitutable for another kilowatt-hour of electricity, regardless of whether it was generated from a renewable or non-renewable source. In this respect, they belong to the same product market. As the Appellate Body noted in *US – Upland Cotton*, "it seems reasonable to conclude that two products would be in the same market if they were engaged in actual or potential competition in that market".

30. Moreover, in Ontario the environmental effects of different energy sources are not reflected in the prices consumers pay, which is the result of a blended price. Consumers pay the HOEP plus the Global Adjustment, which do not distinguish among the different generating technologies.

31. The European Union also observes that Canada has not demonstrated that there is a separate product market with respect to electricity produced by particular sources of renewable energy in Ontario. Consequently, contrary to what Canada maintains, in the present case the proper benchmark should relate to the market conditions for electricity in Ontario, regardless of how it is generated.

32. In any event, in the European Union's view, there is no reason to believe that consumers willing to buy electricity generated from renewable sources would have a preference for electricity for more expensive technologies rather than less expensive technologies. In other words, insofar as the electricity is produced from "clean" sources, consumers may not have further preferences as to the specific type of source. This being said, should the Panel consider that the relevant market benchmark in the present case should take into account the existence of a distinction between electricity generated from renewable and non-renewable sources in Ontario, the European Union considers that the Panel could also determine the existence of benefit on the basis of the different rates guaranteed within the FIT Program. In this respect, the European Union observes that the FIT Price Schedule reflects lower prices for other types of electricity generated from renewable sources, such as waterpower, biomass or biogas, when compared with wind and solar. Thus, even considering renewable electricity as a market separate from non-renewable energy in Ontario (quod non), there would be a benefit granted to the generators of wind and solar electricity.

(d) The proper market benchmark should not be identified by referring to cost of production and, in any event, the structure of the FIT Program leads to payments in excess of costs

33. The European Union considers that, contrary to what Canada maintains, an appropriate market benchmark in this case does not have to reflect the cost of producing renewable electricity. Rather, the relevant question in identifying the appropriate market benchmark in this case is what is the market value of the product (i.e., electricity) for which the FIT Program and its related contracts provide long-term, guaranteed rates.

34. In the context of provision of goods by the government, the Appellate Body noted that it is not the cost to the government in making the product that is the reference to determine the existence of benefit; rather, it is the market value of the product in question. In the European Union's view, the same applies in cases of purchases of goods. The existence of benefit cannot be determined by reference to the cost of production of the producer of the good in question; rather, it is the market value of the product purchased by the government which has to be examined in order to determine whether the government paid adequate remuneration in accordance to the "prevailing market conditions". Quite telling, among the factors included within the notion of "prevailing market conditions" in Article 14(d) there is no reference to "cost of production".

35. The fact that the FIT rates at least cover the high cost of production of the FIT Generators does not show that there is no benefit in the present case. Rather, it shows that, without the FIT Program, no investor would be willing to produce wind and solar energy in Ontario in view of such high costs of production and in view of the fact that they would not be able to ensure an appropriate return in that market.

36. In any event, even if the cost of generating wind and solar electricity would have to be taken into account, as Canada alleges, the European Union submits that the structure of the FIT Program leads to payments in excess of costs. Indeed, the cost of producing wind and solar electricity in general mainly depends on the location of the generating facilities. The capital costs involved in the setting up of a generation facility should not vary too much between different countries because the generation equipment amounts to the largest share of the installation of a generation facility (and thus the capital costs), and those goods can be traded. What makes the difference is the availability of the resources –wind and sun. The fact that FIT rates are standardised (i.e. they are the same for all generators) regardless of the location of the generation facilities and their actual production capacity should logically lead to a higher return for those FIT Generators that will set up facilities in good locations.

37. It is interesting to underline that, as mentioned before, the predecessors of the FIT Program were administered based on the best prices offered by generators through a bidding process. That element of competition was replaced by standardised rates which had to account for the higher costs of inducing the development of local manufacturing capacity (pursuant to the domestic content requirements). Renewable generation capacity could therefore be deployed in Ontario at lower cost. Thus, the European Union maintains that the structure of the FIT Program leads to payments in excess of cost of production.

(e) The HOEP is an appropriate benchmark in this case

38. The European Union maintains that, in the circumstances of this case, the HOEP is an appropriate benchmark to determine the existence of benefit.

39. First, the HOEP represents that wholesale electricity price in Ontario. It is the referenced price which triggers additional payments by the Government of Ontario to generators (including the FIT Generators) which have regulated rates.

40. Second, even if the HOEP is the result of a system concerning the physical distribution of electricity in Ontario and, thus, in this respect, cannot be characterised as a "market" price in the economic sense, it is the market price in the nominal sense and for the purpose of the benchmark analysis under Article 1.1(b) of the SCM Agreement. It is undisputed that "but for" the long-term, guaranteed rates provided by the FIT Program, the FIT Generators would only be able to supply their electricity into the grid at the wholesale electricity market price, that is, at the MCP/HOEP. Absent the FIT Program, a producer of electricity from wind or solar sources, like the FIT Generator, would have to become a market participant under the IESO market rules and supply its electricity within the wholesale electricity market, at the HOEP. Thus, the HOEP becomes the nominal market price in the circumstances of this case, i.e., the counterfactual that would prevail absent the government measures at issue.

41. Canada confirms that 8% of Ontario generators do receive only the HOEP. In the European Union's view, Canada again confirms the validity of the HOEP as a market benchmark in the present case. In fact, the alleged 8% figure of generators receiving only the HOEP appears to be around 16% of total electricity delivered in 2010. In any event, regardless of the figure, the fact of the matter is that there are some generators whose cost structure allows them to sell their electricity and receive only the HOEP. The FIT Generators simply cannot since their cost structure is different. To conclude that the HOEP paid to those generators cannot be used as a benchmark in the present case would be like saying that actual market prices in a particular sector cannot be used for a particular category of the same product because their cost of production are much higher and thus cannot compete with the cost of production of the other operators. That cannot be the case. If for the same product, i.e., electricity, there are generators capable of generating it and earning an appropriate return through the HOEP, then the higher costs of other generators of electricity cannot be used to argue that the HOEP is not an appropriate benchmark. Canada's argument taken to an extreme would lead to absurd results. Indeed, a Member could argue that there is no subsidy involved by compensating the higher cost of production when using obsolete technologies in the production of goods that will compete in another market were operators are more developed technologically and have more efficient methods of production. Thus, the European Union considers that the fact that there are operators receiving the HOEP only shows that it can be used as a market benchmark in the present case. Similarly, in Japan – DRAMs, with respect to the distinction between inside and outside investor, the Appellate Body noted that there is one standard, the market standard according to which rational investors act. In this sense, the fact that there were some inside investors, which may have different interests and return expectations than outside investors, willing to provide the necessary funds to a company in economic difficulties implies that the market would have provided those funds. In other words, the market is also measured by the existence of a category of investors willing to make the necessary investments, even if there is another category which would not make them. Like in the case of outside investors, the presence of generators only receiving the HOEP in the market of Ontario shows that they are part of the market with respect to which the existence of benefit can be determined.

42. Third, Canada argues that the IESO market mechanism is not the "classical" competitive market where supply and demand meet. Indeed, the European Union agrees that it may not be the "classical" market. And there may not be many "classical" markets in many jurisdictions with respect to electricity or other products. However, it is a market where demand, represented by the relevant competent authorities in Ontario, meets with supply (i.e., electricity generators). And it is the market mechanism chosen by the competent authorities in Ontario to regulate the exchanges of electricity. Thus, the HOEP amounts to the rate that is determined based on supply and demand in Ontario.

43. Fourth, the European Union observes that one possible means to assess whether the HOEP represents the price of electricity in Ontario under market conditions is to examine the prices charged and paid by Ontario in its imports and exports of electricity. The similarity between the HOEP and the import and export prices is nonetheless revealing of the fact that the HOEP faithfully reflects the price practiced in Ontario and neighbouring jurisdictions under market conditions. In any event, the European Union submits that either on its own or as a proxy, the import and export prices for electricity in Ontario show that a benefit exists in the present case.

44. Consequently, should the Panel consider it necessary to establish the existence of benefit in the present case by reference to the difference between the FIT rates and another benchmark, the European Union submits that the HOEP would serve as a basis to find such benefit since the HOEP would be price the FIT Generators would obtain in the wholesale electricity market in Ontario absent the FIT Program, like other generators not obtaining regulated rates.

(f) Any of the other alternative benchmarks show the existence of benefit

45. In any event, should the Panel consider that the HOEP is not an appropriate benchmark in the present case in order to establish the existence of "benefit" under Article 1.1(b) of the SCM Agreement, the European Union submits that any of the other alternative benchmarks submitted by Japan in DS412 would show that there is a benefit in the present case.

(i) The weighted average wholesale rate received by all generators in Ontario other than FIT and RESOP generators

46. The "market" price in economic sense in a situation where the government regulates prices could be understood to be the result of the free exchanges between the government (representing in this case the demand and acting on behalf of consumers) and the electricity generators (representing supply). In this sense, the result of the weighted average of all rates agreed between the Government of Ontario (excluding FIT and similar rates) and all generators (excluding FIT and similar generators) in Ontario could be said to amount to the "market" price for wholesale electricity. Such average was 7.13 cents/kWh in 2010, thus below the guaranteed rates under the FIT Program for wind and solar electricity. On this basis, the Panel may find that the FIT Program and its related contracts confer a benefit under Article 1.1(b) of the SCM Agreement.

(ii) The "commodity charge" portion of retail prices for electricity in Ontario

47. Ontario retail prices may be taken into account as a possible benchmark because no generator of electricity in Ontario should expect to receive a rate in excess of the price paid by retail consumers in the commodity portion of their bill, i.e., the retail price for the electricity itself, excluding any service charges. The retail prices of electricity determined by the OEB as part of its RPP range from 7.1 cents/kWh to 8.3 cents/kWh for customers with conventional meters, and from 6.2 cents/kWh to 10.8 cents/kWh for customers with smart meters. These RPPs reflect HOEP plus the Global Adjustment, and are the prices paid by retail consumers in Ontario for the electricity commodity itself (i.e., absent any fees and charges associated with the services of transmission/distribution and market operation). No generator in Ontario should expect to receive rates in excess of these RPP prices for the electricity commodity established by the OEB.

48. Moreover, the European Union notes Canada's statement that "most" users of electricity in Ontario pay the price required of them by the system, i.e., the prices regulated by the OEB. Indeed, there are some consumers who can buy their electricity pursuant to bilateral contracts with generators. Needless to say, such a price will always be lower than the regulated price for final consumers (otherwise, there would not be any interest in having such bilateral contracts). Thus, even if the Panel

were to consider that the HOEP is not a market benchmark in the present case, the European Union considers that, absent the FIT Program, the FIT Generators could only sell their electricity at a price equal to or a bit below the prices regulated by the OEB (RPP), all of which are way below the FIT rates. Since there is no need to quantify the amount of the subsidy but merely its existence under Article 1.1(b) of the SCM Agreement, the Panel can find that the FIT Program and its related contracts confer a benefit to the FIT Generators on this basis.

(iii) The average wholesale rate for electricity in competitive wholesale markets outside of Ontario

49. The European Union observes that Canada does not argue that Ontario's prices for electricity (either those rates agreed between the Government of Ontario and the generators or RPPs) are distorted. In fact, Canada maintains that the Panel should compare the FIT rates to a benchmark located from an examination of the conditions on which wind and solar electricity are normally exchanged in Ontario. In this respect, the European Union considers that there is no need to go outside Ontario to identify a proper benchmark in this case since, even if prices are heavily regulated, this does not imply that they are distorted. That being said, should the Panel consider that regulated rates or prices in Ontario cannot be used, the European Union considers that the outside benchmarks proposed by Japan, where rates are competitively determined in deregulated electricity markets where the government has a limited presence, show that the FIT Program and its related contracts provide a benefit.

(g) Even if the FIT rates were to be found not to confer a benefit, the long-term guarantee nature of the FIT rates would support a determination of benefit

50. Finally, the European Union maintains that the Panel may find the existence of benefit under Article 1.1(b) of the SCM Agreement in the present case exclusively by noting the long-term nature of the rates guaranteed to the FIT Generators, regardless of whether those rates are above the market. Indeed, as explained before, one of the most relevant features of the FIT Program and its related contracts is that they protect the FIT Generators from any market risks for a period of 20 years. During that period, the FIT Generators have a rate in exchange of which they can supply as much electricity as they can. Moreover, the FIT Contracts include price escalation conditions which ensure profitability regardless of the market conditions. The OPA assumes all market risks without charging any premium.

51. Thus, on the basis of this, the Panel may conclude that the FIT Program and its related contracts, regardless of the level of the guaranteed rates, confer a benefit to the FIT Generators.

(h) Concluding remarks as to the existence of "benefit"

52. To sum up, the European Union considers that the Panel may find that the FIT Program and its related contracts confer a benefit to the FIT Generators on the basis of the uncontested fact that, absent the FIT Program, the FIT Generators would not be able to obtain the necessary returns from the market. Thus, the inherent nature of the FIT Program as an incentive to promote the generation of electricity through renewable sources shows the existence of benefit under Article 1.1(b) of the SCM Agreement, like in cases where the fact that no rational investor would have made a particular investment shows the existence of benefit, regardless of its quantum.

53. Should the Panel consider it necessary to determine the existence of benefit in the present case by reference to the difference between the FIT rates and an appropriate market benchmark, the European Union has put forward a variety of benchmarks to show to this effect. Under any of those, the European Union considers that the Panel may find that the FIT Program and its related contracts

confer a benefit under Article 1.1(b) of the SCM Agreement. Even when considering generation costs, as advanced by Canada, the existence of a benefit is apparent.

54. Finally, the Panel may also determine the existence of benefit in this case on the basis of the long-term nature of the guaranteed rates. Indeed, the fact that the FIT Generators receive a guarantee to receive payments at particular rates, regardless of their level, for a period of 20 years, where those prices are automatically subject to price escalation regardless of any market development, provides a benefit to the FIT Generators which is distinguishable from the benefit conferred by the above-market level of the FIT rates.

3. Contingent upon the use of domestic over imported goods: Article 3.1(b) SCM Agreement

55. The European Union submits that the FIT Program is a subsidy contingent upon the use of domestic over imported goods, in the sense of Article 3.1(b) of the SCM Agreement. The FIT Program requires the use of domestic over imported goods, "solely or as one of several other conditions". This may cover the situation where a subsidy is simultaneously subject to two or more cumulative conditions. But it may as well apply to the situation where a subsidy is subject to two or more alternative conditions, so that compliance with any of them gives a right to the subsidy. If one of those conditions is "the use of domestic over imported goods" the subsidy must be deemed prohibited by Article 3.1(b), even if it might also be theoretically possible to qualify for the subsidy by complying with an alternative condition, such as using a certain proportion of domestic labour or of domestic services. A different interpretation –e.g. suggesting that a subsidy may not be prohibited if at least one qualifying condition is not inconsistent with the SCM Agreement– would run contrary to the letter of Article 3(1)(b) and would make it very easy to circumvent the prohibition simply by providing that the beneficiaries may also qualify for the subsidy by fulfilling some irrelevant but dissuasive alternative condition.

56. In sum, the European Union submits that the FIT Program amounts to a prohibited subsidy under Article 3.1(b) of the SCM Agreement.

4. Specificity: Article 2.3 SCM Agreement

57. Article 1.2 of the SCM Agreement states that: "[a] subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2". Article 2.3 establishes that: "[a]ny subsidy falling under the provisions of Article 3 shall be deemed to be specific". The subsidies provided by the FIT Program and related contracts are prohibited subsidies under Article 3.1(b) of the SCM Agreement and, therefore, are deemed to be specific pursuant to Article 2.3 of the SCM Agreement.

5. Violation of Article 3.2 SCM Agreement

58. In view of the foregoing, the European Union submits that Ontario's granting and maintaining of prohibited subsidies contingent upon the use of domestic over imported goods is inconsistent with Canada's obligations under Article 3.2 of the SCM Agreement.

6. Conclusion and relief requested

59. The European Union requests the Panel to find that through the FIT Program as well as individually executed FIT and microFIT contracts for wind and solar PV projects, Canada grants and

maintains prohibited subsidies that are contingent upon the use of domestic over imported goods, in violation of Articles 3.1(b) and 3.2 of the SCM Agreement.

60. The European Union requests the Panel to recommend that Canada withdraw its prohibited subsidies without delay (and, in no case, no more than within 90 days), as required by Article 4.7 of the SCM Agreement.

B. THE MEASURES AT ISSUE ARE TRADE-RELATED INVESTMENT MEASURES AND REQUIREMENTS AFFECTING THE INTERNAL SALE, PURCHASE OR USE OF PRODUCTS IN THE SENSE OF ARTICLE 1 OF THE TRIMS AGREEMENT AND ARTICLE III:4 OF THE GATT 1994 RESPECTIVELY

61. Once the European Union has demonstrated that the FIT Program and its related contracts are inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement, the European Union will address how the domestic content requirements included in the FIT Program violate other relevant provisions of the covered agreements containing the fundamental principle of national treatment.

1. The measures at issue are trade-related investment measures in the sense of Article 1 of the TRIMs Agreement

62. Article 1 of the TRIMs Agreement defines its coverage as applying to investment measures related to trade in goods. The FIT Program and its related contracts meet this definition.

63. First, the FIT Program and its related contracts are "investment measures" in that they aim at encouraging the development of a local manufacturing capability for equipment and components for renewable energy generation facilities in Ontario. Second, the domestic content requirements included in the FIT Program and its related contracts are undoubtedly "related to trade". Finally, the domestic content requirements contained in the FIT Program and its related contracts affect trade in goods, in particular in wind and solar energy generation equipment and components. The FIT Program creates an incentive to purchase or use Ontario's products to the detriment of imported like products. Consequently, the European Union submits that the FIT Program and its related contracts fall within the scope of the TRIMs Agreement.

2. The measures at issue are requirements affecting the internal sale, purchase or use of products in the sense of Article III:4 of the GATT 1994

64. In its first written submission in DS412, Japan has demonstrated that the domestic content rules of the FIT Program and its related contracts are "requirements" that affect the "internal sale, … purchase, … or use" of renewable energy generation equipment and components in Ontario within the meaning of GATT Article III:4. The European Union incorporates those arguments in the present submission, and consequently, submits that the FIT Program and its related contracts fall under the scope of application of these provisions.

3. Conclusion

65. In light of the foregoing, the European Union submits that both the TRIMs Agreement and the GATT 1994 are applicable to the measures at issue.

C. ARTICLE III:8 OF THE GATT 1994 DOES NOT APPLY IN THE PRESENT CASE

66. Before applying the relevant national treatment provisions contained in the TRIMs Agreement and the GATT 1994 to the facts of this case, as a preliminary issue, the European Union

will examine whether Article III:8 of the GATT 1994 applies in the present dispute. As the European Union will show below, Article III:8 is not applicable to this dispute.

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

67. Article III:8(a) of the GATT 1994 states that:

> 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.

68. The European Union notes that Canada's defence under Article III:8(a) of the GATT 1994 may not be an obstacle for the Panel to find that the FIT Program and its related contracts are inconsistent with Article 2.1 of the TRIMs Agreement, in conjunction with paragraph 1(a) of its Annex. As a consequence of such violation, the Panel may also find that the FIT Program and its related contracts are inconsistent with Article III:4 of the GATT 1994, without engaging in a substantive analysis of Canada's defence under Article III:8(a) of the GATT 1994. In any event, in order to provide a positive solution to this dispute, the European Union requests the Panel to examine and make findings (even in the form of alternative findings) with respect to Canada's defence under Article III:8(a) of the GATT 1994 in view of the fact that the conditions for the application of such a provision are not met in the present case.

69. The European Union has shown that Canada's defence under Article III:8(a) must failed in view of the following reasons.

(a) Article III:8(a) of the GATT 1994 covers requirements directly relating to the product purchased by the government

70. Canada argues that the scope of Article III:8(a) of the GATT 1994 is not confined to the purchase of products that are the focus of a claim for breach of Article III. According to Canada, the text of Article III:8(a) does not in any way tie the products that are purchased to the products that are the focus of a claim under Article III. Further, Canada considers that Article XVI of the Agreement on Government Procurement prohibits the inclusion of conditions on the inputs, by means of local content requirements, into the product that is purchased. According to Canada, such prohibition would not make sense if Article III:8(a) of the GATT 1994 already prohibits them.

71. Canada's arguments are inapposite. First, the text of Article III:8(a) of the GATT 1994 states that the national treatment obligation does not apply to laws, regulations or requirements governing the procurement by governmental agencies of "products purchased" for governmental purposes. Thus, the text of Article III:8(a) is structured in a manner that the term "products" is directly qualified by the term "purchased", which implies that the requirements govern the products purchased by governmental agencies and not other products that do not have any relationship with the object or subject-matter of the procurement contract. In other words, the requirements governing the acquisition of products purchased by governmental entities are limited to those products and cannot extend to other products with no relation whatsoever with the product purchased.

72. Second, Article XVI(1) of the Agreement on Government Procurement is of no assistance to Canada. Such provision contains the obligation not to impose offsets including domestic content requirements in the qualification and selection of suppliers, products or services, or in the evaluation of tenders and award of contracts. Article XVI(2), in turn, provides for an exception for developing countries, which are entitled to impose domestic content requirements. Contrary to what Canada

argues, the fact that Article XVI(1) of the Agreement on Government Procurement prohibits what Article III:8(a) of the GATT 1994 also prohibits does not mean that Article III:8(a) must have a different meaning. There are many cross-references in the covered agreements to obligations contained in other covered agreements and that does not imply that the substantive obligations under those provisions are meaningless. Thus, the Agreement on Government Procurement may be understood as clarifying, insofar as domestic content conditions are concerned, what is otherwise prohibited under Article III:8(a) of the GATT 1994.

73. Moreover, the nature of the Agreement on Government Procurement as a plurilateral agreement implies that the parties to that Agreement intended to regulate the matter in a self-contained manner, i.e., without the need to invoke other provisions such as Article III:8(a) of the GATT 1994.

74. The European Union also observes that fact that there is a need for an exception of the general rule not to include domestic content requirements in procurement contracts with respect to developing countries in Article XVI(2) of the Agreement on Government Procurement could also be interpreted as meaning that the general prohibition in Article III:8(a) of the GATT 1994 also applies to developing countries. The possibility to negotiate some conditions upon accession to the Agreement on Government Procurement would be intended to encourage participation in the system, without making any judgement on the applicability of Article III:8(a) of the GATT 1994. Furthermore, the GATT 1994 also includes provisions on the adoption of measures on balance of payments grounds, a situation which is mentioned in the Agreement on Government Procurement as one development aspect underlying the use of offsets. The TRIMs Agreement also includes a provision in this respect. Finally, it is not unprecedented for WTO Members, when negotiating a new agreement, to accept on a transitional basis the maintenance of measures that are inconsistent with WTO provisions in force: Article 5 of the TRIMs Agreement is a good example of this practice, which can also be read in Article XVI(2) of the Agreement on Government.

75. Consequently, the reference as to how the Agreement on Government Procurement deals with offsets is not relevant to interpret the scope of Article III:8(a) of the GATT. Otherwise, the scope of a multilateral agreement (the GATT 1994, and in particular the scope of Article III:8(a) of the GATT 1994) would be affected by the meaning provided to other different terms in a plurilateral agreement which is not binding on the entire WTO Membership.

76. Third, as noted in our response to Question 22, in the circumstances of the present case the European Union agrees with the proposition that the domestic content requirements are not within the scope of Article III:8(a) because it is not the equipment that is being procured by the government. The good being procured or purchased (if any) by the Government of Ontario would be the electricity produced by the FIT Generators. The domestic content requirements relate to different products (i.e., the electricity generation equipment and components), the sourcing of which does not add anything to and is completely disconnected from the basic nature of the product procured or purchased. In other words, the European Union contends that the domestic content requirements imposed by the Government of Ontario do not "govern" the alleged procurement of electricity, within the meaning of Article III:8(a), because they are not requirements related to the subject-matter of the procurement, which is electricity. Those requirements "govern" a "feature" of the equipment for the generation of electricity which has no rational link to the attributes of the electricity and the object of the alleged procurement.

77. To illustrate our views with an example. The European Union considers that a government may require in a public tender to purchase electricity that will be used to provide light to its highways and public roads that such electricity is generated by using renewable sources. In such situations, there is a link between the good purchased and the requirements governing its procurement insofar as the

renewable source is a characteristic connected to the object of the contract, i.e., the purchase of electricity. Similarly, the government may include requirements with respect to the materials or fabric used in the suits or shirts it purchases for its public officials. In contrast, the inclusion of requirements such as the suits or shirts must be made or knitted using machines or equipment made locally (or similarly the requirement as to the origin of the generation equipment and components like in the present case) would be unrelated to the subject-matter of the procurement. And in fact such requirements would amount to a disguised measure of trade protectionism.

78. In sum, the facts of this case show that the requirement to use equipment and components made in Ontario in order to benefit from the FIT Program has nothing to do with the stated object of the FIT Contract, which refers to the supply of electricity. For this reason alone, the Panel may find that the FIT Program and its related contracts do not fall under the scope of Article III:8(a) of the GATT 1994.

79. In any event, the European Union also invites the Panel to examine the substantive requirements contained in Article III:8(a) of the GATT 1994 which, in the European Union's view, lead to the same result, i.e., that the FIT Program and its related contracts do not fall under such provision.

(b) The FIT Program does not involve a "purchase" (or procurement)

80. As explained before in the context of our claims under the SCM Agreement, Canada attempts to characterise what the OPA does pursuant to the FIT Contracts as a "purchase" or "procurement" by the government. For the reasons already mentioned in our section dealing with the claims under the SCM Agreement, the European Union maintains that the FIT Program and its related contracts do not involve a "purchase" or "procurement".

81. Moreover, Canada maintains that the ordinary meaning of "procurement" is "acquisition" and that the OPA certainly acquires renewable electricity under the FIT Contracts. In this respect, the European Union notes that Canada agrees that the term "procurement" in Article III:8(a) of the GATT 1994 is coterminous with "acquisition", as per the French and Spanish versions. However, the European Union disagrees that the OPA is acquiring electricity from the FIT Generators through the FIT Contracts. Pursuant to the FIT Program and its related contracts, the OPA facilities the production of electricity from renewable sources and directs the FIT Generators to supply their electricity into the grid. In this sense, the OPA does not "acquire" anything, other than the obligation to pay upon the delivery of electricity into the grid or upon the compliance by the FIT Generators with the IESO instructions to refrain from generating electricity.

82. Consequently, the OPA does not acquire, use or possess the electricity supplied by the FIT Generators. The purpose of the FIT Program and its related contracts is not to purchase or acquire electricity, but rather to ensure that electricity produced from renewable sources in injected into the grid. Canada appears to confirm that there is no purchase when stating that there is no "resale" of renewable electricity under the FIT Program. If there is no resale, then it is reasonable to assume that there was no purchase in the first place by the OPA. Since Article III:8(a) of the GATT 1994 requires that the government purchases or acquires products and the OPA does not do so pursuant to the FIT Program and its related contracts, the Panel may find that those measures do not fall under Article III:8(a) of the GATT 1994.

(c) The FIT Program does not involve a purchase "for governmental purposes"

83. Assuming that the FIT Program and its related contracts amount to a "purchase" or "procurement" by the Government of Ontario (quod non), the European Union submits that the Panel

may also find that the FIT Program and its related contracts do not meet the requirement under Article III:8(a) of the GATT 1994 that the products must be purchased "for governmental purposes".

84. The European Union already addressed Canada's arguments on this element in its opening oral statement at the first meeting with the Panel. In its oral opening statement at the first meeting with the Panel, Canada did not further address such requirement.

85. In this respect, the European Union recalls that Canada's argument regarding the meaning of "for governmental purposes" revolves around the notion of the "aims of the government" insofar as such aims are contained in legislation, regulations, policies or executive directions. The European Union considers it irrelevant that the stated aims are contained in a piece of legislation or regulation. Otherwise, any stated aim, no matter what purpose or how disconnected with the object of the procurement contract, would be considered as automatically meeting the condition of a purchase "for governmental purposes". Likewise, it is also irrelevant that the government purchases products in line with a particular public policy or public objective since, as a matter of principle, governments are expected to always act in pursuance of public policies or public objectives. In other words, it should be presumed that governments when procuring products do so having a public objective or public policy in mind. Thus, those objectives or public policies cannot be determinative of the question as to the meaning of "products purchased for governmental purposes", as otherwise those terms would be deprived of any real meaning.

86. In the European Union's view, the key issue under the terms "for governmental purposes", when seen together with the French and Spanish versions of Article III:8(a) of the GATT 1994, is whether the products purchased by the government agency were acquired with a view to covering the "needs" of the government. The term "necesidad" ("needs" in Spanish) means, among other things, "aquello a lo cual es imposible sustraerse, faltar o resistir") (something that is impossible to avoid or resist). The term "besoins" ("needs" in French) means "les choses considérées comme nécessaires à l'existence) (something considered to be necessary to exist). Thus, the terms "necesidades/besoins" or "purposes" should be understood as referring to the needs of the government, in the sense that the different government bodies and structures would be unable to exist or perform their functions without reliance on the goods purchased. Such needs may include government purchases in order to be able to provide government services to citizens, as products will be needed by the public institutions in charge of the delivery of public services for their direct use in the delivery of such services. As observed by Brazil in its third party oral statement, different governments may have different needs depending on "the different roles that governments may come to play in different societies". However, the European Union considers that the needs of the government cannot include purchases aiming at complying with any stated public policy, regardless of whether the goods will or will not be used by government in the performance of its many functions, and therefore regardless of whether such purchases cover the government's needs. Otherwise, government purchases aimed at "protecting local producers against imports" as a stated public policy would escape the national treatment obligation in Article III of the GATT 1994. In other words, an interpretation according to which the term "purposes" or "needs" refers to any public policy stated by the government would allow for circumventing the fundamental national treatment principle and thus would run contrary to the object and purpose of Article III of the GATT 1994.

87. To illustrate this with an example. A government may purchase medical equipments and drugs to be used in public hospitals or books to be used by students at public schools in order to provide health and education services for the benefit of citizens. Such purchases would be covered by Article III:8(a) of the GATT 1994 since they will be used by the government in providing health and education services to its population. In contrast, the purchase of electricity by the government to be used only by local producers, even if there was a public policy behind of supporting domestic producers, would not aim at covering the needs of the government (or even generally the citizens), but

rather a more dubious public policy from the national treatment perspective. More generally, the purchase of electricity by the government for injection into the grid and for use by industrial or residential users cannot be seen as a purchase "for governmental purposes" for the purposes of Article III:8(a) of GATT 1994.

88. In sum, the European Union considers that "for governmental purposes" refers to government purchases to cover its needs, which in turn also covers their needs for the maintenance of public sector infrastructure and services, including the provision of services to citizens. However, those terms do not cover purchases made in view of any public policy since, by definition, all purchases by the government are made with such a purpose and that interpretation would allow Article III of the GATT 1994 to be circumvented.

89. In the present case, Canada argues that the OPA purchases electricity from the FIT Generators to fulfil a public policy, i.e., to secure a sufficient and reliable supply of electricity from clean sources. As said, it is not the existence of a public policy objective that is relevant for the purposes of Article III:8(a), but the existence of a "need" of the government to purchase goods that the government will use in the performance of its many functions. In this case, the fact that the OPA purchases electricity from the FIT Generators to secure a sufficient and reliable supply of electricity from clean sources, in pursuit of a public policy, is irrelevant since the electricity purchased is not used by the OPA or the Government of Ontario to perform any of its functions (such as providing light in public buildings, roads, etc).

90. In addition, Canada fails to demonstrate the need that the domestic content requirements imposed on such purchases satisfies. In the European Union's view, the inclusion of domestic content requirements with respect to wind and solar electricity show that the electricity supplied by the FIT Generators is not delivered into the grid to cover the government's needs, such as to secure a sufficient and reliable supply of electricity from clean sources; rather, there is another objective behind the stated one that does not satisfy any government need.

91. Consequently, even if the Panel were to consider that pursuant to the FIT Contract, the OPA purchases electricity, the FIT Program and its related contracts insofar as they contain the domestic content requirements for wind and solar electricity, would not amount to purchases "for governmental purposes" in the sense of Article III:8(a) of the GATT 1994.

(d) Any alleged purchase of electricity through the FIT Program is with a view to commercial resale

92. Canada interprets the terms "not with a view to commercial resale" in Article III:8(a) of the GATT 1994 as meaning that the purchase must not be with the aim to resell for profit. Canada maintains that the OPA does not purchase the electricity with the aim of making a profit and, in fact, there is no profit since the OPA recoups the cost of its purchase through the Global Adjustment. Further, Canada argues that there is no resale of renewable electricity under the FIT Program since the OPA purchases the electricity so it is delivered into the grid, where it is available for consumption.

93. The European Union submits that Canada's arguments are without merit. First, with respect to the interpretation of the terms "commercial resale" Canada refers to a definition of the term "commerce" including the notion of profits. The European Union observes that Canada's definition was taken from a specialised definition coming from (French) Commercial Law. In fact, the definition before the one mentioned by Canada, which has an economic connotation, defines "commerce" as an "exchange". Likewise, other French dictionaries, and in their general entries, more specifically defining the very terms used in Article III:8(a) of the GATT 1994, i.e., "dans le commerce", refer to "sur le marché", without indicating any link with profits. Similarly, the term "comercio" in Spanish is

not defined by reference to profits. Therefore, Canada's dictionary interpretation of the term "commercial" is not dispositive. Other definitions support the European Union's interpretation that the terms "commercial resale" mean that the purchased product is sold or introduced into the market ("revendus dans le commerce").

94. Second, Canada refers to some case-law where panels and the Appellate Body have interpreted the term "commercial". The European Union observes that those panel and Appellate Body reports did not interpret the term "commercial" in Article III:8 of the GATT 1994. Since the same term may have different meanings in different context, the European Union submits that Canada's references to those reports are unavailing.

95. Moreover, even if those panels and the Appellate Body reports considered profitability as central to the meaning of "commercial" in other contexts, this does not mean that the notion of "commercial" must always imply profitability in all cases and in all contexts. It may be clear that the term "commercial" covers situations where profits are present. However, it may also cover situations where those profits are absent and yet qualify the action as "commercial".

96. In this respect, the European Union disagrees with Canada's interpretation of the findings of the panel in *Canada – Wheat Exports and Grain Imports*. Canada argues that the panel's interpretation of the term "commercial considerations", in Article XVII:1(b) of the GATT 1994, "confirms that profitability is central to the ordinary meaning of 'commercial'". However, this is not what the panel decided. In fact, regarding the particular structure of the STE that was the object of the dispute - the Canadian Wheat Board (CWB) – the panel explicitly observed that "[i]t is uncontested that the objective of the CWB in selling wheat is not to make a profit for itself". Rather, the CWB acts as an instrument, aiming at returns not for itself but for the Canadian producers: "because of its governance structure, the CWB has an incentive to maximize returns to the producers whose products it markets … even if the CWB were to make sales in greater volumes and, in some instances, at lower prices than a profit-maximizing enterprise, this would not necessarily imply that the CWB's sales would not be based solely on commercial considerations". In other words, the correct interpretation of the decision of the panel in *Canada – Wheat Exports and Grain Imports* is that it is entirely possible for an entity, organised as a State-Trading Enterprise, to have a goal other than making profits for itself, and still to make purchases based on "commercial considerations".

97. Third, Canada argues that purchases of products by the government with a view to reselling them outside of the government to recover the costs of the acquisition (i.e., without a profit) fall within the scope of Article III:8(a) of the GATT 1994 because the resale might be necessary to fulfil the government purpose for which the product was purchased. In other words, Canada maintains that if, in order to comply with a government purpose the product purchased must be reintroduced into commerce, even if it is subsequently sold, those purchases would fall under Article III:8(a) of the GATT 1994 and thus they would not have to comply with the national treatment obligation. The European Union observes that such interpretation of Article III:8(a) cannot stand since it would lead to circumvention of the national treatment obligation.

98. On the facts of this case, what Canada argues is that the OPA can purchase electricity from the FIT Generators, direct them to supply such electricity into the grid and permit distributors to sell it to consumers. According to Canada, since there is no profit made by the OPA, such mechanism would not involve a commercial resale and would fall under Article III:8(a) of the GATT 1994. The European Union disagrees. The term "commercial resale" cannot be measured against the economic resources of Members capable of purchasing goods and reselling them with no profit to other operators so that they ultimately make profits. That would be tantamount as saying that some Member would have the financial capacity to circumvent the national treatment obligation in Article III (by selling without profit) whereas others would always fall under Article III of the GATT 1994. To use

other examples. A government cannot purchase domestic potatoes only and then resell them with no cost to the government (or perhaps at a loss) to other operators because the negative trade-distorting effect captured by the national treatment obligation in Article III would have already been caused. Indeed, because of the government action, domestic producers of potatoes would get their production purchased by the government and ultimately such production would be reintroduced into commerce, thereby circumventing the essence of Article III of the GATT 1994. The terms "not with a view to commercial resale" in Article III:8(a) are meant to ensure that the national treatment principle is not circumvented by permitting a government purchase on a discriminatory basis in cases where the purchased product will go back to the actual market because the government resells the product. In this sense, the negotiating history confirms that the term "commercial" was introduced "to ensure the continued application of the national treatment exemption to procurement of goods which are sold after use".

99. Finally, the European Union observes that, in the present case, the fact that there is no profit made by the OPA may be irrelevant insofar as the electricity is supplied into the grid "with a view to commercial resale". Indeed, it is uncontested that the electricity supplied by the FIT Generators is subsequently sold at profit by distributors or independent retailers.

100. Consequently, the European Union considers that the Panel may find that the FIT Program and its related contracts are with a view to commercial resale and, thus, escape from the application of Article III:8(a) of the GATT 1994.

(e) Any alleged purchase of electricity through the FIT Program is with a view to being use in the production of goods for commercial sale

101. Canada maintains that in order to fall under the last part of the sentence in Article III:8(a) of the GATT 1994 a purchase must be made "with a view to" the use of the product in the production of goods for commercial sale. Cases where the product purchased is used incidentally in the production of goods for commercial resale would fall under Article III:8(a) of the GATT 1994.

102. The European Union disagrees. The use of the terms "with a view to" do not depend on the subjective intention of the Member concerned when purchasing the products in question. That would make the legal standard under Article III:8 of the GATT 1994 subjective and thus subject to circumvention (i.e., if only based on the alleged or stated intention of the Member concerned). Instead, the European Union considers that the legal test under Article III:8(a) should be objective. In this sense, the Spanish and French versions on the terms "with a view to", i.e., "para"/"pour" ("for") are neutral and cover situations where there is evidence of the intention behind the governmental purchase as well as situations were in fact those products purchased by the government outside the national treatment obligations are used in the production of goods for commercial sale. Thus, Canada's subjective interpretation of the terms "with a view to" cannot stand.

103. Moreover, Canada maintains that the terms "use in the production of goods for commercial sale" should be understood as referring to the actions of the government, and not to actions of other operators. The European Union considers that such interpretation cannot stand either. The terms are neutral in respect of the user and, certainly, do not state "use by the government" as Canada pretends. Rather, Article III:8(a) employs the term "use" in general, without specifying the actual user. In view of the underlying anti-circumvention nature of these terms, the European Union considers that the correct interpretation should encompass situations where the government purchase is made with a view to anyone subsequently using the product in the production of goods for commercial resale.

104. Consequently, in the present case, the Panel can find that this element in Article III:8(a) of the GATT 1994 is not met since the electricity supplied into the grid by the FIT Generators is used by

entities in Ontario in the production of goods for commercial purposes, a fact that Canada does not contest.

(f) Conclusions

105. In view of the foregoing, the European Union requests the Panel to find that the domestic content requirements included in the FIT Program and its related contracts do not fall under Article III:8(a) of the GATT 1994. The Panel may do so by examining one, several or all of the elements mentioned above in Article III:8(a) of the GATT 1994.

106. Consequently, the FIT Program and its related contracts do not fall under the scope of Article III:8(a) since they do not involve a purchase (or procurement) by a governmental agency. Even if a purchase is made, such an acquisition is not made for the direct consumption, benefit or use by the government of Ontario. Finally, even if a purchase is made, such an acquisition is made with a view to commercial resale and/or with a view to be used in the production of goods for commercial sale.

2. Article III:8(b) of the GATT 1994

107. In the present case, the European Union does not claim that the FIT Program violates Article III:4 because its above-market rates for the energy produced by the FIT Generators are available only to Ontario-based renewable energy generators, and not to non-Ontario-based renewable energy generators. Rather, the European Union maintains that the FIT Program's domestic content requirements discriminate against imported renewable energy generation equipment and components in favour of such equipment and components produced in Ontario. Consequently, the FIT Program and its related contracts do not fall under the scope of Article III:8(b).

3. Conclusion

108. In view of the above, the European Union concludes that Article III:8 of the GATT 1994 does not apply in this case. Therefore, the national treatment provisions in Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement, in conjunction with paragraph 1(a) of its Annex, are applicable in the present case.

D. THE MEASURES AT ISSUE ARE TRADE-RELATED INVESTMENT MEASURES INCONSISTENT WITH ARTICLE 2.1 OF THE TRIMS AGREEMENT, IN CONJUNCTION WITH PARAGRAPH 1(A) OF ITS ANNEX

109. The European Union submits that the measures at issue are inconsistent with Article 2.1 of the *TRIMs Agreement*, in conjunction with paragraph 1(a) of its Annex, because the measures are trade-related investment measures that require the purchase or use by enterprises of equipment and components for renewable energy generation facilities of Ontario origin or source.

1. The claims under the TRIMs Agreement are more specific than the claim under Article III:4 of the GATT 1994

110. The core of the matter in this dispute is the domestic content requirements included in the FIT Program and its related contracts. In particular, in order for solar PV (FIT and microFIT) or wind (FIT) Generators to receive the guaranteed, long-term rates under the FIT Program, they must purchase or use a sufficient proportion of goods manufactured, formed or assembled in Ontario and that are listed in the applicable Domestic Content Grid to satisfy the applicable Minimum Required Domestic Content Level. This establishes an incentive for the FIT Generators to utilise goods of

Ontario origin in preference to goods of other origins in their solar PV or wind generation facilities, because goods of Ontario origin count toward the Domestic Content Level of a project while goods of other origins do not. In other words, the FIT Program discriminates against imported products because the FIT Generators have to purchase or use at least some products of domestic origin or source in order to benefit from the FIT Program. In view of the more specific language of the claim under the TRIMs Agreement to the facts at issue in the present dispute, as compared to the GATT, and of the nature of the measures at issue as a TRIM, the European Union will examine its claims under the TRIMs Agreement first.

2. The FIT Program falls under paragraph 1(a) of the Annex to the TRIMs Agreement

111. In order to show that a TRIM is inconsistent with Article 2.1 of the TRIMs Agreement, there are at least two possibilities relevant in this case: either (1) evidence is adduced demonstrating the existence of any of the situations described in the illustrative list of TRIMs as inconsistent with the national treatment provision provided for in Article III:4 of the GATT (and, in particular, paragraph 1(a)) of the Annex to the TRIMs Agreement, or (2) a violation of Article III:4 of the GATT 1994 is shown.

112. The European Union considers that there is sufficient evidence that the FIT Program and its related contracts are TRIMs explicitly addressed in paragraph 1(a) of the Annex to the TRIMs Agreement. Indeed, the FIT Program is a TRIM "compliance with which is necessary to obtain an advantage" since failure to comply with Minimum Required Domestic Content Level denotes that the generators will not benefit from the FIT Program. Moreover, the FIT Program requires the purchase or use of domestic equipment and components in order to satisfy the applicable Minimum Required Domestic Content Level.

113. Therefore, the European Union submits that the FIT Program and its related contracts are inconsistent with Article 2.1 of the *TRIMs Agreement*, in conjunction with paragraph 1(a) of its Annex, because they are TRIMs that require the purchase or use by enterprises (FIT Generators) of equipment and components for renewable energy generation facilities of Ontario origin or source.

3. Conclusion and relief requested

114. In view of the foregoing, the European Union requests the Panel to find that the FIT Program and its related contracts are inconsistent with Article 2.1 of the *TRIMs Agreement*, in conjunction with paragraph 1(a) of its Annex, because they are TRIMs that require the purchase or use by enterprises of equipment and components for renewable energy generation facilities of Ontario origin or source.

115. The European Union requests the Panel to recommend that Canada brings the FIT Program and its related contracts into conformity with the TRIMs Agreements as required by Article 19.1 of the DSU.

E. THE MEASURES AT ISSUE ARE INCONSISTENT WITH ARTICLE III:4 OF THE GATT 1994

116. The European Union argues that the FIT Program and its related contracts are inconsistent with Article III:4 of the GATT 1994 because they are TRIMs falling under paragraph 1(a) of the Annex to the TRIMs Agreement. Alternatively, the European Union argues that the FIT Program and its related contracts are inconsistent with Article III:4 of the GATT 1994 because they impose domestic content requirements on wind and solar PV electricity generators that affect the internal sale, purchase or use of renewable energy generation equipment and components, according less favourable treatment to like products of EU origin.

117. The FIT Program and its related contracts fall within the illustrative list of measures that are deemed to be inconsistent with Article III:4 of the GATT in accordance with the Annex to the TRIMs Agreements. The European Union considers that, on this basis alone, the Panel can find that the FIT Program and its related contracts are also, consequently, inconsistent with Article III:4 of the GATT.

118. Should the Panel decide to examine the claim under Article III:4 of the GATT 1994 separately (e.g., because it does not exercise judicial economy) and/or before the claim under the TRIMs Agreement, the European Union submits that the measures at issue are inconsistent with Article III:4 of the GATT 1994, because the measures accord less favourable treatment to imported equipment and components for renewable energy generation facilities than accorded to like products originating in Ontario. The European Union incorporates hereto paragraphs 262 – 283 of Japan's first written submission in DS412 into this submission.

119. Indeed, the renewable energy generation equipment and components manufactured domestically in Ontario and imported from the European Union are "like products" within the meaning of Article III:4 of the GATT 1994. A number of panels have held the view that where a difference in treatment between domestic and imported products is based exclusively on the products' origin, it is correct to treat products as "like" within the meaning of Article III:4. In that case, there is no need to establish the likeness between imported and domestic products in terms of the traditional criteria – that is, their physical properties, end-uses and consumers' tastes and habits. In other words, it is sufficient for purposes of satisfying the "like product" test for a complaining party to demonstrate that there can or will be domestic and imported products that are "like". In the case at hand, the sole criterion distinguishing the products is that of the origin. The Domestic Content Grid does not refer to any substantial difference between domestic and imported equipment in terms of their physical properties, end-users, consumer perceptions and tariff classifications. Thus, both products, domestic and imported, are like.

120. Moreover, as explained before, the FIT Program and its related contracts are requirements affecting the internal sale, purchase or use of products in the sense of Article III:4 of the GATT 1994.

121. In addition, the FIT Program and its related contracts accord less favourable treatment to imported renewable energy generation equipment and components than that accorded to like products of Ontario origin. The FIT Program creates incentives among Ontario-based wind and solar PV energy generators to use renewable energy generation equipment and components produced within Ontario. The fundamental thrust of these measures is to alter the conditions of competition between imported and like domestic products in order to artificially create a preference for domestic products.

122. Consequently, because the FIT Program and its related contracts impose domestic content requirements on wind and solar PV electricity generators that affect the internal sale, purchase, or use of renewable energy generation equipment and components, according less favourable treatment to like products of EU origin, they are inconsistent with Canada's national treatment obligation under Article III:4 of the GATT 1994.

123. In view of the foregoing, the European Union requests the Panel to find that the FIT Program and its related contracts are inconsistent with Article III:4 of the GATT 1994 because they are TRIMs falling under paragraph 1(a) of the Annex to the TRIMs Agreement. Alternatively, the European Union requests the Panel to find that the FIT Program and its related contracts are inconsistent with Article III:4 of the GATT 1994 because they impose domestic content requirements on wind and solar PV electricity generators that affect the internal sale, purchase or use of renewable energy generation equipment and components, according less favourable treatment to like products of EU origin.

124. The European Union requests the Panel to recommend that Canada brings the FIT Program and its related contracts into conformity with the GATT 1994 as required by Article 19.1 of the DSU.

IV. CONCLUSIONS AND REQUEST FOR RELIEF

125. Based on the foregoing, the European Union requests that Panel to find that:

- Canada violated Articles 3.1(b) and 3.2 of the SCM Agreement since the FIT Program and its related contracts established by the Government of Ontario are subsidies within the meaning of Article 1.1 of the SCM Agreement that are provided contingent upon the use of domestic over imported goods, namely contingent upon the use of equipment and components for renewable energy generation facilities produced in Ontario over such equipment and components imported from other WTO Members, including the European Union;

- Canada violated Article 2.1 of the TRIMs Agreement, in conjunction with paragraph 1(a) of its Annex, because the FIT Program and its related contracts established by the Government of Ontario are TRIMs that require the purchase or use by enterprises of equipment and components for renewable energy generation facilities of Ontario origin or source; and

- Canada violated Article III:4 of the GATT 1994 because the FIT Program and its related contracts established by the Government of Ontario are TRIMs falling under paragraph 1(a) of the Annex to the TRIMs Agreement or, alternatively, because they impose domestic content requirements on wind and solar PV electricity generators that affects the internal sale, purchase or use of renewable energy generation equipment and components, according less favourable treatment to like products of EU origin.

ANNEX A-3

INTEGRATED EXECUTIVE SUMMARY OF CANADA

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I. CANADA'S FIRST WRITTEN SUBMISSION IN DS412[1]

A. INTRODUCTION

1. Electricity is critical to public welfare. Thus, the Government of Ontario plays an important role in ensuring a sufficient and reliable supply of electricity, including from clean sources, by regulating the electricity industry, owning generation facilities, and owning the majority of the transmission network. The Government of Ontario also procures electricity through its agent, the Ontario Power Authority (OPA), which enters into "Power Purchase Agreements" with Independent Power Producers (IPPs).

2. Through the Ontario Feed-In-Tariff (FIT) Program, the OPA purchases electricity from renewable sources. In addition to helping secure the supply of electricity, the FIT Program also helps protect the environment as it reduces Ontario's reliance on electricity from coal, thus reducing the production of greenhouse gases.

3. The procurement of electricity by the OPA through the FIT Program falls within the scope of Article III:8(a) of the General Agreement on Tariffs and Trade 1994 (GATT) and as a consequence, is not subject to Article III of GATT and cannot be inconsistent with Article 2.1 of the Agreement on Trade-Related Investment Measures (TRIMS Agreement). Article III:8(a) removes laws, regulations and requirements that govern certain procurements from the obligations of Article III of the GATT and TRIMS. As explained by Japan's Ministry of Economy, Trade and Industry, Article III:8(a) "permits governments to purchase domestic products preferentially, making government procurement one of the exceptions to the national treatment rule".

4. Japan has also failed to substantiate its allegation that the FIT Program is a prohibited subsidy under the Agreement on Subsidies and Countervailing Measures (SCM Agreement) for two reasons: first, it has mischaracterized the OPA's purchase of goods as a direct or potential direct transfer of funds, or a form of income or price support; and, second, the benchmarks it has chosen to establish the conferral of a "benefit" are inappropriate[2].

B. FACTUAL OVERVIEW

5. The electricity system in Ontario has historically been owned and operated by the provincial government. From 1973 to 1998, a government corporation named Ontario Hydro was responsible for ensuring almost all generation and transmission of electricity in the province. In 1998, financial difficulties experienced by Ontario caused the government to enact the *Energy Competition Act* and the *Electricity Act, 1998*, which created the electricity market and split Ontario Hydro's responsibilities across five separate entities.

6. First, the Independent Electricity Market Operator (IMO) was created to manage the wholesale electricity market[3]. Second, Ontario Power Generation (OPG) was formed to own and

[1] Canada has summarized its key arguments in its written statements and oral opening statements chronologically. Canada has endeavoured to summarize only the new points that have arisen in subsequent submissions. With respect to summaries of its responses to the Panel's questions and certain comments on responses by the complainants, Canada has either inserted these in relevant sections in this document or, to the extent possible, placed them in a footnote to the text that is most relevant.

[2] With respect to Canada's request for a preliminary ruling under Article 6.2 of the DSU, the Panel has set out a general outline of Canada's arguments in its decision.

[3] **Response to question No. 19 (Second Set):** The IMO wholesale electricity market was based on offers of electricity and bids to purchase electricity. In that market, generators offered quantities of electricity at specific rates and volumes while purchasers (mainly Local Distribution Companies (LDCs)) bid to purchase.

operate the generation assets of Ontario Hydro, thus assuming responsibility for 90% of electricity generation in Ontario. Third, Hydro One was made responsible for owning most of Ontario's transmission system and its largest distribution company. Fourth, the Ontario Electricity Financial Corporation (OEFC) was created to manage debt and Non-Utility Generator (NUG) contracts inherited from Ontario Hydro. Fifth, the Electrical Safety Authority (ESA) was established to improve electrical safety for Ontario residents.

7. At the same time, the Ontario Energy Board (OEB) was tasked with regulating the electricity industry, and setting the rates for distribution utilities and consumer prices under the Regulated Price Plan (RPP)[4].

8. While the competitive market was being developed between 1998 and 2002, few generation facilities were constructed and there was insufficient investment from the private sector to ensure reliable supply. The competitive market opened in May of 2002[5]. Over the summer of 2002, very high

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The IMO balanced supply and demand by accepting all offers up to the total quantity of electricity required in a particular five-minute interval. The last quantity of electricity accepted by the IMO set the Market Clearing Price (MCP). The average of all the MCPs for a particular hour set the HOEP. After the market closed in November 2002, this mechanism continued to be the basis on which the IESO balanced physical supply and demand (i.e. volume). However, the IESO mechanism functions differently. First, not all generators present "offers" in the same manner. Most significantly, non-dispatchable generation (including FIT wind and solar electricity) is automatically accepted into the IESO stack on the basis of estimates of volumes generated and without any rate "offer". The IESO then accepts into the stack the baseload quantity from all regulated OPG facilities. OPG "offers" this baseload electricity at extremely low and often negative rates to ensure that it will be accepted. It can do so and face no negative revenue impact because its true rates are set through regulation by the OEB.

It is only after these volumes are accepted that the IESO begins to accept offers into the stack from other generators. These are generators who either receive contractual rates or the HOEP alone. These offers occur across all generation sources except non-dispatchable sources. However, the rates offered are not reflective of the true price for the generation of any contracted electricity source because these are pre-determined by the OPA/OEFC contracts. Ultimately, the last quantities of electricity accepted into the stack tend to be from gas generators with OPA contracts. These contracts contain provisions that require gas generators to "offer" at a rate determined by a formula that ensures that the generators run when it is most economical for them to do so.

With respect to the demand side of the IESO stacking mechanism, LDCs, who make up the vast majority of the demand "bids", are both rate and volume inelastic. They simply flow through the demand of end-users on the basis of expected volumes consumed and take any rate.

[4] Response to question No. 37 (First Set): The operations of the OEB before and after the period of the competitive market in 2002 are substantively the same. In 2003, its role was expanded to include responsibility for developing a new retail electricity pricing mechanism, the RPP. In addition, when the OPA was created in 2002, the OEB was made responsible for approving its fees and procurement processes. In 2005, the OEB became responsible for regulating the rates for the OPG's regulated generating assets.

In 2002, the IESO was called the IMO. It was responsible for managing the wholesale electricity market and operation of the system. In 2004, the IMO was renamed the IESO. The IESO today continues to manage the reliability of the power system, is responsible for operating the algorithm to balance physical supply and demand, and provides short-term forecasts of demand and supply of electricity. There is no substantive change to its responsibilities; however, the removal of the term "Market" from its title indicated the change in Ontario's electricity system. The OPA did not exist in 2002. It was created by the Electricity Restructuring Act in 2004. In 2002, there was no entity mandated to procure electricity on behalf of the Government of Ontario.

[5] Response to question No. 1 (Second Set): The generation technologies that existed during liberalization were nuclear, coal, oil and gas, hydroelectric, wind, wood and waste. The respective capacities and outputs for 2002 have been provided. These generators received the HOEP as remuneration, with the exception of NUG producers, who received contractual rates. During liberalization, NUG producers received averagely $0.06 to $0.07/kWh. The IMO mechanism was not applied to NUG generators as they were entitled to their contractual rates agreed to with the former Ontario Hydro in the early 1990s. NUG generators accounted for

temperatures in the province drove up demand as well as the prices of electricity. As a result, the government capped electricity prices for residential, institutional and small business consumers.

9. As part of a plan to remove the price caps and to facilitate investment in new generation, the government restructured the electricity system again in 2004 through the *Electricity Restructuring Act*. This largely led to the system that exists in Ontario today. Governmental oversight of the electricity system was mandated to the Ministry of Energy, which has the responsibility for ensuring that Ontario's electricity needs are met in a sustainable manner. The Ministry of Energy also has legislative responsibility over the Independent Electricity System Operator (IESO), OEB, OPA, OPG and Hydro One.

10. As the experience with the competitive wholesale market demonstrated that this would not be sufficient to provide for long-term supply needs, the OPA was created and mandated with responsibility for long-term system planning, procuring electricity and the promotion of renewables and clean energy[6]. During restructuring, the IMO was also renamed the IESO. The IESO continues to manage the reliability of the power system and administer the electricity system.

11. Today, electricity is generated by OPG facilities (which provide approximately 50% of supply) and by IPPs who have contracts with the OPA or OEFC (approximately 42% of supply). By mid-2011, OPA-procured electricity accounted for approximately 12,426MW of generating capacity in Ontario. The OPA procures electricity by entering into long-term contracts known as "Power Purchase Agreements"[7].

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about 6% of generation in 2002. The average HOEP during liberalization ranged from $0.03 to $0.0831/kWh. Non-commodity charges were not included in the HOEP, nor are they presently included. In 2002, these constituted the wholesale market service charge, transmission charge and debt retirement charge; for the period of May to November 2002 inclusive, these charges averaged $0.07/kWh, $0.0887/kWh and $0.07/kWh, respectively. These were paid, in addition to the HOEP, by all end-users of electricity during the liberalization period, just as they are today. From May to November 2002, Ontario imported a total of 5.1 TWh of electricity. This represented about 5.7% of total Ontario demand over this period (net imports were about 4.4% of total demand).

The Government of Ontario decided to put an end to liberalization as very high temperatures drove up demand, supply was hampered by the market structure which did not encourage sufficient entry of new generators, and, as a result, prices rose significantly over a short period. The difficulties experienced by consumers as a result of these high prices led the government to lower and cap the prices of electricity for certain consumers. In order to remove price caps and facilitate investment in new generation, the government restructured the electricity market into the electricity system that presently exists.

[6] Response to question Nos. 10 and 36 (First Set): The OPA is neither an "agent" nor a "clearing house", as asserted by the European Union. The legislation that created the OPA does not mandate it to act as an agent but to enter into procurement contracts. It has no agency contracts with sellers or purchasers of electricity and does not act on any instructions from FIT suppliers or consumers. Rather, together with the Ministry of Energy, it decides the conditions of purchase.

A "clearing house" is "[a]n institution […] for the adjustment of their mutual claims for cheques and bills […]". The OPA does not perform this role. The OPA also does not act as a "regulator" – that is the role of the OEB. The OEB regulates the prices paid by low-volume Ontario consumers and businesses, the rates paid to electricity generating assets owned by the government, and the fees paid to transmission and distribution companies for delivering electricity. By contrast, the OPA does not regulate anything. It enters into contracts for the purchase of power. Suppliers are free to accept or reject the price offered by the OPA.

Response to question No. 29 (First Set): The OPA's liabilities are not guaranteed by the Government of Ontario. Presently, the OPA's only source of revenue to pay the contracted prices is the Global Adjustment. In the unlikely event that consumers do not pay the Global Adjustment, the OPA may be unable to make these payments.

[7] Response to question Nos. 16 and 18 (Second Set): It is standard practice for contracts to specify the type of generation technology that will be employed. For example, contracts under the Hydroelectric Contract

12. Thus, the Government of Ontario helps secure the supply of electricity by regulating the electricity industry, owning generating facilities and procuring electricity[8]. In doing so, the government faces two main challenges: first, securing sufficient supply; and, second, securing supply from clean sources.

13. The first challenge of securing sufficient supply exists as Ontario's population will increase by 28% by 2030, while several nuclear facilities will be temporarily shut down for maintenance. Thus, supply will be declining while demand is expected to increase. Further, the government has committed to eliminating coal-fired generation by 2014. It is forecast that 15,000MW of generation capacity will need to be renewed, replaced or added to the existing capacity of 35,000MW by 2030.

14. However, the government faces the problem of stimulating investment in new electricity generation, i.e. the "missing money" problem. This problem arises when wholesale prices do not provide adequate compensation to pay for the fixed costs of generators or the total investment costs of new generators. As a result, investors would not finance the construction of new generation at wholesale prices. This problem is more severe for the capital intensive generation technologies required for renewable electricity generation[9].

15. In Ontario, the wholesale market price (known as the Hourly Ontario Energy Price (HOEP)) does not provide sufficient compensation to stimulate investment in generation. As such, 92% of generators in Ontario are not compensated by the HOEP alone – they are paid regulated or contract prices that are above the HOEP in accordance with OEB regulations, OPA contracts or OEFC contracts[10]. OPG's nuclear and baseload hydroelectric generation have their rates set by the OEB,

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Initiative (HCI) are only awarded to hydroelectric plants. Similarly, contracts under the Combined Heat and Power Standard Offer Program are only for electricity supplied from gas. Other programs, such as FIT, require that the electricity is supplied from certain renewable sources. The only contract for nuclear generation is for the refurbishment of Bruce Power. OPA contracts with hydro facilities under the HCI and FIT are generic in terms of technology (i.e. they provide for standard rates). It is also standard practice for contracts of grid-connected generators to stipulate requirements related to the grid. These typically incorporate the IESO Market Rules. For example, section 2.2(d) of the RES II Contract requires generators to provide a "Connection Impact Assessment […]".

[8] Response to question No. 34 (First Set): In Ontario, the goals of electricity security and sustainable generation are set out in section 1 of the Electricity Act, 1998. The OPA's mandate to ensure an adequate, reliable and secure supply of electricity is set out in section 25.2 of this Act. These objectives are also contemplated by the Green Energy Act, 2009 and the Long-Term Energy Plan (LTEP). These goals are shared by neighbouring jurisdictions. In order to participate in the North American electricity grid, the IESO is required to comply with standards developed by the North American Reliability Corporation, including requirements for having adequate generation reserves.

[9] Response to question No. 42 (First Set); question Nos. 2 and 7 (Second Set): A significant barrier to entry for a new electricity investor in Ontario is ensuring that its sales revenue covers its total costs of production and earns it an attractive enough return to merit the risks. In addition, new investors also face barriers in securing project financing as they must often demonstrate to lenders that they have long-term contracts for the purchase of electricity with credit-worthy entities. Additionally, they must meet a number of regulatory requirements, including: certain credit requirements; application to the IESO to become a market participant and pay an application fee; obtain a licence from the OEB; register generation facilities with the IESO (if they are transmission grid connected); and register interval meters to measure energy that flows in or out of the grid.

All FIT suppliers connected to the IESO grid are considered "Market Participants" and must adhere to IESO Market Rules. The Market Rules exist to ensure the safety and reliability of the system.

[10] Response to question No. 38 (First Set); question No. 5 (Second Set): All rates received by generators are above the HOEP, with the exception of certain older, unregulated OPG-owned coal and non-baseload hydro facilities. OPG nuclear and base-load hydro plants receive above-HOEP rates. Effective

while generators receiving a capacity contract price are NUGs, IPPs, OPG plants that have contracts, and Renewable Energy Supply (RES) and FIT Program generators[11]. The only generators that receive the HOEP alone are OPG's unregulated hydroelectric facilities and two coal-fired facilities, making up approximately 8% of generation. These are older, state-owned facilities whose capital costs have largely been depreciated. In the case of coal, these facilities will be shut down by the end of 2014.

16. Second, Ontario faces the challenge of securing clean energy supply as it has committed to reducing its production of greenhouse gases and to phasing out all coal-fired generation by the end of 2014. Coal generation will be replaced partly by renewable generation. The Government aims to increase capacity from wind, solar and bioenergy to 10,700MW by 2018[12].

17. FIT Programs play an important role in securing clean electricity supply. Countries around the world, including Japan, have developed FIT programs which generally provide guaranteed rates with long-term contracts in return for the provision of renewable electricity by a producer[13]. These

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1 March 2011, the rate for nuclear was $0.056/kWh, and regulated hydro was $0.034/kWh. Bruce Power received $0.057/kWh for its "A" units and a floor price of $0.045/kWh for its "B" units, adjusted in accordance with its contract terms. These rates escalate according to the Consumer Price Index (CPI) factor. Unregulated hydro plants receive only the HOEP. Plants under the OPA's HCI receive $0.069/kWh, escalated in accordance with the CPI. Waterpower generators under FIT receive $0.131/kWh. On average, OPA-contracted gas generators are paid $0.09/kWh, while NUG gas contracts receive $0.10/kWh. Two coal facilities with OEFC contracts receive approximately $0.10/kWh above the HOEP as a contingency support payment. The remaining coal facilities receive the HOEP alone. Bioenergy generators under the RESOP Program receive $0.11/kWh. New bioenergy projects under FIT receive from $0.104 to $0.195/kWh. Wind and solar rates under RES range from $0.08/kWh to $0.11/kWh. Wind projects under FIT receive $0.135/kWh. FIT solar generators receive prices that range from $0.443 to $0.713/kWh, depending on the solar facility. Solar generators under the RESOP Program receive $0.42/kWh. OPA contracts for natural gas and non-solar PV generation under RESOP receive an annual price escalation of 20% of the Ontario CPI.

[11] Response to question Nos. 15 and 16 (First Set): The only contract between generators in Ontario and transmission companies is a "connection agreement" which provides the terms on which generators inject electricity into the transmission grid. The transmission company's fee for distributing the electricity is determined by the OEB and paid by consumers. There are no contracts for the purchase of electricity between generators and transmission companies. The only contract between generators and LDCs is a similar "connection agreement". The fee of LDCs for distributing electricity is determined by the OEB and paid by consumers. There are no electricity purchase contracts between generators and LDCs. There is no contractual relationship between electricity generators in Ontario and consumers, whether transmission or distribution connected.

[12] Response to question No. 33 (First Set): The current policies on "supply mix" are found in the LTEP. The LTEP directs that Ontario's supply mix must balance reliability, cost and environmental impacts. Consequently, the different technologies employed must achieve a balance of goals, that is: conservation, sufficient baseload, intermediate and peak power, and the reduction of carbon emissions.

[13] Response to question Nos. 46 and 50 (Second Set): A number of governments around the world promote the supply of electricity from clean sources as part of policies to ensure reliable and sufficient supply. For example: (1) Japan, through its "Strategic Energy Policy"; (2) Europe, through the "Directive on the promotion of the use of energy from renewable sources"; (3) Germany, in its statement on "The Path to the Energy of the Future – Reliable, Affordable and Environmentally Sound"; (4) California, through its "Clean Energy Future" policy; (5) Australia, through the Department of Resources, Energy and Tourism, on its commitment to clean energy technologies; (6) South Africa, through its National Energy Act; and (7) Switzerland, through its "Energy Strategy 2050".

Canada is not of the view that all governments pursue this objective in the same manner as the Government of Ontario. Some do. For example, India procures renewable electricity through its National Solar Mission program, which aims to "promote ecologically sustainable growth while addressing India's energy security challenge" and requires state utilities to procure solar generated electricity through a "Renewable Purchase Obligation".

prices are often higher than those for electricity produced from traditional sources, to reflect the higher costs of production.

18. The production costs from the wind and sun are significantly higher for several reasons. For instance, there are fewer economies of scale in comparison with large nuclear, coal, hydro and gas plants; wind and solar facilities produce electricity for a much smaller proportion of the year; the smaller experience base means there are fewer operational efficiencies; and the lack of experience in constructing wind and solar facilities leads to fewer efficiencies. Thus, prices guaranteed by FIT programs provide remuneration to generators to cover the higher costs involved in renewable electricity generation.

19. The Ontario FIT Program was created by a Ministerial Direction issued by the Minister of Energy and Infrastructure to the OPA on 24 September 2009, under the authority provided by section 25.35 of the *Electricity Act, 1998*. The objective of this was to induce new renewable generation. This was necessary as most of these generators would not have entered the market in the absence of the FIT Program.

20. The Ministerial Direction instructed the OPA to develop a FIT Program "designed to procure energy from a wide range of renewable sources" and stipulated that each wind and solar photovoltaic (PV) and solar microFIT project contain a percentage of domestic content[14]. The key objectives of the FIT Program are to "increase capacity of renewable energy supply to ensure adequate generation and reduce emissions" and to "introduce a simpler method to procure and develop generating capacity from renewable sources of energy". The Ministerial Direction dictates the eligible technologies of the program, and prescribes the process for establishing prices, contract duration and specific requirements to be contained in the FIT Rules and contract.

21. The OPA implements the FIT Rules and the Ministerial Direction through "Power Purchase Agreements" with generators under the authority provided by the Ministerial Direction and its authority to procure electricity in section 25.2(5) of the *Electricity Act, 1998.* The FIT Program is open to generators of electricity from solar, wind, water and bioenergy sources[15]. Domestic content requirements are restricted to solar projects and wind projects greater than 10 kilowatts.

22. The FIT contracts provide solar and wind generators fixed prices in accordance with the FIT Price Schedule, for 20 years. Domestic content requirements are set out in Exhibit D (Domestic Content Grid) of the FIT Contract. Like other regulated and procured electricity in Ontario, FIT contracts provide prices that are higher than the HOEP to provide the additional revenue required to pay for the higher costs involved. These supplemental payments are recovered from the Global Adjustment charge, an amount charged to customers in proportion to total consumption and type of consumer[16].

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[14] Response to question No. 32 (First Set): The FIT Program was developed in line with the goals of the Green Energy Act, 2009. There are no functional or technical requirements underpinning the domestic content requirements.

[15] Response to question No. 41 (First Set): The OPA has the discretion to reject applications made to the FIT or microFIT Programs that could nonetheless satisfy the relevant conditions. This discretion is set out in section 12.2(c) of the FIT Rules, and, section 6.1(e) of the microFIT Rules.

[16] Response to question No. 30 (First Set); question No. 3 (Second Set): Ontario's electricity generation, transmission and distribution system is a closed financial system. All costs are recovered from ratepayers through fees or through charges levied under the Global Adjustment. No funds from consolidated revenue are made to the OPA, OEB or IESO.

In January 2005, the Government of Ontario initiated the "Provincial Benefit" mechanism in part to recover the cost of the NUG contracts. This was later renamed the "Global Adjustment".

C. LEGAL ARGUMENTS

23. Japan's claims that Canada has breached the GATT, the TRIMS Agreement and the SCM Agreement are without merit because: (i) the local content requirement is within the scope of GATT Article III:8(a) and therefore is not subject to Article III of the GATT; (ii) as the local content requirement is not subject to Article III, it cannot be inconsistent with Article 2.1 of the TRIMS Agreement; (iii) the Panel has no jurisdiction over the SCM Agreement claim due to Japan's deficient panel request; (iv) in the alternative, the Government of Ontario is not transferring funds or providing any form of income or price support within the meaning of the SCM Agreement – it is purchasing electricity; and, (v) Japan has failed to demonstrate that the price the Government pays for renewable energy under the FIT Program confers a benefit within the meaning of the SCM Agreement.

1. The FIT Program Is not Subject to GATT Article III

24. Certain government procurements are not subject to GATT Article III. When this Article was being developed, some parties sought to have its obligations apply broadly to purchases by government. However, this proposal to expressly extend the national treatment obligation to governmental purchases was rejected. Instead, certain government procurements were removed from the scope of national treatment through what eventually became Article III:8(a)[17]. This Article provides:

> The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for

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Response to question No. 39 (First Set); question Nos. 4 and 8 (Second Set): The IESO pays the HOEP component of a FIT generator's payment, while the OPA pays the balance through the Global Adjustment. The LDC serves as an agent on behalf of the OPA with respect to making payments under FIT contracts to distribution-connected generators using funds collected from consumers that constitute the HOEP and the Global Adjustment. The settlement processes are set out in Section 8 of the FIT Rules (Overview of Settlement) and Exhibit B to the FIT Contract. The same settlement process generally applies for all generators with OPA contracts irrespective of technology. Transmission-connected generators receive HOEP payments from the IESO and the balance from the OPA via the Global Adjustment. Distribution-connected generators receive payments through the LDC. However, with respect to the RES generators under OPA contracts, the OPA pays RES I and RES II contract-holders the full payment directly. RES III contract holders are paid by the IESO for the HOEP component, and by the OPA for the balance. The OEB does not have contracts with any generators.

All OPA contracts, including FIT and microFIT, serve the same basic objective – to ensure a secure and reliable source of electricity for Ontario from clean sources. Generally, IPPs with OPA contracts receive rates that vary according to technology and the terms of their contracts. Rates for wind projects under the RES request for proposal process range from $0.08/kWh to $0.11/kWh. These projects provide much smaller capacity than the capacity provided by the wind projects under FIT, which receive $0.135/kWh. Compensation to producers who have gas-fired generation contracts will vary according to the contract. Clean Energy Supply contracts receive rates on the basis of the lowest cost bids accepted. Other gas contracts receive rates based on bilateral negotiations. Gas contracts are designed to ensure that generators are able to recover fuel costs regardless of fluctuations in natural gas prices. While grid connection requirements are similar for each technology, larger generation projects have more extensive requirements.

Response to question No. 40 (First Set): The LDC serves as an agent of the OPA with respect to making contract payments to microFIT generators. Settlement procedures are described in Section 4.4 of the microFIT Contract and Section 5.2 of the microFIT Rules.

[17] Response to question No. 59 (First Set): The purpose of Article III:8(a) is to exclude laws, regulations and requirements that govern certain procurements from the scope of Article III. This ensures that such laws, regulations and requirements are not subject to Article III and that Members are free to impose conditions on the relevant procurements that would otherwise be inconsistent with the Article.

> governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

25. Article III:8(a) preserves governments' flexibility to pursue public policy objectives through their procurements. As Japan's Ministry of Economy, Trade and Industry has explained:

> GATT Article III:8(a) permits governments to purchase domestic products preferentially; making government procurement one of the exceptions to the national treatment rule. This exception is permitted because WTO Members recognize the role of government procurement in national policy. For example, […] government procurement may […] be used as a policy tool to promote smaller business, local industry or advanced technologies.

26. The laws and requirements that create and implement the FIT Program – section 25.35 of the *Electricity Act, 1998*, the Ministerial Direction, and the FIT and microFIT Rules and contracts – satisfy all the elements of Article III:8(a). The *Electricity Act*, *1998* is a law, the Ministerial Direction imposes requirements on the OPA to establish the program, the FIT and microFIT Rules and standard contracts impose requirements on the OPA concerning implementation of the Program. In addition, these laws and requirements govern the procurement of renewable electricity by the OPA.

27. The OPA is a governmental agency that procures the product[18] of renewable electricity. The *Oxford English Dictionary* defines "product" as "[a]n object produced by a particular action or process; the result of mental or physical work or effort". Renewable electricity is such an "object". The aforementioned laws and requirements also expressly state that the OPA is "procuring" electricity and that the FIT Program is a "program for *procurement*", and that it is designed to *procure* energy from a wide range of renewable energy sources.

28. The ordinary meaning of "procurement" is "[t]he action of obtaining something; acquisition […]" and "purchase" is "[t]o acquire in exchange for payment in money or an equivalent; to buy"[19]. The OPA acquires renewable electricity by purchase: it is paying money in return for the delivery of that electricity into the transmission grid. The Ministerial Direction and contracts state that the OPA is *purchasing* electricity under contracts that are "Power Purchase Agreements".

29. The FIT Program laws and requirements *govern* the procurement of electricity because they direct or regulate the OPA's purchase. The ordinary meaning of "govern" endorsed by the panel in *EC – Customs Matters*, is to "control, regulate, or determine […]".

30. The ordinary meaning of a "purchase for governmental purposes" is a purchase for an aim of the government. Such purchases can be directed in legislation, regulations, policy or an executive direction. The OPA's purchase of renewable electricity furthers the aim of the Government to secure the supply of adequate and reliable electricity from clean sources.

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[18] Response to question No. 51 (Second Set): Electricity is a good and a product for the purposes of the SCM Agreement, the GATT 1994 and the TRIMs Agreement.

Response to question No. 53 (First Set): Electricity produced from renewable electricity sources that are the subject of the FIT contracts is the same product as electricity produced from all other sources.

[19] Response to question No. 56 (First Set): "Procurement" is just one element of Article III:8(a). There is no indication that the words following "procurement" limit its ordinary meaning. To fall within the scope of this Article, the "procurement" must be of a "product", which is "purchased" by a "governmental agency", and that purchase must be for "governmental purposes". A "purchase" will always be an "acquisition" and consequently, will always be a "procurement" for the purposes of Article III:8(a).

31. Further, this purchase is not with a view to commercial resale as it is not a purchase with an aim to resell for profit. The ordinary meaning of "commercial" as endorsed by the Appellate Body in *US – Anti-Dumping and Countervailing Duties*, is "interested in financial return rather than artistry; likely to make a profit […]" while "with a view to" means "with the aim of attaining […]"[20]. The OPA's purchase is not aimed at resale for profit. In accordance with subsection 25.2(2) of the *Electricity Act¸ 1998*, the OPA does not profit from the sale of electricity – it simply recovers its costs of the purchase. Similarly, the OPA is not purchasing renewable electricity with a view to using this product in the production of goods for commercial sale as neither the OPA nor any other part of the Government of Ontario uses the electricity to make goods.

2. Japan's Claim under the TRIMS Agreement

32. Article 2.1 of the TRIMs Agreement states: "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". Thus, the FIT Program can only breach Article 2.1 if it is inconsistent with Article III of the GATT. As the FIT Program is not subject to the obligations of Article III, consequently it is not inconsistent with Article 2.1 of TRIMS[21].

3. Japan's SCM Agreement Claim

33. The panel has no jurisdiction to hear this claim as Japan's panel request concerning the SCM Agreement failed to comply with Article 6.2 of the Dispute Settlement Understanding (DSU) by failing to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". In responding to Canada's prior jurisdiction submission, Japan summarized its panel request and explained for the first time that: the form of the benefit is a "financial contribution" or "income or price support" through "guaranteed long-term pricing" on "terms more advantageous than available on the market"; and, "the recipients of the benefit are "renewable energy generation facilities […] that contain a defined percentage of domestic content".

34. As confirmed by the Appellate Body in *EC and Certain Member States – Large Civil Aircraft*, Japan's response cannot remedy the deficiencies in its panel request. A complaining Member cannot provide the "legal basis of the claim" based on "subsidies contingent […] upon the use of domestic over imported goods" unless it identifies from Article 1.1(a) which form of subsidy has been

[20] Response to question No. 48 (Second Set): The structure of Article III:8(a) indicates that the word "commercial" was included to ensure that the purchase of a product falls within its scope when a government agency wants to resell the product on a non-commercial basis to help fulfil the governmental purpose behind the purchase. This interpretation is consistent with the General Agreement on Trade in Services (GATS). GATS confines its scope to measures that are "commercial" rather than "governmental". The exclusion from the scope in GATS of "services supplied in the exercise of governmental authority" illustrates the importance to WTO Members of preserving policy flexibility when undertaking certain "governmental" activities.

[21] Response to question No. 54 (First Set): The European Union's submission seems to be that, while measures that fall within GATT Article III:8(a) cannot breach Article 2.1 of the TRIMs Agreement, those measures listed in the Annex to the TRIMs Agreement were regarded by the negotiators as falling outside the scope of GATT Article III:8(a). This is not correct. First, this submission is inconsistent with the text as neither the Article nor the Annex refers to the consistency of the measures with GATT Article III as a whole. Second, the European Union provides no evidence to support its interpretation of the negotiators' intention. Third, this is inconsistent with the other provisions of the TRIMs Agreement. If the European Union's interpretation is correct, then this must also be the effect of the illustrative list of TRIMs that are inconsistent with GATT Article XI:1. That is, the TRIMs that are listed in the Annex as inconsistent with Article XI:1 must fall outside the scope of Article XI:2. For example, the Annex lists measures "which restrict the importation by an enterprise of products used in or related to its local production […]". Such a measure can clearly fall within the scope of Article XI:2(c)(ii).

provided. By failing to identify the form of the subsidy, who provided and who benefited from the subsidy, and the form of the benefit conferred, Japan's panel request failed to satisfy Article 6.2 of the DSU, and the Panel has no jurisdiction to hear the subsidy claim. Accepting jurisdiction will undermine the requirement to provide "the legal basis of the complaint" and encourage complaining Members to obtain procedural advantages by waiting until the first written submission to disclose the legal basis of their claim.

35. In the alternative, Japan has failed to demonstrate its claim under the SCM Agreement for two reasons. First, it has mischaracterized the OPA's purchase of goods as a "direct or potential direct transfer of funds", or "any form of income or price support". As Canada has demonstrated above, the OPA purchases renewable electricity[22] under Power Purchase Agreements. According to the panel in *US – Large Civil Aircraft,* if a transaction is appropriately characterized as a purchase, even though it involves transfer or potential transfer of funds, it must be classified as a purchase of goods, otherwise the term "purchases goods" in Article 1.1(a)(1)(iii) is rendered "redundant and inutile". Thus, the transfer here, i.e. the payment of the FIT rate in exchange for the production and delivery of renewable electricity, cannot alter the correct characterization, which remains a purchase of goods.

36. Similarly, Japan's alternative characterization that the FIT Program constitutes a form of income support is inconsistent with the ordinary meaning and context provided by Article 1.1(a)(1) and the panel's reasoning in *US – Large Civil Aircraft.* Such a characterization would also render Article 1.1(a)(1)(iii) inutile.

37. Second, Japan has failed to demonstrate that the FIT Program confers a "benefit" on producers of wind and solar electricity under Article 1.1(b) of the SCM Agreement as its four proposed benchmarks and the "present market value" calculation are inappropriate comparators for assessing benefit. These benchmarks are: the HOEP; certain average wholesale prices in certain jurisdictions outside Ontario (Alberta, New York, New England and the PJM Interconnection); a "weighted average wholesale price" for all producers in Ontario other than FIT and Renewable Energy Standard Offer Program (RESOP) producers; and the "Commodity Charge" portion of Ontario ratepayer bills.

38. The importance of locating a proper comparator has been highlighted by the Appellate Body in *EC and Certain Member States – Large Civil Aircraft* where it stated that "a financial contribution will only confer a 'benefit' […] if it is *provided on terms that are more advantageous than those that would have been available to the recipient on the market*". Further, the context in Article 14(d) of the SCM Agreement describes the conditions that must be considered when selecting a comparator, i.e. "the adequacy of remuneration shall be determined *in relation to prevailing market conditions […] in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)*".

39. The fundamental condition of purchase in the FIT Program is that the electricity be generated from renewable resources. As all of Japan's benchmarks ignore this condition, they are inappropriate. The inappropriateness of this is confirmed by the fact that the cost structure and operating conditions of wind and solar are different from other generation technologies and will influence the price at which a producer will be willing to sell its goods and the price at which the good will actually be sold.

[22] Response to question No. 23 (First Set): The facts that demonstrate there are "products purchased" under GATT Article III:8(a) also help demonstrate a government "purchases goods" under Article 1.1(a)(1)(iii) of the SCM Agreement. Nevertheless, these two phrases are not identical. Consequently, a conclusion that a government does not "purchase" under the SCM Agreement does not automatically mean there are no "products purchased" for the purpose of Article III:8(a). It would still be possible for the Panel to find that the OPA procures electricity in accordance with Article III:8(a).

A benchmark that refers to rates that would not cover reasonable costs of production cannot be appropriate. All of Japan's benchmarks have ignored the fundamental condition in the FIT Program[23].

40. As explained by Professor William Hogan, a leading electricity economist, wind and solar facilities have much lower economies of scale compared to nuclear, coal, gas and hydro plants. Non-renewable producers use larger-scale technologies and are able to produce energy at lower cost. Wind and solar facilities also produce electricity for a much smaller proportion of the year than most non-renewables. The key differences in costs and operating characteristics between technologies have been summarized by Professor Hogan in Table 1 of his report.

41. As a result, Japan's comparators are inappropriate because they fail to reflect the fundamental condition of purchasing renewable electricity. However, there are other reasons these proposed benchmarks are inappropriate, as well. First, the HOEP price does not meet the costs of production of non-renewable electricity producers[24]. In fact, 92% of producers in Ontario receive more than the

[23] Comment on Japan's response to question No. 28 (Second Set): Japan has presented two new prices that are higher than the RPP in an attempt to rehabilitate its proposed "commodity charge portion of the Ontario retail price" benchmark. It ignores that these are rates for commodity electricity and not comparable to rates for wind and solar electricity. Generally, end-users would pay more than the RPP if they choose to contract with a retailer on the basis of guaranteeing some price certainty over a portion of the commodity price (i.e. the HOEP portion) over a longer period of time than that offered by the RPP.

[24] Response to question No. 14 (Second Set): The OEB does not set "wholesale electricity rates" (HOEP). The HOEP is determined by the IESO's dispatch mechanism. The OEB sets rates for a number of entities including OPG regulated rates. 14(a): These rates for prescribed OPG generation would allow for OPG to reinvest its facilities in a manner that ensures the long-term sustainability of OPG assets. 14(b): In setting these rates, the OEB is guided by the framework set out in Ontario Regulation 53/05. The OEB considers whether the costs of the facilities were prudently incurred, the deemed capital structure (debt to equity ratio), cost of debt, and return on equity. The OEB follows standard Canadian and US utility regulation precedents and jurisprudence for cost of service regulation. To assist with information gathering, the OEB conducts interrogatories and public hearings where stakeholders are able to present evidence and to be cross-examined.

14(c): The OPA may impose fees and charges for any costs incurred carrying out activities permitted or required under the Electricity Act, 1998. OPA rates must be approved by the OEB. Through those fees, the OPA recovers its staffing costs and costs for consultants.

Response to question Nos. 26 and 27 (First Set); question Nos. 12 and 15 (Second Set): Payments to the OPG (for regulated facilities) are based on cost recovery and a margin of return. This is determined by a formula based on Government of Canada and corporate bond rates and a risk premium. In 2011, the margin of return was 9.43%. However, for unregulated facilities, these receive only the HOEP as they are older facilities whose capital costs are largely depreciated. Some of OPG's coal facilities have a contract with the OEFC, which provides for OPG to recover its costs until the facilities are shut down by the end of 2014. Payments by the OPA to OPG for a planned biomass facility will also be guided by the principle of cost recovery and a margin of return.

OPG does not report a "commercial risk profile" since it borrows from the Government of Ontario. In 2011, OPG's Standard & Poor's credit rating was "A-". Regarding IPPs, for competitive contracts, the rate is the lowest bids received that meet the requisite conditions. For FIT contracts, the rate was based on cost recovery and margin. The rate of return on equity used to develop FIT rates in 2009 was 11%. For solar PV RESOP contracts, the rate was based primarily on cost recovery, while others were based on RES rates. NUG rates do not provide for a particular rate of return but are tied to the rates paid by large electricity consumers.

The "price formula" is not the same for all technologies as some generators receive regulated rates and others contracted rates in accordance with the relevant procurement program and objectives of the procurement. As such, the price calculations are not designed to create preferential treatment. The general principle behind contract and regulated rates is to allow for cost recovery and a reasonable rate of return to generators.

Response to question No. 17 (Second Set): The profits of electricity generators will vary according to their specific efficiencies. Generally, a generator can earn higher returns compared to other generators if it is able to reduce its actual costs and/or increase its output. Any variation in profitability during the life of any contract will also be a function of efficiencies and output.

HOEP and even Japan admits that the offers and bids "do not reflect the prices actually paid by consumers or the rates actually received by generators; rather they serve as a 'dispatch' mechanism to determine the quantity of supply and the HOEP". Japan's out-of-jurisdiction comparators also reflect wholesale market prices similar to the HOEP based on traditional non-renewable electricity production costs. Thus, they are inappropriate for the same reasons. These comparators bear no relation to the reality of renewable electricity production in Ontario. As acknowledged by Japan, the FIT Program "became necessary to encourage the entry into the market of renewable energy generators, most of which would not have entered the market in the absence of the FIT Program".

42. Second, both Japan's weighted average wholesale price and its "commodity charge" component of the OEB-regulated retail price also fail to reflect the fundamental condition of purchase under the FIT Program that renewable electricity be generated. These comparators include predominantly non-renewable electricity production technologies that are not comparable between themselves and that also enjoy significant economies of scale, higher capacity factors, and lower sunk and fixed costs. Further, the "commodity charge" is a bundled price for all electricity and reflects the overwhelming volume of non-renewable electricity production. Renewable electricity, other than hydroelectricity, currently makes up only approximately 4% of Ontario's capacity.

43. Finally, Japan's present market value calculation is flawed because, again, it ignores that the critical condition of purchase is that *renewable* electricity must be supplied. Japan's use of the HOEP and the "commodity charge" as its so-called "market rate of electricity" takes no account of the significant costs FIT wind and solar electricity producers incur, nor a reasonable rate of return. As demonstrated by Professor Hogan, investors will only finance construction of *any* new generation if the present discounted value of expected future revenues exceeds their *all-in* costs. Japan's approach presumes that an investor or producer would be willing to accept rates well below their costs of production for a 20-year period. No rational investor would accept such losses. Thus, Japan has failed to demonstrate that the FIT Program confers a benefit and that it constitutes a prohibited subsidy.

44. For the reasons above, Canada requests that the Panel reject Japan's claims and find that Canada has not acted inconsistently with Article III:4 of the GATT and Article 2.1 of the TRIMS Agreement.

II. CANADA'S FIRST WRITTEN SUBMISSION IN DS426

45. The European Union supports its claims largely by repeating the arguments set out in Japan's first written submission in DS412. Canada demonstrated that these arguments were unfounded in its first written submission in DS412 and, therefore, incorporates that submission here.

A. THE FIT PROGRAM IS NOT SUBJECT TO GATT ARTICLE III AS IT FALLS WITHIN THE SCOPE OF ARTICLE III:8(A)

46. For the reasons described in Canada's first written submission in DS412, the FIT Program is a procurement program within the scope of Article III:8(a). The fact that the OPA purchases electricity is confirmed by its payment of sales tax under FIT contracts.

47. The European Union argues that the OPA's role to facilitate the diversification of electricity supply sources by promoting the use of cleaner energy sources does not require purchasing electricity from FIT generators. However, the European Union overlooks the fact that the OPA is also required to "support […] the goal of ensuring adequate, reliable and secure electricity supply". While

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Response to question No. 20 (Second Set): The OPA does not carry cash reserves. Any excess cash at the end of a month is used to pay the operating expenses in the following month.

"promoting the use of cleaner energy sources" may not require purchase, this is how the Government of Ontario has chosen to promote that goal.

48. The European Union argues that the dictionary meaning of "for governmental purposes" would imply that the acquisition is "in favour of a reason pertaining to the government". This accords with Canada's definition, as reasons pertaining to the government can also be described as the aims of the government. The European Union also argues that "governmental purposes" means for the "consumption, benefit or use" of the government and relies on the French and Spanish versions of Article III:8(a) to conclude that this means the purchase is for the "needs" of the government. However, the European Union does not explain how purchases for the "needs" of a government are purchases for the consumption, benefit or use of a government. Indeed, the "needs" of the government can be interpreted as simply what is required to fulfil the government's aims[25]. The European Union has also relied on Canada's General Notes to Appendix 1 to the Agreement on Government Procurement (GPA). This is not relevant context as the Notes do not fall under any of the categories recognized in Article 31(2) of the Vienna Convention on the Law of Treaties. These Notes were not made in connection with the conclusion of the GATT and were drafted solely by Canada concerning a treaty concluded decades after the GATT between different parties. Canada's Notes merely clarify the extent of its commitments under a different agreement, the GPA. Canada was not advancing a general meaning of "procurement", let alone any such meaning for the purposes of GATT Article III:8(a).

49. Further, the European Union's reference to the Background Note from the WTO Secretariat does not support its interpretation of "government purposes". The Note only observes that, originally, the two provisions were meant to refer to the same type of procurement but says nothing of the drafters' final intention. Indeed, the Note highlights that the drafters ultimately did not confine its scope to purchases for "consumption in governmental use".

50. The OPA's purchase is not with a view to commercial resale as it is not with an aim to resell for profit. The centrality of profit to the meaning of "commercial" is confirmed by several WTO decisions, namely, *US – Anti-Dumping and Countervailing Duties (China)* (Appellate Body) previously discussed; *China – Intellectual Property Rights* (panel), which stated, "[t]he distinguishing characteristic of a commercial activity is that it is carried out for profit"; and *Canada – Wheat Exports and Grain Imports* (panel), which held that a state trading enterprise acting in accordance with "commercial considerations" should seek to purchase or sell on terms that are "economically advantageous".

51. Further, the European Union's example of a supermarket selling goods at a loss does not support its interpretation of "commercial", as the supermarket can still hope to profit through the sale of other goods to customers who are attracted by this "loss-leader". As explained in Canada's first written submission in DS412, the purchase of electricity is not "with a view to production of goods for commercial sale" as it is to ensure a reliable and sufficient source of electricity for Ontarians.

B. THE EUROPEAN UNION'S SCM AGREEMENT CLAIM

52. The Panel has no jurisdiction to hear this claim as the European Union failed to provide the legal basis for its claim in its panel request in accordance with Article 6.2 of the DSU. The European Union failed to identify the type of financial contribution or form of income or price support, the

[25] Response to question No. 28 (First Set): This interpretation is confirmed by the English text of GATT Article III:8(a). That text does not refer to a purchase for the "needs" of the government. Rather, it refers to a purchase for "governmental purposes". The ordinary meaning of a purchase for "governmental purposes" is a purchase for the aims of the government. Since the French and Spanish text can be read as consistent with this interpretation, as explained above, this must be the proper interpretation of that phrase.

beneficiary, and how a benefit is conferred. Canada asks the Panel to find that both the European Union's and Japan's panel requests are inconsistent with Article 6.2 and to refuse jurisdiction.

53. In the alternative, the European Union fails to demonstrate that the FIT Program is inconsistent with the SCM Agreement for the reasons set out in Canada's first written submission in DS412 (summarized above).

54. The European Union has adopted Japan's mischaracterization of the OPA's purchase, but suggests that it is only the difference between the HOEP rate and the FIT rate that represents the funds being directly transferred. Yet, separating the HOEP payments does not transform these "purchases of goods" into "direct transfers of funds".

55. As the Appellate Body held in *US – Softwood Lumber IV*, the "evaluation of the existence of a financial contribution involves consideration of the nature of the transaction through which something of economic value is transferred by a government". The appropriate focus is on the *nature* of the transaction as a whole, not simply how payments are made.

56. The Appellate Body recognized that, in addition to the monetary contributions enumerated in paragraphs 1.1(a)(1)(i) and (ii), "a contribution having financial value can also be made *in kind* through governments providing goods or services, or through government purchases". The "financial contributions" enumerated in (i) are all examples of "monetary contributions". Those enumerated in (iii) either do not involve a monetary contribution at all (in-kind provisions of goods or services) or do not *simply* involve a monetary contribution (i.e. the purchase of goods). What differentiates a simple monetary contribution such as a "direct transfer of funds" from a "purchase of goods" is that the latter involves a monetary contribution *in exchange* for a good. Here, the OPA's transaction with FIT generators involves a monetary contribution (payments) *in exchange* for electricity – a good – that the OPA directs be supplied into the system once generated. Thus, this transaction is properly characterized as a "purchase of goods" and not a transfer of funds.

57. The European Union also argues that the OPA's purchase constitutes a form of "income or price support". In its first written submission in DS412, Canada showed this interpretation would render Article 1.1(a)(1)(iii) "redundant and inutile". Further, the European Union has misinterpreted the terms "any product" in GATT Article XVI to support its position. "Any product" in Article XVI does not refer to unsubsidized input goods. Rather, it refers to goods actually impacted by the notified subsidy. The European Union alleges that the OPA subsidizes renewable electricity, not input goods. Hence, the European Union would need to demonstrate that trade in electricity, not in the equipment, is affected by the alleged subsidy.

58. The European Union relies on Japan's proposed benchmarks to determine that a benefit has been conferred on renewable electricity producers. It claims that the HOEP is established by market forces and thus is an appropriate benchmark. However, as Canada has demonstrated in response to Japan's first written submission, the HOEP is not an appropriate benchmark because it does not reflect the cost of producing renewable electricity[26]. As a result of restructuring in 2004, the formerly

[26] Response to question No. 55 (First Set): Based on the Appellate Body's decisions in US – Softwood Lumber IV and EC and Certain Member States – Large Civil Aircraft, Article 14(d) of the SCM Agreement does not qualify in any way the market conditions that are to be used as the benchmark. As such, the text does not explicitly refer to a "pure" market, or market "undistorted by government intervention", or to "fair market value". Thus, the fact that there is government regulation does not necessarily prevent the use of prices in a jurisdiction subject to such regulation for the purpose of a benefit analysis. The Appellate Body has also acknowledged that, in limited circumstances, for example where prices are distorted by a government's predominant position as a provider of a good, benchmarks other than private prices in the relevant jurisdiction

competitive wholesale market became a mechanism primarily aimed at enabling the IESO to physically balance supply and demand through dispatch instructions.

59. Thus, the IESO wholesale market is primarily a dispatch mechanism in which electricity is offered at rates that do not reflect the true cost of generation. The true costs for most generators are accounted for by OEB-regulated rates or in contracts. In addition, FIT wind and solar generators are not dispatchable, that is, they do not submit offers into the IESO market mechanism. Thus, their generation does not affect the HOEP price. Instead, they provide the IESO, on a day-ahead basis, with hourly estimates of the volume of electricity they forecast they will generate.

60. For the reasons described above, Canada requests that the Panel reject the European Union's claims. Canada also requests that the Panel find that it does not have jurisdiction under the SCM Agreement claim.

III. CANADA'S OPENING STATEMENT AT THE FIRST MEETING OF THE PANEL

A. THE GATT CLAIM

61. The OPA's purchase of renewable electricity is evidenced by five facts. First, the OPA only pays money in exchange for renewable electricity that is produced. Articles 3.1 and 1.4 of Exhibit B to the FIT Contract show that the OPA pays producers only for the electricity that they deliver into the grid[27]. Second, the OPA acquires the right to future revenue, as well as by-products from the

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may be used in an adequacy of remuneration analysis. It follows that, when prices are distorted by the government's predominant position as a purchaser of a good, alternative benchmarks may be used. However, the Appellate Body also cautioned that, whatever the alternative chosen, it must relate to the prevailing market conditions in that country, and must reflect price, quality, marketability and other conditions of purchase and sale as required by Article 14(d). In Canada's view, it is not possible to determine in the abstract a "point" at which the involvement of a government in a market deprives that market of its price-setting ability for the purpose of a benefit analysis. Such a determination must be made on a case-by-case basis.

Response to question No. 57 (First Set): 57(a): A "benefit" analysis must begin with an examination of the "market" and an effort to locate a proper comparator. However, there may be situations where a market test cannot be applied "strictly". In this respect, the starting-point, when determining adequacy of remuneration, is the prices at which the goods in question are purchased by private buyers in arm's-length transactions in the country of purchase (US – Softwood Lumber IV). However, alternative benchmarks may be used and "could include proxies that take into account prices for similar goods quoted on world markets, or proxies constructed on the basis of production costs".

57(b): The structure of Article 14 of the SCM Agreement implies that a benefit can be determined in different ways taking into account the type of financial contribution. While the underlying principles should be similar, Article 14 acknowledges that some flexibility exists to tailor the benefit analysis to the type of "financial contribution" in question. Furthermore, the type of product at issue may require the benefit determination to be conducted in different ways as the nature of the product itself may influence relevant market conditions. In this case, for example, we are dealing with a unique good, the production and consumption of which requires government regulation to ensure adequate supply. Furthermore, the physical nature of electricity requires central planning due to the physical constraints of needing to constantly balance supply and demand.

[27] Response to question No. 17 (First Set); question No. 10 (Second Set): The obligation in FIT Rule 6.3 is implemented through Article 3.1 and 1.4 of Exhibit B to the FIT Contract. In practice, the OPA discharges the 'payment obligations' referred to in FIT Rule 6.3(a) by calculating each month the amount of its obligations under the FIT contracts. It reports this to the IESO who uses this amount, together with amounts for other OPA and OEFC Power Purchase Agreements, to calculate the Global Adjustment. This Global Adjustment is included in the monthly electricity bill paid by households and businesses, usually to an LDC. The LDC recovers its charge for distribution and sends the rest to the IESO, which extracts the Global Adjustment and sends it to the OPA. The OPA uses this to pay its obligations under its Power Purchase Agreements. Exhibits B3A and B3B to the FIT Contract both relate to distribution-connected projects.

production of renewable electricity, as shown in Article 2.10(a) of the FIT Contract[28]. Third, the OPA pays sales tax on the payments to the producers, as shown in Article 3.5 of the FIT Contract[29]. Fourth, the contracts describe the OPA as purchasing electricity[30] in the Definitions, Article 3.4, 3.5, Appendix A of the FIT Contract, and Article 2.1 of the microFIT Contract[31]. Fifth, other legislation and OPA documents recognize that the OPA "procures" and "purchases" electricity, as seen in the *Electricity Act, 1998*, the Ministerial Direction and the Retail Settlement Code.

62. Japan also relied on the panel decision in *US – Sonar Mapping*. However, the panel there was addressing the meaning of a different term – "government procurement" – and a different treaty, the Tokyo Round Agreement on Government Procurement. That panel was not addressing the meaning of "procurement" within GATT Article III:8(a).

63. Japan argues that the OPA does not purchase electricity because it is supplied by producers directly into the grid. However, electricity is unique because it cannot be stored and is consumed almost at the same time as it is produced. Thus, it is not helpful to try to determine ownership through physical possession. Further, possession is not a condition for its purchase, as exemplified by a purchase of a book over the internet by someone who pays with a credit card and directs Amazon to deliver the book to a different recipient. Another example is the trade of products in transit through bills of lading.

Response to question No. 9 (First Set): Canada does not agree with footnote 69 of the European Union's first written submission. The Government of Ontario (Government "A" in the European Union's example) does not "direct" any company to sell anything. The Government, through the OPA, enters into a contract under which it agrees to purchase electricity that the supplier injects into the grid.

[28] Response to question No. 18 (First Set): FIT Rule 7.3(c) refers to the OPA's purchase of revenue from Future Contract Related Products. Through the FIT Contract, the OPA acquires 80% of the revenue from any Future Contract Related Products. In addition, it also acquires Environmental Attributes. This helps demonstrate that the OPA is purchasing the renewable electricity.

Response to question No. 2 (First Set): This Article refers to Environmental Attributes, which are defined as the "interests or rights arising out of attributes […] associated with a Renewable Generating Facility". Through its payment to suppliers, the OPA acquires by-products, such as carbon credits.

[29] Response to question No. 11 (Second Set): There is no provision dealing with the liability for sales tax in the microFIT Contract. This is because the OPA anticipated that microFIT suppliers would qualify for the tax exemption from the requirement to charge and collect sales tax that is applicable to those with revenues of less than $30,000 a year.

[30] Response to question No. 25 (Second Set): The FIT contracts provide for the purchase of electricity. Like every purchase contract, they contain provisions to ensure that the good meets the requirements of the purchaser, i.e. that the electricity supplied helps fulfil the government of Ontario's goal of a secure electricity supply. To that end, the contract provides for payment for electricity that is injected into the grid. It imposes conditions concerning the design and construction of the facilities for safety and grid compatibility reasons. Insurance covenants in the contract help ensure that the facility is actually built. Lenders' rights and provisions for re-negotiations help ensure the continued operation of the facility. Even if FIT contracts are more than just purchase contracts (which they are not), as long as the contract does not change the nature of the transaction into one of the other forms of "financial contribution" identified in Article 1.1(a)(1), then the transaction will be one where the government purchases goods. None of the "facets" identified by the Panel in its question changes the nature of the transaction.

Comment on Japan's response to question No. 25 (Second Set): Japan argues that "the OPA promises to pay […] [a] rate that guarantees the recovery of costs plus a reasonable return on investment over a 20-year period " but it is the price that is guaranteed, not the recovery of costs or a reasonable rate of return. The efficiencies of generators determine whether they recover their costs and obtain a reasonable rate of return. An inefficient generator may be unable to recover its costs.

[31] See response to question No. 1 (First Set).

64. The scope of Article III:8(a) is not confined to the purchase of products that are the focus of a claim of a breach of Article III. This is because the drafters of the GATT did not include such specific limits, such as the obligations imposed in the GPA. Article XVI of the GPA prohibits the imposition of "offsets" (i.e. "measures used to encourage local development or improve the balance-of-payments accounts [including] by means of domestic content […]"). The GPA prohibits such offsets. Signatories to the GPA would not have needed to prohibit offsets if they were already prohibited by the GATT[32]. There would have been no point.

65. Japan and the European Union have argued that the purchase by the OPA falls outside the scope of Article III:8(a) as it is with a view to commercial resale. In response, Canada notes the following. First, the renewable electricity purchased by the OPA is not "resold"; instead, it is co-mingled with electricity from other sources and is available for consumption. Second, the OPA does not purchase with the aim to make any profit. Third, despite the European Union's reliance on the French version of Article III:8(a), which refers to "revendus dans le commerce", the French text can be interpreted as a resale for profit. "Commerce" can be defined as " opération ayant pour objet de mettre les divers produits […] à la portée des consommateurs et des clients, à l'effet d'en tirer un profit". The choice of words in the English and Spanish version, i.e. "commercial resale" and "reventa commercial", instead of "resale in commerce", confirms this interpretation[33].

66. Purchases with a view to resell outside government to recover costs fall within the scope of Article III:8(a) because that resale might be necessary to fulfil the government purpose for which the product was purchased.

67. Finally, the purchase of renewable electricity by the OPA is not "with a view to the production of goods for commercial sale". A purchase will only fall outside the scope of Article III:8(a) if it is "with a view to" the use of the product in the production of goods for commercial sale. A purchase does not fall outside the scope of the Article merely if the product is used in the production of goods for commercial sale. However, renewable electricity is purchased with a view to ensure a reliable and sufficient supply of electricity. It is not purchased with a view to the use to which some consumers may put that electricity.

B. THE SCM AGREEMENT CLAIM

68. Canada focuses its submissions on two key points. First, contrary to the complainants' continued mischaracterizations of the nature of the transaction, the OPA purchases renewable electricity through the FIT Program. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body

[32] Response to question No. 22 (First Set): WTO Members have a means to accept disciplines on the conditions they impose on the inputs – i.e. the GPA, not the GATT. Further, Article XVI(2) of the GPA allows developing countries to negotiate exemptions from the disciplines on offsets. There would be no point to this if they faced such disciplines under the GATT. Professor Sue Arrowsmith explains that it is common practice for governments to require private firms to purchase national products as a condition of access to government contracts. Such measures are generally referred to as "offsets". When such offsets relate only to work in connection with the government contract, it is clear that they are measures governing procurement and are excluded from the national treatment rule.

[33] Response to question No. 25 (First Set): Any "lack of purity" in the market conditions does not directly determine whether a resale in that market is "commercial". Rather, it is directly determined by whether the intention of the reseller is to profit. Nevertheless, there may be circumstances where the regulation of a market helps demonstrate the welfare to consumers and, in turn, helps indicate that the product was purchased with a view to ensuring it is available for consumption by consumers, rather than with a view to profit from the resale. The regulation of the environment in which a transaction takes place does not affect whether that transaction is a purchase under GATT Article III:8(a) or the SCM Agreement. The "purchase" is determined by whether there is an "acquisition" in exchange for "payment".

characterized "direct transfers for funds" as "[…] action involving the conveyance of funds from the government to the recipient" where "funds" include "not only money, but also financial resources and other financial claims more generally". In contrast, it characterized the "purchase of goods" as situations in which "[...] goods are provided *to* the government by the recipient […]". It noted that "purchase" is usually understood to mean that the person or entity providing the goods will receive some consideration in return"[34].

69. The Appellate Body also noted in *US – Softwood Lumber IV* that the "range of government measures capable of providing subsidies is *broadened still further* by the concept of 'income or price support' […]"[35].

70. Thus, the methods by which a government can transfer economic value are differentiated by reference to their inherent qualities. "Direct transfers of funds" are transactions "by which money, financial resources, and/or financial claims are made available to a recipient". Forms of "income or price support" involve transactions whose nature is to support incomes or prices for a particular commodity. However, in government "purchases", payment is made "in consideration" for the exchange of a good.

71. Second, one must look at the *whole* transaction to ascertain the essential *nature* of the transaction. As shown earlier, the *nature* of the OPA's transaction is that payments are made *in consideration* for renewable electricity.

72. The complainants have failed to demonstrate that the OPA's purchases confer a benefit. In accordance with Article 14(d) of the SCM Agreement, there is no benefit conferred unless the "purchase is made for more than adequate remuneration" "in relation to the prevailing market conditions for the good in question in the country of purchase". As recognized in *EC and Certain Member States – Large Civil Aircraft,* "locating a proper comparator" is critical to this determination. Thus, the Panel must locate a benchmark that focuses on the conditions of exchange of, specifically, wind and solar electricity, as the measure at issue concerns only these OPA purchases. Neither Japan nor the European Union has identified such benchmarks.

73. Instead, the complainants have focused on benchmarks for non-renewable electricity. This focus may be due to the fact that, to an end-user, all electricity is the same. While it is true that ultimate consumers cannot distinguish between the electricity they consume, their views are

[34] See response to question No. 19 (First Set).

[35] Response to question No. 58 (First Set): 58 (a): Whatever "income or price support" might precisely mean, it is a concept not covered by "financial contributions". Article 1.1(a)(1) and (2) are separated by the disjunctive "or", indicating that "financial contributions" are distinct from "income or price support". The fact that Article 1.1(a)(2) refers to GATT Article XVI means that the type of "income or price support" captured by the SCM Agreement is the type of "income or price support" notified under Article XVI.

58(b): Agricultural import tariffs, indeed any import tariff, may confer benefits on producers of goods, but they should not be treated as subsidies. As the panel in US – Export Restraints held, not all governmental action capable of conferring a benefit should be treated as a subsidy, such as import tariffs. With respect to what distinguishes such governmental action from "income or price support", the focus must be on the nature of the measure. Where prices for a good are supported by government purchases, such action may be characterized as income or price support if the support decreases imports of competitive products or increases exports of the supported product. However, this is not the case with respect to the FIT Program. The nature of the OPA's purchase is to ensure sufficient supply of electricity from clean sources. Regarding minimal wage requirements, Canada does not consider that they could support prices as they would presumably add costs to the production of a good.

58(c): It is likely that "income or price support" under the SCM Agreement would involve some kind of fiscal commitment.

irrelevant. The focus of any benefit analysis must be on the alleged recipients of the benefit, i.e. the wind and solar generators.

74. To Ontario, the purchaser in question, how the electricity is produced is an essential condition of purchase, as this condition is intended to help meet the objective of a secure and clean energy supply. The Panel must examine the behaviour of wind and solar generators and purchasers of wind and solar electricity in relation to the conditions of supply and demand in Ontario.

75. The HOEP is an inappropriate benchmark for reasons Canada has explained in its first written submissions. The IESO market mechanism is not the classical competitive market where supply and demand meet. Furthermore, despite the fact that 8% of Ontario generators do receive only the HOEP, this is only because these generators are old government-owned facilities whose capital costs have been largely depreciated and, in the case of coal facilities, will be shut down by the end of 2014. For 92% of generators, the HOEP is not an adequate price. Moreover, most users of electricity simply pay the price required by the system.

76. In sum, Japan and the European Union have failed to present an appropriate benchmark and, consequently, failed to demonstrate the existence of a subsidy. Thus, the FIT Program cannot be found to violate Article 3.1(b) of the SCM Agreement.

IV. CANADA'S SECOND WRITTEN SUBMISSION IN DS412 AND DS426

77. The first hearing reinforced that the FIT Program is a program for the purchase of renewable electricity to help secure a sufficient and reliable supply of electricity for Ontario's citizens from clean sources. It also reinforced that the Government's purchase of renewable electricity falls within the scope of Article III:8(a) of the GATT.

78. During the first hearing, Japan and the European Union failed to prove that the FIT Program involves "direct transfers of funds" within the meaning of Article 1.1(a)(1) of the SCM Agreement. Instead, the complainants continued to repeat their assertions from their first written submissions. Japan and the European Union also failed to carry their burden of proving the FIT Program involves a form of "income or price support" within the meaning of Article 1.1(a)(2) of the SCM Agreement.

79. Further, Japan and the European Union failed to prove that the FIT Program confers a "benefit" on FIT suppliers, as required by Article 1.1(b) of the SCM Agreement.

80. In terms of the order of analysis in this case, in response to question No. 24 of the Panel's first set of questions, Canada noted that, according to the Appellate Body in *EC – Bananas III*, when the GATT 1994 and another Agreement in Annex 1A to the WTO Agreement (for example, the SCM Agreement) both appear to apply to the measure in question, the measure should be examined on the basis of the agreement that "deals specifically and in detail" with the measure.

81. In this case both Japan and the European Union have taken great pains to be clear that what they are challenging in the FIT Program and FIT contracts is the domestic content requirements. In its first written submission Japan states, at the outset:

> To be clear, Japan challenges the FIT program and individually executed FIT and microFIT contracts, *not* because they have the effect of promoting investment in renewable energy generation, but rather because, in light of the domestic content requirement, they discriminate against imports of renewable energy generation equipment in favor of Ontario-made renewable energy generation equipment.

82. In a similar vein, the European Union states in its first written submission:

> At issue in the present dispute are the domestic content requirements included in the FIT Program (including the microFIT Program) issued by the Government of Ontario in 2009. To be clear, the European Union does not bring claims against other elements included in the FIT Program, nor does the European Union contest the general purpose of the FIT Program, as helping promote electricity supply from renewable energy sources. […] However, WTO Members cannot use FIT programs in order to achieve other trade-distorting purposes, such as the protection of its domestic industries to the detriment of others, by including by domestic content requirements.

83. It is thus clear that the domestic content requirements and their impact on imports of renewable energy generation equipment from these two countries are central to the complaint of both Japan and the European Union. The agreement that deals most specifically with the treatment of these goods is the GATT and, more specifically, GATT Article III. Therefore, in this case, the Panel's analysis should begin with the GATT.

A. THE GATT CLAIM

84. Canada reaffirms its explanations in previous submissions that the OPA purchases renewable electricity. Japan and the European Union have challenged Canada's reliance on descriptions of the OPA purchasing and procuring electricity set out in legislation and related documents that authorize the OPA's purchase. In response, Canada notes that it is relying on the characterization by various government and private entities that have nothing to do with this dispute and have no incentive to mischaracterize it. Moreover, WTO panels have acknowledged the importance of a Member's description of its own law. In *EC – Trademarks and Geographical Indications (US)* the panel observed that a Member is normally "well-placed to explain the meaning of its own law".

85. Japan argues that "[g]overnment acquisition and payment are certainly aspects of the 'procurement analysis', but critically, so too is government use, consumption or benefit". None of the sources that Japan relies on to support its definition of "procurement" is apposite.

86. With respect to Japan's reliance on *US – Sonar Mapping*, Canada notes that the panel was not addressing the meaning of the term "procurement", either generally or within Article III:8(a). The panel even stressed that it was "not intending to offer a definition of government procurement within the meaning of Article I:1(a)".

87. Japan has argued that the word "use" in Article III:8(a) shows that the Article "contemplates consideration of how the acquired products are *used*". Contrary to Japan's assertions, the word "use" at the *end* of the Article highlights that drafters did not intend to impose a requirement that government purchases that fall within the scope of Article III:8(a) be for governmental use. Despite Japan's reliance on comments of GATT and WTO Secretariats, these are not valid sources for interpreting the GATT. Moreover, the Secretariats do not suggest that "government procurement" is *confined* to the circumstances described in Article XVII:2[36]. In fact, the Secretariat stated that

[36] Response to question No. 45 (Second Set): There are similarities between Articles III:8(a) and XVII:2. Both limit the scope of GATT obligations. Both Articles contain the word "governmental" and both refer to "products", "resale" and "use in the production of goods". However, there are significant differences. Article III:8(a) applies to "laws, regulations or requirements", whereas Article XVII:2 applies to "imports of products". While Article III:8(a) refers to "products purchased", Article XVII:2 refers to "products for immediate or ultimate consumption". Article III:8(a) refers to "products purchased for governmental purposes",

"*originally*, the two provisions were meant to refer to the same type of procurement", but says nothing about the drafters' *ultimate* intention.

88. Japan also seeks to confine the meaning of "procurement" by relying on the purpose of GATT Article III, "to avoid protectionism […]". In doing so, Japan ignores the purpose of Article III:8(a), which is to allow Members scope to pursue policies through their procurements outside their national treatment obligation, as recognized by Japan's Ministry of Economy, Trade and Industry statement on this Article.

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whereas Article XVII:2 refers to "consumption in governmental use". Article III:8(a) excludes from its scope those purchases "with a view to" "commercial resale" or "use in the production of goods for commercial sale", whereas Article XVII:2 excludes from its scope those purchases "for" "resale or use in the production of goods for sale". Whereas Article III:8(a) qualifies the words "resale" and "sale" with "commercial", Article XVII:2 does not. Article XVII:2 imposes an obligation on the imports that fall within the scope of the paragraph – Members must "accord to the trade of the other contracting parties fair and equitable treatment" – whereas Article III:8(a) imposes no obligation. Finally, Article III:8(a) links the first conditions on the application of the paragraph with the second conditions through the words "and not" – it states that "[t]he 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 […]". Conversely, Article XVII:2 links the conditions with the words "and not otherwise" – it states that "[t]he provisions of paragraph 1 of this Article shall not apply to imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale […]".

The ordinary meaning of "otherwise" is "in circumstances different from those present or considered". Its use in Article XVII:2 could indicate that the import of "products […] for resale" is a different circumstance to the import of "products for immediate or ultimate consumption in governmental use". These significant differences in the structure and wording of Article XVII:2 undermine its utility as context for the purpose of interpreting Article III:8(a). Nonetheless, whatever context is provided by the Article helps demonstrate that "governmental purposes" in Article III:8(a) is not confined to "consumption in governmental use" but has a wider scope. Article XVII:2 also helps demonstrate that the conditions in Article III:8(a) are cumulative. The inclusion of the word "otherwise" in Article XVII:2 highlights that the drafters chose not to include this word in Article III:8(a). By instead linking those conditions with the word "and", the drafters indicated that the conditions are cumulative – to fall within the scope of Article III:8(a) a purchase must be for "governmental purposes" and also "not with a view to commercial resale or with a view to use in the production of goods for commercial sale".

Since the conditions in Article III:8(a) are cumulative, a purchase for "governmental purposes" must be capable of also being a purchase "with a view to commercial resale or with a view to use in the production of goods for commercial sale" – otherwise, there would be no point including the condition that the purchase is not with such a view. This reinforces that a purchase for "governmental purposes" cannot be confined to a purchase for consumption by the government, as suggested by Japan and the European Union. A government agency cannot purchase a product to consume and, at the same time, purchase it with a view to its commercial resale or its use in the production of goods for commercial sale. Conversely, a government agency can purchase a product for an aim of the government but also with a view to the product's commercial resale or use in the production of goods for commercial sale. (For example, the Liquor Control Board of Ontario purchases alcohol for commercial resale to the public but for the governmental aim of financing the provision of public services with the profits from that resale.)

Comment on Japan's response to question No. 45 (Second Set): Although Japan relies on commentary by Dr. Ping Wang that the differences between Article III:8(a) and XVII:2 are not substantial, the sole authority for this statement is an unpublished lecture note of Professor Arrowsmith. However, Professor Arrowsmith has written that "purchases [of] books for distribution at a nominal charge to community libraries" are "within the exclusion". Clearly, a governmental agency that purchases books for distribution to community libraries is not purchasing to consume the books itself. Similarly, she has written that the purchase of goods as part of aid for a foreign country falls within the scope of Article III:8(a), even though it is the foreign country that will consume the goods.

89. Japan's reliance on the negotiating history, i.e. an alleged comment from the WTO Secretariat regarding "purchases effected for governmental *use*" is based on a statement that has been misquoted by the *GATT Analytical Index* and, in turn, the Secretariat. The actual document does not state this.

90. Japan has also selectively quoted from John Jackson to support its interpretation of government purposes. However, in his comments on which Japan relies, Jackson was not referring to the meaning of "governmental purposes", but a different aspect of Article III:8(a).

91. Finally, Japan cannot rely on negotiating history with respect to the United States' proposal to extend the national treatment obligation, as this proposal was rejected.

92. Even if Japan's interpretation of "procurement" is correct, the OPA's purchase still falls within all four elements of Japan's interpretation. First, the OPA "*pays*" for the electricity. Second, as "*benefit*" means "advantage, profit or good", this purchase is for the "advantage" and "good" of the Government of Ontario since it helps fulfil its governmental policy of a sufficient and reliable electricity supply from clean sources. Third, the OPA "*obtains*" and "*acquires*" the electricity by paying and stipulating that the electricity must be injected into the grid. Use or possession is not necessary as a government often obtains and acquires medicine that is used by the sick. The IESO's statement that it does not take title to energy says nothing about the OPA's acquisition. Fourth, the OPA and the Ministry of Energy have "*control*" over obtaining the electricity because they decide the terms of the purchase, including price and length of the contract, while consumers only obtain electricity from the co-mingled pool through their use.

93. Japan relies on Australia's definition of "purpose", to mean "practical advantage or use" but fails to mention that Australia acknowledged that this meaning may not be as common as the meaning cited by Canada, and that the context of this definition is specific to "to work to good purpose", which is not similar to the phrase "governmental purposes".

94. Japan's definition further ignores the context of Article III:8(a). In addition to excluding from its scope those purchases "with a view to the production of goods for commercial sale", this Article also excludes those purchases "with a view to commercial resale". However, a government cannot purchase a product for its "use" or "consumption" and, at the same time, purchase it "with a view to commercial resale". Thus, defining the purchase as one for governmental "use" or "consumption" denies the requirement that the purchase is not "with a view to commercial resale" of any effect.

95. Japan and the European Union assert that interpreting a purchase for "governmental purposes" as a purchase for an aim of the government would render the requirement limitless. This is incorrect. First, only purchases that are objectively discernible as for the aims of the government will be for "governmental purposes". Second, the aim must be discernible before the purchase[37]. Third,

[37] Response to question No. 47 (Second Set): The provision of public services is an aim of any government. The Panel can distinguish between public services that should be considered to fall under Article III:8(a) and those that should not by distinguishing between those that are publicly identified by the government before the time of the purchase as a service that it is providing and those that are not. Thus, the provision of a reliable and sufficient supply of electricity from clean sources is a public service that falls within the meaning of "government purposes" as the Government of Ontario identified this as a public service that it would provide through legislation enacted before the time of the purchase.

In the alternative, the Panel can still distinguish objectively in line with an approach suggested by Brazil where "governmental purpose" includes the provision of public services for which the government has "constitutional or legal responsibility". With respect to the "specific function performed by a given government" in the "sector of its economy", the Government of Ontario regulates the electricity sector, and owns many of the generation facilities and the majority of the transmission and distribution network. The government's role is performed under the authority of the Canadian constitution. Under the European Union's interpretation, the

discrimination, itself, cannot be the aim behind the purchase. To interpret a discriminatory purpose as a "governmental purpose" would ensure that a purchase could fall within the scope of Article III:8(a) simply because it is inconsistent with the national treatment obligation of Article III:4. Such an interpretation, therefore, could render Article III:4 ineffective.

96. In addition, Japan and the European Union overlook the limits imposed by the GPA. While a purchase that is for the aims of the government and that satisfies the other requirements of Article III:8(a) is not subject to the disciplines of Article III, it will be subject to the disciplines of the GPA if the Member chose to accept them.

97. Even if a purchase for "governmental purposes" is not a purchase for the aims of the government, the OPA's purchase of renewable electricity is still for governmental purposes. The OPA's purchase is for governmental purposes, according to the interpretation of that term by Brazil.

98. Brazil rejected the suggestion that a purchase for "governmental purposes" within GATT Article III:8(a) is confined to purchases for consumption by the government. According to Brazil, this interpretation would "indicate that the sole purpose of the government is to provide services that enable its own maintenance and the regular functioning of its bureaucracy". However, "state bureaucracy is only a means to the achievement of a myriad of ends, defined by each society".

99. Brazil noted that "[t]he 'purpose of a government' cannot be conceptually construed" but it will depend on the "role" a government "may […] play" and "the degree of intervention exerted in practice in any given country". Brazil observed that, for example, "most governments do have the constitutional or legal responsibility to provide a great number of services to their citizens, such as health, education, water, electricity, transportation and public security" and notes that "[p]roviding these services is certainly regarded as a governmental purpose by these governments".

100. Thus, the OPA's purchase is for "governmental purposes", according to the interpretation of that term by Brazil. To apply Brazil's example, the *Canadian Constitution Act, 1982* gives Canadian provinces powers to make laws related to the development of sites and facilities in the province for the generation of electricity[38]. Thus, the Government of Ontario has enacted legislation to pursue a reliable and sufficient supply of electricity from clean sources. It is for this purpose that the government, through the OPA, purchases renewable electricity.

101. Japan and the European Union argue that the purchase of renewable electricity by the OPA is "with a view to commercial resale". Japan interprets this phrase as meaning "with a view to being sold into the stream of commerce or trade (as opposed to being used or consumed by the government)". Similarly, the European Union argues that "the determining factor is whether the goods are sold on the market place, where other similar goods are traded". However, this interpretation denies the word "commercial" of any effect.

102 Moreover, the grounds on which Japan and the European Union rely to support their interpretation of "commercial" have no foundation. To support its interpretation of the phrase "with a

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purchase of electricity through the FIT Program is also for a public service as it is no different to a government's purchase of "drugs to be used in public hospitals or books to be used by students at public schools".

[38] Response to question No. 35 (First Set): The distribution of legislative authority between the Central Government of Canada and the Province of Ontario is established under sections 91 and 92 of the Constitution Act, 1867. Provinces have legislative authority over the generation of electricity, including developing renewable energy facilities, subject to two exceptions. First, the federal government has legislative authority over generation from nuclear power (under its exclusive authority over atomic energy), and, second, it has authority over international exports of electricity (under its exclusive authority over trade and commerce).

view to commercial resale", Japan relies on a dictionary definition of "commercial" as meaning "[o]f or pertaining to commerce or trade". Japan then provides several definitions of "commerce" which, it states, "do not include any element of 'profit'". However, Japan overlooks that "commerce" has been defined as "the exchange of the products […], with an intent to realize a profit". The WTO Secretariat comment relied upon by Japan actually undermines Japan's interpretation of "commercial resale" as it indicates that a resale of a second-hand product after its use will not be a commercial resale. The resale of a second-hand product is not with the aim to profit; it is to recover some of the costs of the original purchase.

B. THE SUBSIDY CLAIM

103. Japan and the European Union bear the burden of demonstrating that the FIT Program is a subsidy. They both claim to have made a *prima facie* case and thereby hope to shift the burden to Canada to rebut the claim. However, as Canada has demonstrated, the complainants have continued to mischaracterize the transaction at issue and continued to rely on inappropriate benchmarks to assess benefit. As a result, they have failed to meet their burden. This burden is only met when there is sufficient evidence adduced to raise a presumption that what is claimed is true. Only when this presumption has been established does this burden shift to the respondent to rebut.

104. Canada reiterates its previous explanations which show that transactions under the FIT Program are purchases of renewable electricity and not a "direct transfer of funds" or "income or price support". The OPA enters into a variety of procurement contracts with different generators through bilateral negotiations, requests for proposals and standing offer programs such as the FIT Program. In doing so, it is fulfilling its statutory mandate to procure sufficient electricity supply. This is not "income or price support". Under the complainants' theory, any government contract for the purchase of goods at a contracted price would constitute "income or price support".

105. The European Union suggests that the FIT Program functions in a similar manner to a typical support scheme for agricultural products where governments ensure that producers obtain a guaranteed price that a market otherwise would not have provided. This is incorrect because the HOEP does not represent a market price for electricity, and, in a typical situation of price support, the price is received not only by sellers who sell to the government, but also by other sellers of the good in question.

106. In response to the complainants' continued focus on the HOEP as a benchmark, Canada reiterates its previous explanations on the inappropriateness of doing so.

V. CANADA'S OPENING STATEMENT AT THE SECOND MEETING OF THE PANEL

A. THE GATT CLAIM

107. Canada has demonstrated that the FIT Program is not subject to the obligations in GATT Article III:4 and Article 2.1 of the TRIMs Agreement as it falls within the scope of GATT Article III:8(a). Canada reiterates its previous explanations and will elaborate on several issues in response to the complainants.

108. In its question No. 59, the Panel asked about the purpose of GATT Article III:8(a). In its answer, Japan did not address the statement of its Ministry of Economy, Trade and Industry. Instead, Japan relied on paragraph 1 of Article III to restrict the scope of Article III:8(a). However, its reliance is misplaced. This Article begins by stating, "*[t]he provisions of this Article shall not apply* to laws,

regulations or requirements governing" certain procurements. Thus, *all* the provisions of Article III, including paragraph 1, do not apply to laws, regulations or requirements governing procurements.

109. Canada explained that physical possession is not a condition for a purchase, as exemplified by the purchase of a book over the internet, and products subject to a bill of lading. Japan now appears to have shifted ground as it argues that, in these examples, "the alleged purchasers have the *right* to take possession". However, Japan provides no sources to support this new definition of "purchase". Japan also suggests that the purchaser must either use the product itself or seek profit from the resale of the product. This is not consistent with the purchase by non-profit organizations of food and medicine, which they do not use themselves, nor derive any profit.

110. Japan also contrasted the role of the OPA with the role of electricity "marketers" and "aggregators" in certain US states who are described by those state governments as taking "title" to electricity. Although electricity "marketers" and "aggregators" may take "title" to electricity, they never physically possess it as the electricity is passed from the generator to the end-consumer, through transmission and distribution lines. Even if possession is a condition of a purchase, the Government of Ontario still purchases electricity as it owns 97% of the transmission lines, and only three of the 80 local distribution companies in Ontario are private[39]. Consequently, when a FIT supplier injects electricity into the grid, the vast majority is transferred to the physical possession of the Government of Ontario.

111. The contract condition that requires the OPA to pay for electricity that a supplier is directed not to produce is needed to prevent oversupply of electricity into the grid and is a common condition in electricity purchase contracts. The IESO has never directed a FIT supplier not to produce electricity, contrary to the European Union's statement[40]. The IESO also cannot make such a request of smaller FIT suppliers because they are not connected directly to the grid.

[39] Response to question No. 13 (Second Set): While Hydro One (transmission company) is required to operate as a "commercial enterprise", its core mandate is to ensure "safe, reliable and cost-effective transmission and distribution of electricity". It must "prioritize investments in transmission and distribution capacity to support projects necessary to maintain ongoing grid security and reliability". The 77 publicly owned LDCs are mandated to provide "reliable delivery of electricity". LDCs are required to incorporate in accordance with the Electricity Act, 1998. They receive rates for the distribution of electricity that allow for cost recovery and a rate of return that is "just and reasonable". The OEB is responsible for approving the rates of Hydro One and LDCs according to this principle.

[40] Response to question No. 21 (First Set): 21(a): A FIT generator has never been directed by the IESO to reduce production.

21(b): If a generator is directed to reduce all of its output, the nature of the transaction should still be characterized as a "purchase of goods". The "Additional Contract Payment" provision is a condition on the purchase of renewable electricity. Furthermore, this is a common clause in Power Purchase Agreements for electricity produced from any source, as system administrators must be able to reduce supply into the grid to safeguard against overloads. It is not unusual for purchase and sale agreements for a variety of commodities to contain conditions requiring payments even when the purchaser cannot take supply. This may be the case, for example, where the purchaser has committed to paying for goods but is unable to take them into inventory.

21(c): This situation does not apply to microFIT and Type 3B facilities because they are not connected to the transmission grid. Only transmission-connected generators are dispatched by the IESO.

21(d): A similar condition applies to certain contracts with nuclear facilities, which cannot easily moderate the volume of electricity they produce in response to IESO instructions. In particular, contracts with Bruce Power (nuclear) have provisions allowing for full payments when its generators are required to reduce production or be dispatched off in order to manage grid congestion. Most dispatchable generators (such as coal and hydro) do not require such provisions as they can more easily respond to instructions to turn supply on or off.

112. The OPA's purchase of electricity is analogous to the European Union's examples of purchases for governmental purposes, i.e. medical equipment and drugs to be used in public hospitals, and books to be used in public schools "in order to provide health and education services for the benefit of citizens". Similarly, electricity is purchased to be used by Ontarians in order to provide the government service of a secure supply of electricity from clean sources for the benefit of Ontario's citizens.

113. The European Union has argued that a purchase for "governmental purposes" is a purchase for the "needs" of the government. It clarifies that "[s]uch needs may include government purchases in order to be able to provide government services to citizens […]". However, the European Union has focused on the wrong purpose when it argues that the domestic content requirement is not imposed in order to provide services. The domestic content requirement is a *condition* of the purchase and Article III:8(a) does not impose any limits on the purpose of such conditions. For example, in purchasing books to be used by students at public schools, the government could impose the condition that the books be published domestically. Thus, the purpose behind this purchase is governmental. Similarly, the OPA's purchase of renewable electricity is for "governmental purposes" as it is to help secure a sufficient and reliable supply of electricity for Ontario's citizens from clean sources and it is also "in order to be able to provide government services to citizens".

114. The European Union and Japan have also argued that a "commercial resale" is a resale with the intention of *anyone* to profit, and that the FIT suppliers, distributors and retailers will all profit from the alleged resale. However, the elements of Article III:8(a) focus on the actions of the *government*: the purchase is "by *governmental* agencies"; the purposes are "*governmental*"; and the view with which the purchase is made is that of the *government*. Thus, the "commercial" nature of the resale is determined by the intention that the *government* profit.

115. Further, any resale of electricity is irrelevant to the profits of FIT suppliers as they make their profit on the FIT Contract as soon as they deliver electricity into the grid. Distributors also do not profit from the resale, but from the *service* of distributing electricity. Finally, retailers make their profit through separate financial contracts with end-users and not through the use of electricity by those end-users.

116. The European Union has argued that the *domestic content requirement* does not *govern* any procurement by the OPA. However, it is not the *domestic content requirement* that must govern the procurement. Nothing in Article III:8(a) obliges the "requirement governing procurement" to be the same requirement alleged to breach the national treatment obligation. Even if the European Union is correct, the domestic content requirement does "govern" the OPA's procurement, as to "govern" means to "control, regulate, or determine", and the OPA is not allowed to purchase the electricity if the condition is not satisfied.

117. Moreover, the domestic content requirement is not "disconnected from the basic nature of the product" as it concerns the process and production method of the electricity that is purchased, i.e. the services and inputs used to produce the electricity. As stated by Professor Sue Arrowsmith, "[w]hen such offsets or secondary measures relate only to work in connection with the government contract awarded […] *it is clear* that they are measures 'governing' procurement […]".

B. THE SUBSIDY CLAIM

118. In this statement, Canada will focus on the following issues: first, the correct analytical approach to determine "financial contribution" or "income or price support"; and, second, the proper characterization of FIT transactions.

119. The European Union relies on three cases to argue that the same measure can be simultaneously characterized under several sub-headings in Article 1.1(a)(1). However, these cases do not support the European Union's theory.

120. In *Japan – DRAMs (Korea)*, the panel was speaking in *obiter* and actually dealing with whether the modification of loan repayment terms and debt-to-equity swaps were "direct transfers of funds" and not whether they could be treated as some other "financial contribution".

121. In *US – Countervailing Measures on Certain EC Products*, the Appellate Body was not dealing with an Article 1.1 "financial contribution" analysis. Rather, it was interpreting the term "recipient" in the context of a benefit analysis and determining whether a recipient had to be a "legal person" or whether they could be a natural person. The Appellate Body's point was simply that "financial contributions" can be provided directly to legal persons such as corporations or through natural persons such as the owners of a corporation through a tax concession. This is not the same as saying that the same transaction can be properly characterized as both a "direct transfer of funds" and "revenue foregone" at the same time.

122. The European Union also relies on *US – Large Civil Aircraft (2nd complaint)*, where the Appellate Body stated in a footnote that: "[t]he structure of [Article 1.1(a)(1) of the SCM Agreement] does not expressly preclude that a transaction could be covered by more than one subparagraph". The Appellate Body's point is that "Article 1.1(a)(1) […] does not explicitly spell out the intended relationship between the constituent subparagraphs". Contrary to the European Union's assertions, what is clear from this jurisprudence is that the Appellate Body has not specifically ruled that a particular measure or transaction could be properly found to be multiple forms of "financial contribution" at the same time[41].

123. With respect to the nature of "income and price support", Canada notes that the type of "income or price support" captured by GATT Article XVI has been incorporated by reference into the text of Article 1.1(a)(2)[42]. Article XV1:1 requires notification of "any subsidy, including any form of income or price support, that operates directly or indirectly to increase exports […] or reduce imports […]". Thus, this requires "trade effects". There is no evidence suggesting that imports of wind or solar electricity into Ontario have declined as a result of the FIT Program or that exports have increased. In fact, there is no evidence that wind or solar electricity is traded at all. Thus, one of the requirements of "income and price support" cannot be met.

124. The ordinary meaning of "price support" is "assistance from a government or other official body in maintaining prices at a certain level regardless of supply or demand", and applies equally to the concept of income support. Thus, this not only means that incomes or prices must be maintained through government measures, but that there would be income or price *levels* first established by supply and demand (i.e. by a market).

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[41] Response to question No. 24 (Second Set): The Appellate Body did not, contrary to the European Union's assertions, find that a particular measure could be properly found to be multiple forms of "financial contribution" at the same time. A panel should come to a view as to where the measure properly fits. If that is within Article 1.1(a)(1) as a "financial contribution", then a proper characterization will lead to one subparagraph. When the Panel's choice is between one of the subparagraphs in Article 1.1(a)(1) and possible (2), then the same proper characterization analysis will again lead to a conclusion that places it in one or the other but not both at the same time. The "or" between the two paragraphs reinforces this approach.

[42] Response to question No. 20 (First Set): Article 1.1(a)(2) does not require a finding of "serious prejudice" in order to find "income or price support". This dispute is not a "serious prejudice" case (pursuant to Articles 5(c) and 6 of the SCM Agreement). In such cases, an assessment of serious prejudice should be conducted only after a finding of benefit, and of "specificity" under Article 2 of the SCM Agreement.

125. So, "income or price support" necessarily presupposes a market that provides a signal causing a government to take measures to maintain income or prices when they fall below a certain *level.* The European Union acknowledges this when it provides the example of a system for milk in which producers will obtain payments if the *market* price is below the guaranteed price. The FIT Program is not based on any such signal.

126. Recipients of price support will not be limited to sellers who sell to the government. Indeed, price support should also alter the market price for other sellers in that market. For example, when a government purchases sugar to support its price, this should alter the price of sugar not only for those selling to the government but for other sellers as well. Here, there are no allegations that any sellers apart from the FIT generators selling to the government receive FIT prices.

127. With respect to a "direct transfer of funds", Japan has now claimed that the FIT Program is a "conditional grant". It is incorrect because, first, the obligation to generate electricity and deliver it into the system is the central characteristic of all OPA contracts. Japan may characterize it as a "reciprocal obligation" made in "performance" for receiving payment, but this is only another way of describing a "purchase of goods". Second, Japan fails to reference the Appellate Body's conclusion that grants are normally given "[…] without an obligation or expectation that anything will be provided to the grantor in return". Japan's theory seeks to blur the distinction between a "direct transfer of funds" and a "purchase of goods" to the point that the latter is rendered redundant.

128. Turning now to the issue of "benefit", Canada has repeatedly demonstrated that all of the complainants' proposed benchmarks are rates for co-mingled commodity electricity and, therefore, do not reflect the conditions of purchase and sale for wind or solar electricity in Ontario. The underlying premise of the complainants' position that rates for blended commodity electricity are appropriate benchmarks is untenable. They argue that there is a single market for electricity in Ontario and all sources of generation compete with each other in that single market. This is simply not the case for the reasons set out below.

129. First, the IESO administered market mechanism or algorithm[43] is not a "venue where buyers and sellers meet with the aim of exchanging goods or services […]". Such a wholesale market for electricity in Ontario both began and ended in 2002. Subsequently, the government created a system with a market mechanism to allow the IESO to balance physical supply and demand and make dispatch decisions. The OEB was also mandated to regulate the rates of certain OPG facilities.

130. As a result, the HOEP no longer represents a rate for electricity determined by the interaction of buyers and sellers, and only 8% of generation is paid the HOEP. Canada notes that the European Union questions this figure based on certain data in Table 1 of Japan's first written submission. However, the European Union assumes that all the generation Japan has included under "Unregulated Thermal" "OPG Assets" receives the HOEP price alone. This is a faulty assumption. Japan's Exhibit JPN-15, on which Table 1 is based, includes three facilities – the Lambton, Nanticoke and Lennox stations – under this category that account for over 11.5 TWh of production. These facilities all

[43] Response to question No. 31 (First Set): There is one algorithm, the "dispatch algorithm" that is run in two modes – "constrained" and "unconstrained". The difference is that the constrained mode considers all physical limitations of the system, while the unconstrained mode ignores these. The constrained mode produces the dispatch instructions, while the unconstrained mode is run to stack offers (from the lowest to the highest) and determine the MCP. Consumers pay the HOEP plus Global Adjustment.

The price paid by consumers is based on the RPP developed and reviewed every six months by the OEB. These prices reflect a forecast of the HOEP and Global Adjustment for the next 12 months and any variance recovery from the previous year. The average HOEP in 2011 was $31.47/MWh, representing about 22% of the average residential bill. The Global Adjustment averaged $40.48/ MWh in 2011.

receive contractual rates under agreements with the OEFC or the OPA. They do not receive the HOEP alone. When properly taken into account, the proportion receiving the HOEP alone is indeed 8% in 2010. Although imports receive the HOEP, this is still not an appropriate benchmark as imports also constitute co-mingled commodity electricity.

131. Second, contrary to the assertions of Japan and the European Union, different sources of electricity in Ontario do not compete with each other in the manner asserted by Japan and the European Union as they have different costs and inherent attributes[44]. Further, despite the European Union's admission that the government represents the demand side of the transaction, it continues to focus on the views of end-users who do not even participate in the IESO mechanism that allegedly constitutes the relevant market.

132. Third, the complainants have also argued that the HOEP is the rate generators would obtain but for the FIT Program. However, even prior to the program, Ontario had specific procurement programs for purchasing renewable electricity. In all likelihood, but for the FIT Program, a prospective renewable electricity generator would approach the government through the OPA and attempt to negotiate a contract at rates reflective of prevailing market conditions, including its costs and the government's supply requirement.

133. The various out-of-jurisdiction benchmarks presented by Japan and the European Union are also rates for commodity electricity and, thus, inappropriate. The European Union further argues that Canada has not shown that the proposed in-jurisdiction benchmarks are distorted. Canada underscores that it is the party wanting to rely on out-of-jurisdiction benchmarks that must justify their use, as exemplified in *US – Softwood Lumber IV* and *US – Anti-Dumping and Countervailing Duties (China)*.

134. Even if there were justification for using such benchmarks, they would need to be adjusted to reflect prevailing market conditions for wind and solar electricity in Ontario. The Appellate Body has recognized that making the necessary adjustments would be very difficult. Japan has not made any adjustment to the out-of-jurisdiction rates presented. As such, they are inappropriate for the Panel's analysis.

135. Finally, if the HOEP or any of the other proposed benchmarks were appropriate, this would mean that any generator earning a rate higher than these benchmarks would be conferred a benefit,

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[44] Response to question No. 3 (First Set): Renewable electricity has significantly higher costs of production than electricity from non-renewable sources. The production of renewable electricity also results in environmental attributes such as carbon credits that may have economic value in carbon credit markets.

Response to question Nos. 41 and 43 (Second Set): There is no competition between FIT wind and solar electricity – either on the basis of rates or volumes – and any other form of electricity generation in Ontario in the manner alleged by the complainants. Because the FIT contracts themselves establish the rates paid to generators, there is no price competition. Also, because FIT wind and solar generators produce non-dispatchable forms of generation, the IESO accepts all their generation volume estimates into the dispatch stack before all other forms of generation and without any rate offer. The rates for other forms of renewable generation are also set by contracts and such generators do not submit offers to the IESO. Since the rates for OPG regulated generation are set by the OEB, there is no price competition. Likewise, there is no price competition between contracted forms of generation. With respect to older coal and smaller hydro facilities that receive the HOEP alone, this is not a result of rate competition between forms of electricity. Rather, the rate is a function of a government policy decision.

No competitive wholesale electricity market currently exists in Ontario in the manner alleged by the complainants. As the European Union admits, the HOEP, which is ultimately set by the final accepted offer of electricity into the IESO stack, is generally set by the offers of gas generators with OPA contracts. These offers are determined by a formula contained in the contracts. Thus, the HOEP is a rate set by OPA contracts, not competitive market forces.

even if the rates were insufficient to cover the costs of production[45, 46]. Generators losing money every day would be found to be receiving a subsidy. This Panel would have to find that a rate for electricity much lower than the costs of producing that electricity would constitute "more than adequate remuneration" – this simply cannot be.

136. An analytical approach that might have been taken could have started by locating in-jurisdiction private prices for the goods in question. The complainants have not provided any such evidence. If no private prices for wind and solar electricity in Ontario are available, an alternative, such as a constructed benchmark based on the costs of production, could possibly be used, as noted by the Appellate Body. In response to the Panel's question Nos. 65 and 67, Saudi Arabia effectively makes the same point. The complainants have not offered such an alternative.

137. If an appropriate in-jurisdiction benchmark were ultimately exhausted, the prospect for using an out-of-jurisdiction benchmark might still have existed, but such rates must be justified and adjusted to reflect prevailing market conditions in Ontario. Despite clear Appellate Body guidance, the complainants chose not to pursue such an approach and have instead provided inappropriate benchmarks. These benchmarks cannot be the basis of a proper benefit analysis. Thus, the complainants have failed to meet their burden of establishing that the FIT Program is inconsistent with the SCM Agreement.

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[45] Response to question No. 44 (Second Set): The European Union seems to suggest that climate is the most important cost factor in a wind or solar facility and that, since it will vary from location to location, a standard rate will ensure that FIT facilities will not exist where it would just cover capital and operating costs. The implication of this argument is that FIT generators will only locate their facilities where the rate would be considerably higher than costs, meaning that "structurally" the FIT Program cannot be said to reflect the costs of generation and therefore confers a benefit. This assertion is untenable. First, the European Union provides no textual or jurisprudential support for its position that a benefit can be simply determined because the payment for a good is at a fixed rate. Second, suggesting that standard rates necessarily confer a benefit on some producers would lead to absurd results. Take the example of a government's purchase of pens at a list price applicable to all consumers. Obviously, any given pen manufacturer will have inherently different costs and relative efficiencies. If a benefit analysis were conducted on the basis suggested by the European Union, a government would be found to be providing subsidies to all manufacturers despite the fact that other non-governmental purchasers pay the same price for the good. This cannot be the proper analysis.

The Quebec wind rates presented by the European Union are from a jurisdiction other than Ontario. The European Union has provided no justification for the use of these rates as a benchmark. Further, any such use must first be adjusted for prevailing market conditions in the jurisdiction in question. As this has not been done, the rates are not useful to the Panel's consideration of benefit.

[46] Response to question No. 42 (Second Set): Japan's argument that the history of Ontario's electricity market demonstrates that the FIT Program confers a benefit is unpersuasive. First, Japan seems to argue that the Panel may find a benefit conferred in an abstract manner. However, the Panel must determine whether the OPA's purchases are for more than adequate remuneration according to Article 14(d) of the SCM Agreement. Second, Japan fails to acknowledge that the competitive wholesale market ended in November 2002 and there has been no return to such a market. Third, the analysis of benefit must be based on a comparison with a contemporaneous benchmark. It would be illogical to compare the purchase price for any good with market conditions that existed years before the transactions in question. Here, the impugned rates for FIT wind and solar electricity came into effect on 24 September 2009. Fourth, referring to a historical market price in the form of the HOEP as it was during liberalization is still a reference to a rate for co-mingled electricity.

ANNEX B

WRITTEN SUBMISSIONS AND ORAL STATEMENTS
OF THE THIRD PARTIES

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ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY
OF AUSTRALIA

I. INTRODUCTION

1. These proceedings initiated by Japan and the European Union present Members with the opportunity to consider the interpretation of Members' international trade obligations in the context of domestic environmental measures. Australia addresses the following key issues:

a. the definition of a subsidy under Article 1.1 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement);
b. the determination of benefit under Article 1.1(b) of the SCM Agreement; and
c. the scope of Article III:8(a) of the General Agreement on Tariffs and Trade 1994 (GATT 1994).

II. SUBSIDY

A. FINANCIAL CONTRIBUTION OR INCOME OR PRICE SUPPORT

2. Australia agrees with the arguments of the European Union and Japan with respect to the classification of the FIT contracts as a form of income or price support under Article 1.1(a)(2) of the SCM Agreement.

3. As an alternative, Australia considers it would be open to the Panel to consider an argument that the Government of Ontario "purchases goods" under Article 1.1(a)(1)(iii) of the SCM Agreement through the operation of the FIT contracts.

4. Canada argues that the Ontario Power Authority (OPA) enters into Power Purchase Agreements with renewable energy producers to procure or purchase renewable energy. Canada asserts that this transaction "is, and remains, a purchase of goods".[1]

5. The Appellate Body in *US – Large Civil Aircraft* identified two aspects of a purchase of goods within Article 1.1(a)(1)(iii):

a. goods are provided to the government by the recipient; and [2]
b. the person or entity providing the goods will receive some consideration in return.[3]

6. Australia considers that in determining whether a financial contribution is a purchase of goods, it is not necessary for the government to use the goods purchased. Rather, in Australia's view, a purchase of goods for the purposes of Article 1.1(a)(1)(iii) occurs where a government pays a person or entity for the provision of goods.

7. In the current dispute, the OPA is an agent of the Government of Ontario. The OPA is contractually bound under an executed FIT contract to pay the contract rate for electricity produced by

[1] Canada's first written submission, para.120.
[2] Appellate Body Report, *United States – Large Civil Aircraft*, para. 619.
[3] Ibid.

FIT generators. The contract rate received by FIT generators could be appropriately classified as consideration for the electricity supplied to the Ontario electricity market.

8. Australia considers that the Panel could use this reasoning to find that the transaction between the OPA and FIT generators could be appropriately characterised as a purchase of goods within the definition of financial contribution in Article 1.1(a)(1)(iii).

B. BENEFIT

9. Australia does not accept Canada's argument that comparators used by Japan and the European Union are inappropriate for assessing whether the OPA's procurement of wind and solar electricity under the FIT Program contracts confers a "benefit".[4]

10. Australia notes that a financial contribution confers a benefit if the terms of the financial contribution are more favourable than the terms available to a recipient on the market. In Australia's view the relevant market in this dispute is the electricity market. In this regard, Australia notes that the Appellate Body in *EC and Certain Member States – Large Civil Aircraft* stated that a calculation of benefit in relation to the prevailing market conditions "demands an examination of behaviour on both sides of the transaction, and in particular in relation to the conditions of supply and demand as they apply to that market".[5]

11. In Australia's view, Canada's defence of the FIT program predominantly focuses on the conditions of supply of renewable energy in its analysis of benefit. That is, Canada repeatedly points out that renewable energy production costs are significantly higher than non-renewable energy production costs. Australia does not dispute this. However, in Australia's view, the Panel should also consider the demand side of the electricity market in examining benefit. In this regard, Australia submits that although the FIT program distinguishes between different renewable energy sources (wind and solar) in determining the rate received by FIT generators per kWh of electricity produced, that distinction does not flow through to the market place. Further, consumers of electricity in Ontario do not (and cannot) distinguish between renewable and non-renewable sources of electricity.

12. Australia does not consider that the difference in the production costs for different energy types precludes a benefit analysis using the market price for electricity. In Australia's view, the subsidised product in question is electricity, not the subset of electricity generated from renewable sources.

13. In Australia's view, there are two possible ways in which the FIT contracts confer a benefit to FIT generators. First, the government support establishes a buyer for the renewable energy that would not otherwise exist. Absent the government support, there would not be sufficient compensation to stimulate investment in renewable energy – market forces alone would not engender profitable participation in the renewable energy sector. Second, the FIT generators receive a higher price for their product than that which is otherwise available on the market.

14. In relation to the second issue, Australia considers that the HOEP used by Japan and the EU is an appropriate comparator for determining benefit. The HOEP is the rate of electricity as determined by supply and demand of electricity in Ontario and is the rate that a generator of electricity would receive in the wholesale market, absent any contractual and regulatory arrangements.[6]

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[4] Ibid, para. 130.
[5] Appellate Body Report, *EC and Certain Members States – Large Civil Aircraft*, para. 981.
[6] Japan's first written submission, para. 220.

III. GOVERNMENT PROCUREMENT

15. A significant issue that arises in this case is whether the purchase of electricity for distribution to the general public should be properly characterised as government procurement for the purposes of Article III:8(a) of GATT 1994.

16. Australia submits that the mere labelling of an activity as "procurement" in legislation is not sufficient to bring that activity within the scope of Article III:8(a) of GATT 1994.

A. GOVERNMENT PURPOSES

17. Critical to the analysis of Article III:8(a) of GATT 1994 is a determination of whether the purchase of electricity by the Government of Ontario can be appropriately characterised as for "governmental purposes".

18. Australia notes that "purpose" can mean "practical advantage or use".[7] This meaning may not be as common as the meaning cited by Canada, but the Appellate Body has indicated that a treaty interpreter "should seek the meaning that gives effect, simultaneously, to all the terms of the treaty, as they are used in each authentic language".[8] Australia notes that the French version of Article III:8(a) provides in relevant part:

> "Les dispositions du présent article ne s'appliqueront pas aux lois, règlements et prescriptions régissant l'acquisition, par des organs gouvernmentaux, de produits achetés *pour les besoins* de pouvoirs publics…(emphasis added)"

19. This version of the text, and in particular the reference to "les besoins" appears to support an interpretation of the term "purposes" as being "for the practical advantage or use" by the government, rather than a "purchase for an aim of the government" or "a purchase by a governmental agency which is directed in legislation, regulations, policy or an executive direction".[9]

20. Australia submits that the Panel will need to consider whether, in the absence of a practical advantage or use by the government, the Government of Ontario's procurement of electricity is for "governmental purposes" under Article III:8(a) of GATT 1994.

B. COMMERCIAL RESALE

21. If the Panel accepts that the purchase of electricity by the Government of Ontario is for "governmental purposes", Australia submits that the Panel should consider the following issues in determining whether the procurement is "with a view to commercial resale" under Article III:8(a) of the GATT 1994.

22. Australia notes that the online New Oxford Dictionary defines "commercial" as concerned with or engaged in "commerce"; commerce is defined as the activity of buying and selling. The concept of profit in both these definitions is a secondary consideration.[10]

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[7] Collins English Dictionary online, accessed 9 January 2012: http://www.collinsdictionary.com/dictionary/english/purpose
[8] *US – Final CVD for Softwood Lumber*, para. 59.
[9] Canada's first written submission, para. 86.
[10] Oxford New Dictionary, online, accessed 9 January 2012: http://oxforddictionaries.com/definition/commercial?q=commercial; http://oxforddictionaries.com/definition/commerce?q=commerce

23. Although the OPA does not operate for profit, it procures electricity which is fed into the electricity grid for immediate resale and distribution. The electricity grid is characterised as a "physical market" where electricity is bought and sold.[11] The OPA procures the electricity with the intention that the electricity will be resold on market terms.

24. Australia submits that to interpret "with a view to commercial resale" as meaning a purchase with an aim to re-sell for profit would be an overly narrow definition. Such an interpretation would expand the possible exemptions to the national treatment provisions in Article III:1 captured by Article III:8 (a). Australia submits that it is open to the Panel to consider whether the exemption in Article III:8(a) envisaged such a broad carve-out from the provision.

25. The Government of Ontario does not use the vast majority of electricity it purchases. The electricity is purchased for distribution to consumers who purchase the electricity at market rates. Australia submits that Article III:8(a) of GATT 1994 was not intended to cover the situation where a government enters into contracts for the supply or purchase of electricity at fixed prices, which it then sells on a market for general consumption.

IV. CONCLUSION

26. In Australia's view, the FIT program could be categorised as either a purchase of goods within the meaning of financial contribution in Article 1.1(a)(1)(iii) or a form of income or price support under Article 1.1(a)(2) of the SCM Agreement.

27. Australia does not consider that the difference in the production costs for different energy types precludes a benefit analysis using the market price for electricity.

28. Finally, in Australia's view, interpreting Article III:8(a) of GATT in the manner suggested by Canada would extend the scope of the provision well beyond its ordinary meaning. Such an interpretation could significantly undermine the scope of the national treatment obligations set out in Article III and permit a wide range of protectionist measures, at odds with the important principle enunciated in Article III:1 of GATT 1994.

[11] Japan's first written submission, para. 68, footnote 120.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY
OF BRAZIL

I. INTRODUCTION

1. Brazil offers comments on aspects of: (i) the meaning of "for governmental purposes" in Article III:8(a) of the GATT; and (ii) the interpretation of the term "benefit" in Article 1.1(b) of the SCM Agreement and the appropriate benchmark for a determination thereof.

II. ARTICLE III:8(A) OF THE GATT: "FOR GOVERNMENTAL PURPOSES"

2. By maintaining that only purchases for the government's own use or benefit should be considered to serve the purposes of the government, Japan and the EU unduly limit the scope of the term "for governmental purposes" in Article III:8(a) of the GATT. This interpretation seems to indicate that the sole purpose of the government is to provide for the maintenance and the regular functioning of its bureaucracy and disregards the fact that state bureaucracy is only a means to achieve a myriad of ends, defined by each society. If negotiators wished to restrict the meaning of the term "for governmental purposes" to purchases made by governmental agencies for their "own use", they should have expressly done so. Instead, the wording of Article III:8(a) reads "procurement by governmental agencies of products purchased **for governmental purposes**", which means that the proper interpretation of this provision must give meaning to the term "for governmental purposes".

3. The "purpose of the government" cannot be conceptually construed, in a general aprioristic manner. Rather, it can only be understood on a case-by-case basis, informed by the specific function performed by a given government in each sector of the economy. Brazil proposes that such concept can be seen as a spectrum: at one end of the spectrum, the Member may be acting as an intervening agent, constitutionally or legally bound to guarantee the supply of a certain good or service; at the other, it may act as an economic agent like any other, wholly subject to market conditions. On the first case, the governmental purpose is central, therefore clearly covered by Article III:8(a); on the second, it is at best marginal, and outside the scope of said exception. The scope of governmental purposes may be perceived as falling within the following categories of governmental action: i) as providers of goods or services (sometimes constituting a state monopoly); ii) as fomenting agents, promoting strategic sectors to ensure the development of areas where private enterprise alone may not suffice; iii) as regulators, closely monitoring the purveyance of a certain service, while not legally obliged to provide such goods or services; and iv) as economic agents, subject to market conditions. In the first two categories governmental purposes would be readily discernible. In the third, it would require that other considerations be taken into account. In the fourth, governmental action would fall outside the range of governmental purposes.

4. The Panel should thus compare the overall design, structure and architecture of a procurement program with the specific function exercised by the government. Moreover, in interpreting the meaning of "governmental purposes", adjudicators should refrain from making abstract determinations of what is a legitimate "governmental purpose". Just as an "accordion" (in reference to the analogy developed for "like product" by the Appellate Body in *Japan – Alcoholic Beverages II*) the definition of governmental purpose stretches and squeezes according to how and to which extent a particular government acts to achieve its purposes, as inferred from the legitimate framework applicable and from the facts of each case.

5. Nonetheless, the definition of "governmental purposes" cannot be as broad as suggested by Canada ("all purchases by a governmental agency directed in legislation, regulations, policy or an executive direction"), or else the scope of the national treatment obligation set out in Article III would be significantly undermined.

III. ARTICLE 1.1(B) OF THE SCM AGREEMENT: "BENEFIT" AND BENCHMARKS

6. The parties in the dispute disagree on the proper benchmark, or "comparators", that would allow an assessment of whether there is a "benefit" in the sense of Article 1.1(b) of the SCM Agreement conferred by the rates paid for the energy producers that participate in the FIT programme. For Brazil, the appropriate benchmark in this case should be assessed in light of the Appellate Body's decision in *EC and other member States – Large Civil Aircraft,* which built upon the concept of "marketplace" established in *Canada – Aircraft* to conclude that:

> "[…] Even where a market is limited for a particular good or service, that market price is not dictated solely by the price a seller wishes to charge, or by what a buyer wishes to pay. Rather, the equilibrium price established in the market results from the discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in that market."[1]

7. Though the costs of production are relevant to analyse whether a benefit is being conferred (as it determines whether a producer would offer a product but for government intervention), they are incomplete parameters to inform benchmarks, for they only refer to the supply-side of the market[2]. In order to properly analyse a market and therefore adequately establish its benchmarks, there needs to be a complete assessment of both buyers and sellers, looking at not only the price at which sellers are willing to offer their products, but also the price buyers are willing to pay for the goods or services in question.

8. When there is significant government participation in the market, private prices may not be an appropriate benchmark, as the Appellate Body has acknowledged in *US – Softwood Lumber VI*). In that case, the Appellate Body emphasized that the use of alternative benchmarks needs to be connected with "prevailing market conditions in the country of provision, (including price, quality, availability, marketability, transportation and other conditions of purchase or sale), with a view to determining, ultimately, whether the goods at issue were provided by the government for less than adequate remuneration".[3]

9. As to the appropriate benchmark to be used in this case, Brazil considers that both the supply and the demand sides in the energy market should be taken into account. The benchmark cannot be based solely on the prices for which producers of a certain kind are willing to sell or the prices government set forth, neither can wholesale unregulated market prices in a strategic sector of an economy form the basis for this benchmark.

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[1] *EC and certain member States – Large Civil Aircraft* (AB Report, paragraph 981).

[2] "We acknowledge that, in certain circumstances, a seller's costs may be a relevant factor to consider in assessing whether goods or services were provided for less than adequate remuneration. As we see it, however, the difficulty with the Panel's analysis is not that it referred to these costs as a factor in its analysis, but rather as the sole basis for its findings" (*EC and certain member States – Large Civil Aircraft.* AB Report, paragraph 980).

[3] *US – Softwood Lumber IV*, (AB Report, paragraph 115).

ANNEX B-3

INTEGRATED EXECUTIVE SUMMARY
OF CHINA

I. WHETHER ARTICLE III:8 (A) OF THE GATT 1994 APPLIES IN THE PRESENT DISPUTE

1. Canada submits that the procurement of renewable electricity under the FIT Program shall fall within the scope of GATT Article III:8(a), therefore, shall be exempted from the discipline of Article III:4 of the GATT 1994.

2. In order to apply the exemption, several conditions need to be satisfied, which are, *inter alia*, "for governmental purposes" and "not for commercial resale". In China's view, the two terms refer to two parallel conditions, and failure to meet any condition shall lead to non-application of GATT Article III:8 (a).

a. For governmental purposes

3. In its submission, Canada claims that a purchase for "governmental purposes" is a purchase for an aim of the government. In China's view, the phrase of "a purchase for governmental purpose" shall be read as a whole. If it is read as a whole, the ordinary meaning of "a purchase for government purposes" shall be that government is the reason for purchase, government shall benefit from the result or effect of purchase, or government is the aim or the end of purchase.

4. There is no doubt electricity "purchased" by OPA will be injected into the grid for sale to end users of Ontario. Therefore, the electricity is purchased for end users instead of government. Government itself will not directly benefit from the result of effect of purchase. Although the Government of Ontario also purchases the electricity through the OPA, the quantity of electricity consumed by Government of Ontario only accounts for a very insignificant part. Therefore, the government is not the aim or end of purchase. Furthermore, since majority of electricity are sold to end users instead of government, how can government benefit from such a "purchase"? Therefore, China is not convinced by the assertion of Canada that the "purchase" by OPA is for governmental purpose.

b. Not with a view to commercial resale or not with a view to use in the production of goods for commercial sale

5. China takes note of the statement by Canada that OPA does not aim to profit, nor does it profit in fact, from the sale of renewable electricity – the OPA simply recovers the cost of purchasing that renewable electricity. However, in China's view, the fact that government does not make any profit may only prove that the purchase by OPA does not constitute commercial resale, the panel shall continue to examine if the purchase constitute use in the production of goods for commercial sale. According to Canada, the electricity will be delivered into the grid for use by all Ontario consumers, whether they are homeowners, government or business operators. The electricity sold to business operators will surely be used in the production of goods for commercial sale. Although Canada argues that neither the OPA, nor any other part of the Government of Ontario, is using the renewable electricity which is purchased by the OPA to make any goods, Canada can not prevent other end users of electricity to make goods for commercial resale.

6. In conclusion, China believes that since the purchase of electricity by OPA is not for governmental purpose, and the electricity will be sold by OPA to end users and some end users may use the electricity in the production of goods for commercial sales, FIT program does not meet the criteria of GATT Article III: 8(a).

II. WHETHER THE FIT PROGRAM CONCERNED CONSTITUTES A SUBSIDY UNDER SCM AGREEMENT

7. Canada argues that Japan fails to demonstrate that the FIT Program and Contracts confer a "benefit" on FIT Producers of wind and solar electricity under Article 1.1(b) of the SCM Agreement.

8. Japan proposes four benchmarks in support of its allegation that the FIT Program and contracts confer a benefit under Article 1.1(b) of the SCM Agreement, including the HOEP. Canada argues that all of Japan's proposed comparators are improper because they do not reflect the fundamental condition of purchase in a FIT contract, namely that renewable electricity be produced. Canada stressed that the unique cost and operating conditions make comparing prices of some or all non-renewable electricity and wind and solar electricity inappropriate. However, China is not convinced by Canada's assertion.

a. Whether or not confer a benefit does not depend on the proportion of non-subsidized recipient

9. Canada argues that Japan fails to demonstrate that the FIT Program and Contracts confer a "benefit" on FIT Producers of wind and solar electricity under Article 1.1(b) of the SCM Agreement.

10. As indicated by Appellate body in Canada-Aircraft, a financial contribution will only confer a "benefit" i.e., an advantage, if it is *provided on terms that are more advantageous than those that would have been available to the recipient on the market*.[1] Furthermore, in accordance with the criteria set by the Appellate Body in DS379, in order to deny the market price, i.e. HOEP as the appropriate benchmark, Canada has to prove that (1) the government of Ontario is a "*predominant*" supplier (or purchaser); (2) the market of electricity in Ontario is distorted due to the presence of "predominant" role of the government of Ontario; (3) other factors. However, Canada only states that 92% producers received more than HOEP, therefore, it seems that the government of Ontario is a "*predominant*" purchaser. However, Canada did not address in detail why the market is distorted due to the presence of "predominant" role of the government of Ontario, nor did it address in detail if there are any other factors which may affect the assessing appropriate benchmark. Therefore, in China's view, Canada's rebuttal on "benefit" does not meet the requirement of Appellate Body in this regard.

b. Whether or not confer a benefit does not depend on the cost of recipient of subsidy

11. Canada argues that wind and solar energy need significant investment in capital and face considerable ongoing fixed costs, and no rational investor in wind or solar generation would ever sell electricity below the cost. Therefore, Canada submits that the benchmark prices proposed by Japan is below the cost of production, and can not be appropriate benchmark for determining the existence of "benefit".[2] China also can not agree with such an assertion.

12. In China's view, the benchmark price is not decided by the cost of the production. As indicated above, conferring a benefit depends on whether or not there is advantage compared with prices available in the market. It clearly does not depend on the cost of recipient of subsidies.

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[1] Appellate Body Report, *Canada – Aircraft*, para. 149. (emphasis original)
[2] Canada's first written submission, para. 147.

13. Canada argues that cost of developing renewable energy is greater than other forms of energy. However, even if it is true, the high cost may only prove the existence of subsidy, because unless intervened by government there is no reason for rational end users to pay more to buy the electricity generated from renewable energy since its quality is not superior to the electricity from fossil. Since the electricity from renewable energy and those from other forms of energy are similar and comparable, we fail to see the reason why HOEP available to electricity from other forms of energy can not be the appropriate benchmark. Taking a step back, even if HOEP is not an appropriate benchmark, we still fail to see the reason why the cost of production of recipient of subsidies shall be decisive for assessing the existence of conferring a "benefit", which does not have any legal basis in the WTO Agreements and case laws.

14. In conclusion, China believes that Canada's assertion on "benefit" is not consistent with Article 1.1(b) of the SCM Agreement and relevant WTO case law.

III. WHETHER EXPORT RESTRICTION COULD BE CONSIDERED AS "INCOME SUPPORT" UNDER ARTICLE 1.1(A)(2) OF THE SCM AGREEMENT

15. China noted that Paragraph 33 of the EU's submission in DS426 referred *to United States — Measures Treating Export Restraints as Subsidies* (DS194) and *China — Measures Related to the Exportation of Various Raw Materials* (DS394, DS395 and DS398), asserting that export restriction could be considered as "income support" under Article 1.1(a)(2) of the SCM Agreement.

16. China submits that export restriction is not "income or price support", and illustrates the reasoning as the below:

17. Firstly, reading the term "income or price support" in its context, it does not exhaust all government interventions that may have an effect on income or price, such as tariffs and quantitative restrictions. In China's view, the term "income or price support" shall base on the nature of a government action rather solely on the basis of the effects of such an action.

18. Secondly, applying the "effect" test to the existence of an "income or price support" would have far-reaching implications. In particular, it would seem to imply that any government measure that creates market conditions favourable to or resulting in the increased supply of a product in the domestic market would constitute a "income or price support", and hence a "subsidy" under the SCM Agreement. It is inevitable that the effect test will exaggerate the reasonable scope of "income or price support".

19. Thirdly, since Article XI of the GATT 1994 has dealt with deals with Members' obligation of "general elimination of quantitative restrictions", it is very doubtful that the concept of "income or price support" contained in Article 1.1(a) of the SCM Agreement seeks to bring such government action within the ambit of the SCM Agreement.

20. Fourthly, we note that a concept of "market price support" is included in the Annex 3 of Agreement on Agriculture, which provides that "market price support" is calculated as the difference between an external reference price and the "applied administered price". It indicates that a direct control over domestic price by the government is required in order to prove the existence of "price support". Therefore, in terms of "income or price support", the core issue should be the direct government action and the nature of such an action, rather than a movement in prices which is an indirect effect of another form of government intervention.

21. Lastly, the EU reached its conclusion by referring to Paragraph 7.430 of the Panel Report in *China — Measures Related to the Exportation of Various Raw Materials* (DS394, DS395 and

DS398). However, by referring to the Panel Report, the EU failed to notice the footnote therein added by the Panel, which explicitly expressed that "The use of the term "subsidy" herewith does not implicate a legal conclusion under the WTO Agreement on Subsidies and Countervailing Duties".[3]

22. To sum up, China believes that the term of "income or price support" shall be interpreted narrowly, and export restriction is not "income or price support". Having said that, China does not challenge the assertion of the EU that relevant FIT programs constitute subsidies. What China disagree is that the EU uses an inappropriate example of export restriction to illustrate the term of "income or price support".

[3] Panel Report, *China — Measures Related to the Exportation of Various Raw Materials* (DS394, DS395 and DS398), footnote 674.

ANNEX B-4

INTEGRATED EXECUTIVE SUMMARY
OF EL SALVADOR*

I. INTRODUCTION

1. El Salvador has expressed its interest in participating as a third party in these proceedings because they address various systemic issues chiefly relating to the WTO Agreement on Subsidies and Countervailing Measures. El Salvador believes that subsidies are vital tools for the management of a country's trade policy, since in some cases they are essential to a country's economic and social development.

2. This summary raises two issues of systemic importance to El Salvador: (a) the key element that the subsidy must come from a government or any public body within the territory of a Member; and (b) income or price support must be provided "in the sense of Article" XVI of the GATT 1994.

II. DISCUSSION

A. A GOVERNMENT OR ANY PUBLIC BODY WITHIN THE TERRITORY OF A MEMBER

3. This dispute has given rise to a debate over the nature of the relationship between different entities operating on the renewable energy market in the Province of Ontario, as can be seen in Question 15 from the Panel to the Parties.

4. El Salvador considers it important to underscore the relevance of the fact that the Local Distribution Companies (LDCs) are owned by the Government of Ontario, given the predominant role that the complainants claim is being played by these companies in the direct or potential direct transfer of funds, in the sense of Article 1.1(a)(1) of the SCM Agreement, to FIT generators.[1]

5. In this connection, we would point out that, for purposes of determining government or public body intervention in a subsidy, the Appellate Body in *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* called upon investigating authorities and panels to engage in a "*careful evaluation of the entity in question and to identify its common features and relationship with government in the narrow sense, having regard, in particular, to whether the entity exercises authority on behalf of government. An investigating authority must, in making its determination, evaluate and give due consideration to all relevant characteristics of the entity and, in reaching its ultimate determination as to how that entity should be characterized, avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant*".[2]

6. We consider the foregoing relevant to this dispute, because in this way it will be possible to ascertain the amount of generation tariff-related financial transactions in favour of FIT generators, in

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* This Executive Summary was originally made in Spanish.

[1] Japan's First Written Submission (DS412), Attachment 1: Reproduction of Flow of Electricity and Money Diagrams Presented as Figures 2 and 3.

[2] Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, para. 319.

the exercise of Ontario Government authority, since both complainants, namely Japan and the European Union, have asserted that the "*majority*" of LDCs are owned by the Government of Ontario.

B. INCOME OR PRICE SUPPORT MUST BE PROVIDED "*IN THE SENSE OF ARTICLE*" XVI OF THE GATT 1994

7. In its first third-party submission, El Salvador referred to the requirement that the form of income or price support under Article 1.1(a)(2) of the SCM Agreement be in "*the sense of Article*" XVI of the GATT 1994.[3]

8. In the same submission, we expressed our view that objective parameters should be provided for the Panel to determine that there had been a decline in imports of renewable energy generation equipment and components in favour of equipment and components from the Province of Ontario.

9. We also note that in its Question 20 to the Parties the Panel referred to this element of Article 1.1(a)(2) of the SCM Agreement.

10. El Salvador considers that the SCM provision in question requires evidence that a subsidy falls within the meaning of Article XVI:1 of the GATT 1994, i.e. that it be shown in what way it operates "*directly or indirectly*" to "*reduce imports of any product into its territory*".

11. Under the Agreement, price support is required to meet certain criteria. To assess this, the direct or indirect effects on trade based on imports and exports of the subsidized product should be taken into account. Price support will therefore exist insofar as it causes or has an impact in the form of a decline in imports.

12. We consider that the methods employed under other WTO provisions may be used to deal with the measure at issue in this dispute. In matters relating to safeguards, for example, there is a way to examine the correlation between the increase in injury and the domestic industry; this may be a time-related correlation (i.e. ascertaining whether a correlation exists between the moment when imports increased and the injury). The other way is to analyse the conditions of competition between imports and the like domestic product.

13. In El Salvador's view, there must be an assessment and a positive, method-based determination that income or price support has been provided in the sense of Article XVI of the GATT 1994.

III. CONCLUSION

14. This case raises important questions of a systemic nature relating to the implementation of the Agreement on Subsidies and Countervailing Measures. El Salvador therefore trusts that the Panel will take the foregoing into consideration.

[3] First Written Submission of El Salvador (DS426), paras. 13-16.

ANNEX B-5

INTEGRATED EXECUTIVE SUMMARY OF THE
EUROPEAN UNION (WT/DS412)

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I. INTRODUCTION

1. The European Union intervenes in this case because of its systemic interest in the interpretation of fundamental provisions of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"), the *Agreement on Trade-Related Investment Measures* ("TRIMs Agreement") and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). The European Union also has a substantial commercial interest in this matter, which led to its own request for consultations with Canada on 11 August 2011 (DS426). In the context of its third party intervention, the European Union will provide its views on the legal claims advanced by Japan, while not taking a final position on the specific facts of this case or prejudging the European Union's possible claims and arguments in the context of dispute DS426.

II. CANADA'S REQUEST FOR A PRELIMINARY RULING

2. The European Union fails to understand why the parties did not provide copies of their submissions to third parties when they were filed. Due process is a fundamental principle of WTO dispute settlement that informs and finds reflection in the provisions of the DSU. Due process implies that the interests and views of third parties "shall be fully taken into account during the panel process". This can only be achieved if the parties provide copies of their submissions to third parties when they are filed (or shortly thereafter). The European Union also fails to understand why the Panel did not forward the parties' submissions to the third parties when it received them and, in any event, before taking a preliminary decision on the issues raised by Canada. On substance, the European Union agrees with Japan that Canada's request for a preliminary ruling is unwarranted.

III. MEASURES AT ISSUE

3. The European Union understands that Japan challenges the FIT Program (including the microFIT Program) as well as the FIT and microFIT contracts.

IV. SCM AGREEMENT

4. The European Union agrees with Japan that the measures at issue, i.e. the FIT Program, and FIT and microFIT contracts, by imposing a domestic content requirement on FIT Generators of wind and solar PV electricity as a condition for receiving guaranteed, above-market electricity rates, would provide subsidies contingent upon the use of domestic over imported goods, which are prohibited by Articles 3.1(b) and 3.2 of the SCM Agreement.

5. The European Union considers that the FIT Program amounts to a subsidy as defined by Article 1.1 of the SCM Agreement. First, no matter how regarded, either as a direct transfer of funds or a potential direct transfer of funds, the FIT Program implies a financial contribution by the government of Ontario, through its public agencies (and, in particular, through the OPA) and/or through private bodies entrusted or directed by the government to make FIT payments (i.e. LDCs). The Canadian province of Ontario, through the FIT Contract signed between the OPA and the FIT Generator, commits to pay the agreed price for the electricity generated by the FIT Generator. In the European Union's view, this commitment could be better characterised as a "direct transfer of funds" in the sense of Article 1.1(a)(1)(i) of the SCM Agreement because future payments are made unconditionally (other than the nature of the contract, i.e. the expected delivery of electricity in exchange of the payment). Second, in the alternative, the FIT Program provides a form of income or price support to the FIT Generator through guaranteed prices in the sense of Article 1.1(a)(2). Third, the FIT Program also provides a benefit to the recipient, i.e. the FIT Generator. The FIT Program will result in most cases in a benefit to the FIT Generator resulting from the difference between the market

prices and the guaranteed prices. In the European Union's view, in an *ex-ante* analysis, the benefit assessment should focus on the relevant market benchmark at the time the financial contribution is granted to the recipient. That benchmark entails a consideration of what a market participant would have been able to secure on the market at that time. The market benchmark is predicated upon a projection as to the anticipated flow of returns that are expected to accrue as a result of the financial contribution. Japan has illustrated this in various ways. No matter how the Panel addresses this question, the European Union considers that the FIT Program confers a benefit to the recipient.

6. The subsidy appears to be "contingent" in the sense that compliance with the domestic content requirements is mandatory: if the FIT Generator does not show that it has met the domestic content requirements before starting its operations, the contract will be in default. Moreover, the FIT Program would require the use of domestic over imported goods, "solely or as one of several other conditions".

V. GATT 1994

7. According to Japan the renewable energy generation equipment manufactured in Ontario and the one imported from Japan, and to the EU's understanding also in other countries, are "like products" in the sense of Article III:4 of the GATT 1994. The European Union agrees with Japan's assessment. According to the information provided by Japan, the contested measures are "requirements" in the sense of Article III:4. On the basis of the information provided by Japan, the Domestic Content Grid is enforceable, mainly in view of the fact that a failure to comply with those domestic content requirements implies that the contract is in default. Concerning the question whether the measure affects the internal sale, purchase or use of the imported goods, the European Union wishes to recall that it is sufficient that it may be reasonably expected that this measure will adversely modify the conditions of competition. It is therefore sufficient to analyse, on the basis of the available elements of fact, whether that is the case as regards the measures challenged by Japan.

8. The European Union considers that an analysis of the actual effects of the measure at issue on the sale of imported products is not required under Article III:4. Concerning the issue whether Japan has discharged its burden of proof in respect of the question whether the challenged measure modifies the conditions of competition to the detriment of imported goods, the European Union observes that the Appellate Body recently noted that the analysis of whether imported products are accorded less favourable treatment requires a careful examination grounded in close scrutiny of the fundamental thrust and effect of the measure itself, including the implications of the measure for the conditions of competition between imported and like domestic products. This analysis however does not need, according to the Appellate Body, to be based on empirical evidence as to the actual effects of the measure at issue in the internal market of the Member concerned. The FIT Program creates incentives among Ontario-based wind and solar PV energy generators to use renewable energy generation equipment produced within Ontario. In particular, on the basis of the information provided in Japan's first written submission, the FIT Program attaches the contractually guaranteed standard rate only to the use (to an important extent, see Domestic Content Grid) on Ontario sourced goods.

9. Finally, on the basis of the facts provided in Japan's first written submission, the European Union shares the analysis concerning the inapplicability of Article III:8 of the GATT 1994. First, it seems that no "procurement" in the sense of Article III:8(a) exists. The Government of Ontario is at no stage acquiring any products for its own use or benefit under the FIT Program. In any event, it seems that even if one could argue that it is being done, *quod non*, this would be the case only with a view to commercial resale or use in production of goods for commercial sale. On the basis of the information provided by Japan, electricity delivered under the FIT Program is sold to all consumers at commercial prices. Second, the exception of Article III:8(b) does not apply either. Japan's case is not that the FIT Program favours Ontario-based renewable energy generators, but that

FIT Program discriminates against imported renewable energy generation equipment. On the basis of the constant case-law, Article III:8(b) does not serve as a defence for measures which discriminate between imported and domestic products.

10. Consequently, the European Union considers that the measures at issue are inconsistent with Article III:4 of the GATT 1994.

VI. TRIMS AGREEMENT

11. According to Japan, the FIT Program, FIT and microFIT contracts are also inconsistent with Article 2.1 of the TRIMs Agreement. The European Union generally agrees with Japan's assessment. In addition to the arguments presented by Japan, the European Union would like to underline that the panel in *Indonesia-Autos* noted that the TRIMs Agreement is a "fully fledged agreement in the WTO system", which applies independently to GATT Article III and which contains special transitional provisions including notification requirements; concluded that the TRIMs Agreement has an "autonomous legal existence". In that case the panel decided to examine the claims first under the TRIMs Agreement, "since the TRIMs Agreement is more specific than Article III:4 as far as the claims under consideration are concerned". The European Union is of the opinion that, should this Panel follow the approach chosen by the panel in *Indonesia-Autos*, the requirements to find a breach of Article 2.1 of the TRIMs Agreement would be met.

12. Finally, the European Union also notes that the measures at issue would be covered by Annex 1(a) of the TRIMs Agreement, which refers to a category of measures that are deemed inconsistent with the obligation of national treatment provided for under Article III:4 of GATT 1994. A finding that a measure falls under Annex 1(a) of the TRIMs Agreement results, in and of itself, in a finding of violation of Article 2.1 of the TRIMs Agreement and, consequently, in a finding of violation of Article III:4 of the GATT 1994. Thus, in the European Union's view, the Panel does not need to examine first whether there is a violation of Article III:4 of the GATT 1994 to then conclude that there is a violation of Article 2.1 of the TRIMs Agreement.

ANNEX B-6

INTEGRATED EXECUTIVE SUMMARY
OF JAPAN (WT/DS426)

TABLE OF ABBREVIATIONS

Abbreviation	Description
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Communities
EU	European Union
FIT	feed-in tariff
FIT Program	Ontario's Feed-In Tariff Program
GATT 1994	General Agreement on Tariffs and Trade 1994
OED	*Oxford English Dictionary*
OPA	Ontario Power Authority
SCM Agreement	Agreement on Subsidies and Countervailing Measures
US	United States
Vienna Convention	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

TABLE OF CASES

Short Title	Full Case Title and Citation
China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, circulated to WTO Members 30 January 2012, adopted 22 February 2012
EC – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, 3791
EC – Trademarks and Geographical Indications (US)	Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, Complaint by the United States, WT/DS174/R, adopted 20 April 2005, DSR 2005:VIII, 3499
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
US – 1916 Act (EC)	Panel Report, *United States – Anti-Dumping Act of 1916, Complaint by the European Communities*, WT/DS136/R and Corr.1, adopted 26 September 2000, upheld by Appellate Body Report WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, 4593
US – Countervailing Measures on Certain EC Products	Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/R, adopted 8 January 2003, as modified by Appellate Body Report WT/DS212/AB/R, DSR 2003:I, 73
US – Section 301 Trade Act	Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815

1. Japan addresses three issues in this submission: (i) the sufficiency of the European Union's panel request; (ii) the relevance of the characterization of measures in domestic law for purposes of WTO law; and (iii) the meaning of "income or price support".[1]

I. THE EUROPEAN UNION'S PANEL REQUEST IS SUFFICIENT UNDER ARTICLE 6.2 OF THE DSU, AND ACCORDINGLY, THE PANEL SHOULD REJECT CANADA'S PRELIMINARY RULING REQUEST

2. In a letter to the Panel dated 14 February 2012, Canada repeated the request for a preliminary ruling that it made with respect to Japan's panel request in DS412. The panel in DS412 did not find merit in Canada's request, stating explicitly that it was "not convinced of the merits of Canada's request".[2] This Panel should similarly find no merit in Canada's request for a preliminary ruling in this dispute largely for the same reasons expressed by Japan in its 11 November 2011 response to Canada's preliminary ruling request in DS412.[3]

3. Canada raises two new points that were not mentioned in DS412 and warrant a response. First, Canada suggests that the Appellate Body's recent report in *China – Raw Materials* supports a finding that the EU's panel request is insufficient. Second, Canada suggests that the EU's use of a term that Japan did not use in its own panel request in DS412 – i.e., the term "above-market" – establishes that Japan's panel request in DS412 was inadequate. For the reasons provided below, these arguments by Canada have no merit.

A. THE APPELLATE BODY'S ANALYSIS IN *CHINA – RAW MATERIALS* DOES NOT SUPPORT A FINDING THAT THE EU'S PANEL REQUEST IS INSUFFICIENT

4. The European Union's panel request is sufficient pursuant to Article 6.2 of the DSU, and a decision by this Panel to reject Canada's preliminary ruling request would be fully consistent with the Appellate Body's reasoning in *China – Raw Materials*. Japan also observes that the Appellate Body in *China – Raw Materials* relied on much of the same jurisprudence that the parties in DS412 addressed in their submissions on this issue.[4]

5. The Appellate Body in *China – Raw Materials* emphasized that the determination of sufficiency under Article 6.2 "involves a case-by-case analysis".[5] Moreover, a determination of sufficiency "may depend on whether it is sufficiently clear which 'problem' is caused by which

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[1] At the outset, Japan notes that it incorporates its arguments from DS412 into DS426, where applicable.

[2] Panel's Communication to the Parties, WT/DS412, 21 November 2011.

[3] Japan's Response to Canada's Preliminary Ruling Request, WT/DS412, 17 November 2011.

[4] *See* Appellate Body Reports, *China – Raw Materials*, paras. 218-235. Canada appears to rely primarily on the Appellate Body's reiteration in that dispute of its finding in the previous dispute that a brief summary of the basis under Article 6.2 should "explain succinctly *how and why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question". Appellate Body Report, *China – Raw Materials*, para. 226, quoting the Appellate Body Report, *EC – Customs Matters*, para.130. However, Japan notes that in its preliminary ruling submission in DS412, Canada had already advanced its arguments relying on this finding of the Appellate Body in *EC – Customs Matters* (See Annex 1 of Canada's preliminary Ruling Submission of 14 February 2012 in DS426, para.5) but Canada's request was squarely rejected by the panel in DS412. See the panel's communication of 21 November 2011 to the parties in DS412. Thus Canada's perfunctory arguments in DS426 relying on the Appellate Body's mere reiteration of its previous finding hardly establishes a *prima facie* case that would disturb, or warrant departure from, the panel's preliminary ruling in DS412.

[5] Appellate Body Reports, *China – Raw Materials*, para. 220.

measure or group of measures", and whether "a panel's ability to perform its adjudicative function" is "impair[ed]".[6]

6. The key issue in the present dispute is whether the EU's panel request "provide[s] a brief summary of the legal basis of the complaint sufficient to present the problem clearly".[7] The Appellate Body in *China – Raw Materials*, relying on its earlier jurisprudence, explained that "a brief summary of the legal basis of the complaint as required by Article 6.2 of the DSU should 'explain succinctly *how or why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question'".[8]

7. The Appellate Body in *China – Raw Materials* concluded that the panel request at issue in that dispute did not satisfy this aspect of DSU Article 6.2.[9] The Appellate Body further observed that the listed WTO provisions "contain[ed] a wide array of dissimilar obligations"[10], and found that the panel request was insufficient pursuant to Article 6.2 because of its "failure to provide sufficiently clear linkages between the broad range of obligations contained [in the 13 listed WTO provisions] and the 37 challenged measures".[11]

8. None of these facts and circumstances exists in the present dispute (or in DS412). The European Union's panel request does not involve a complex array of measures and WTO provisions, without providing sufficiently clear linkages between the measures and legal obligations alleged to be violated. Rather, the European Union's panel request makes it abundantly clear which "problem"[12] with respect to the SCM Agreement is caused by the enumerated measures relating to the FIT Program – that is, the FIT measures are "subsidies" as defined in Article 1.1 of the SCM Agreement, that are "provided contingent upon the use of domestic over imported goods", and thereby inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement. The European Union does not obscure "how or why"[13] the measures at issue violate the WTO obligations in question. And those obligations are contained in Articles 3.1(b) and 3.2 of the SCM Agreement, not Article 1.1 of the SCM Agreement. Accordingly, it is clear that the Appellate Body's reasoning in *China – Raw Materials,* when read in the context of the facts of that dispute, *supports* a finding by the current Panel that the European Union's panel request is sufficient under Article 6.2 of the DSU.

B. THE PRESENCE (OR ABSENCE) OF THE TERM "ABOVE-MARKET" IN THE EU'S PANEL REQUEST IS OF NO SIGNIFICANCE

9. Further, it is difficult to understand what significance the Panel could attach to the term "above-market" that the European Union inserted in its description of the *measures* at issue, in the Panel's consideration of Canada's request for a preliminary ruling where Canada alleges a failure to provide a brief summary of the *legal basis* of the complaint.

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[6] Appellate Body Reports, *China – Raw Materials,* para. 220.
[7] DSU Article 6.2.
[8] Appellate Body Reports, *China – Raw Materials*, para. 226 (emphasis in original), quoting Appellate Body Report, *EC – Selected Customs Matters*, para. 130.
[9] Appellate Body Reports, *China – Raw Materials*, para. 226.
[10] Appellate Body Reports, *China – Raw Materials*, para. 228.
[11] Appellate Body Reports, *China – Raw Materials*, para. 234.
[12] DSU Article 6.2.
[13] Appellate Body Reports, *China – Raw Materials*, para. 226.

II. THE GOVERNMENT OF ONTARIO'S CHARACTERIZATION AND TREATMENT OF ITS FIT PROGRAM DOES NOT DETERMINE THE STATUS OF THE MEASURES UNDER ARTICLE III:8(A) OF THE GATT 1994 AND ARTICLE 1.1(A)(1)(III) OF THE SCM AGREEMENT

10. Canada asserts that the characterization and treatment of the FIT Program in the text of the Ontario measures at issue establishes that the FIT Program constitutes the "procurement" or "purchase" of renewable electricity within the meaning of Article III:8(a) of the GATT 1994[14], and the "purchase" of such electricity within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.[15] However, the characterization and treatment provided in the text of domestic measures cannot have any bearing on applying or interpreting these provisions of the WTO agreements, or more generally on determining whether any WTO obligations have been violated. This is because domestic measures are to be taken as facts by a WTO panel; treaty language is to be interpreted by a WTO panel in accordance with the customary rules of treaty interpretation as codified at Articles 31 and 32 of the Vienna Convention on the Law of Treaties; and then the available facts are to be applied to the proper legal interpretation to determine whether a violation has taken place. Indeed, it would be no more compelling for the Panel's analysis had the Government of Ontario explicitly declared within its FIT contracts that "this contract is deemed to be consistent with the provisions of the GATT 1994" or "this contract constitutes procurement pursuant to the Agreement on Government Procurement".

11. A conclusion to the contrary would be tantamount to enabling Canada to determine whether its measures are consistent with its WTO obligations, which the Appellate Body said in *India – Patents (US)*, "clearly, cannot be so".[16] Simply put, WTO panels are not bound by a Member's interpretation or characterization of its own domestic measures.[17] Rather, as the panel aptly summarized in *US – Countervailing Measures on Certain EC Products*, WTO panels are tasked with "establish[ing] the meaning of the disputed [measures] as a factual element and determin[ing] whether the factual element constitutes conduct by the respondent Member contrary to its WTO obligations".[18]

12. For similar reasons, precisely how a Member chooses to administer its tax system has little relevance for whether a particular transaction is or is not a "procurement" or "purchase" for purposes of Article III:8(a) of the GATT 1994, and/or a "purchase" for purposes of Article 1.1(a)(1)(iii) of the SCM Agreement. This is purely a question of finance internal to the government of the Member in question, and undoubtedly a government may choose to tax many activities other than purchases. At most, the alleged fact indicates that the Government of Ontario has determined the scope of the "sales" subject to its "sales" tax.[19] This is nothing other than a matter of legal characterization under *domestic law*, which cannot bind the panel's legal characterization of the government action at issue under *the WTO Agreement*.

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[14] Canada's first written submission, paras. 16-17.

[15] Canada's first written submission, para. 54.

[16] Appellate Body Report, *India – Patents (US)*, para. 66.

[17] *See* Panel Report, *EC – Trademarks and Geographical Indications (US)*, para. 7.55; Panel Report, *US – Section 301 Trade Act*, para. 7.19; Panel Report, *US – 1916 Act (EC)*, para. 6.51.

[18] Panel Report, *US – Countervailing Measures on Certain EC Products*, para. 6.38 (emphasis omitted), citing Panel Report, *US – Section 301 Trade Act*, para. 7.18 and Appellate Body Report, *India – Patents (US)*, para. 66.

[19] Japan also observes that the particular tax at issue is described as a tax "that applies to the *supply* of most property and services in Canada", and therefore does not appear to be a tax applied to the "purchase" of property and services, despite use of the term "sales tax". *See* Canada Revenue Agency, How GST/HST Works, Exhibit CDA-56 (emphasis added). This further illustrates why a panel should not rely upon a Member's characterization of a measure in its domestic legal system for purposes of applying and interpreting WTO law.

III. ARTICLE XVI:1 OF THE GATT 1994 DOES NOT LIMIT "INCOME OR PRICE SUPPORT" TO SUPPORT PROVIDED FOR THE GOODS ACTUALLY IMPACTED BY THE SUBSIDY

13. Canada suggests that for "income or price support" to constitute a "subsidy" within the meaning of Article 1.1 of the SCM Agreement, the support must be provided to the goods whose trade is actually impacted by the support. Canada bases this view on the notification requirements listed in Article XVI:1 of the GATT 1994, and particularly its view that the reference to "any product" in that provision "is not a reference to unsubsidized input goods", but rather a reference to "the subject of the alleged subsidy".[20]

14. Japan notes that Article XVI:1 of the GATT 1994 does not define the meaning of "subsidy"; the definition of "subsidy" is provided by Article 1.1 of the SCM Agreement. Article XVI:1 of the GATT 1994 provides the conditions under which the notification requirements and the discussion obligation imposed by that provision shall take place.

15. To the extent Article XVI:1 may serve as relevant context for interpreting "income or price support" under Article 1.1(a)(2) of the SCM Agreement, it does not support Canada's view. Canada offers no support or analysis of any kind for its interpretation that the term "any product" is a reference to the "subject of the alleged subsidy", and may not be a reference to "unsubsidized input goods". It is noteworthy that Article XVI:1 uses the term "*any* product", and not a term such as "*like* product".[21] With regard to the definition of "any", the *Oxford English Dictionary* provides: "In affirmative sentences it asserts concerning a being or thing of the sort named, without limitation as to which, and thus constructively of *every* one of them, since every one may in turn be taken as a representative".[22] Thus, the term "any product" in Article XVI:1 refers to every product, including unsubsidized input goods, whose exports may increase or imports may decrease as a result of the income or price support provided. In other words, for "income or price support" to fall within the scope of GATT Article XVI, and thereby within the meaning of Article 1.1(a)(2) of the SCM Agreement, it need not be provided to a product that is identical to or even "like" the affected products. Rather, income or price support provided to a product falls within the definition of a "subsidy" if it increases exports or reduces imports of *any product*, whether an identical product, a "like" product, or any other product.

[20] Canada's first written submission, paras. 61-62.
[21] Emphases added.
[22] *The Oxford English Dictionary*, OED Online, Oxford University Press, http://www.oed.com/view/Entry/8973 (emphasis in original).

ANNEX B-7

INTEGRATED EXECUTIVE SUMMARY
OF KOREA

1. In Korea's view, the measures adopted by Ontario that are the subject of this dispute appear to be intended, fundamentally, to address a critical issue of environmental protection — to provide incentives that will encourage the development of methods for generating electricity that are ultimately environmentally-sustainable and economically-viable. It is critical that the provisions of the WTO Agreements not impede these global efforts. At the same time, the goal of promoting environmentally-sound energy policies should not be allowed to serve as a pretext for discriminatory measures adopted not to protect the environment, but to promote domestic production over imports.

2. In light of this, this dispute carries important systemic implications that go beyond the factual details of Ontario's incentive programs. The ruling by the Panel in this case will provide an important indication of how actions taken to develop sustainable energy alternatives can and should be squared with the WTO rules.

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

3. Canada does not appear to dispute that Ontario's program fails to comply with the obligations of GATT Article III:4 and Article 2.1 of the TRIMs Agreement. Instead, Canada contends that Article III:4 is simply inapplicable here, because Ontario's program falls under the exception set forth in GATT Article III:8(a). And, in light of its claims that Article III:4 does not apply, Canada also contends that there can be no derivative violation of Article 2.1 of the TRIMs Agreement.

4. Examining the specific terms of Article III:8(a) of GATT, the term "procurement" is not defined in the article — or, for that matter, in the plurilateral Agreement on Government Procurement (the "GPA"). The text of Article III:8(a), when read as a whole, does suggest that the meaning of "procurement" is not completely identical to the meaning of "purchase" — since Article III:8(a) uses both terms in the same sentence in a manner that suggests that there may be types of procurement that do not involve purchases. The term "procurement," then, would appear to encompass any form of government acquisition, including but not limited to "purchase."

5. Complaining Members assert that there is no "procurement" in this case "because the Government of Ontario is not acquiring any products for its own use or benefit under the FIT Program."[1] The Panel's evaluation of that argument will require not only interpretation of the legal meaning of the term "procurement," but also assessment of the precise role played by the Government of the Ontario in the transactions covered by Ontario's FIT program.

6. Canada asserts that it is beyond dispute that "renewable electricity" is a "product."[2] Its only support for this contention is an online dictionary that defines "product" as "[a]n object produced by a particular action or process; the result of mental or physical work or effort." However, electric power is not a material object.[3] It is, instead, a form of energy typically generated when coils of wire are

[1] *See* Japan's First Written Submission, para. 287.

[2] *See* Canada's First Written Submission, para. 70 ("Nor can there be any dispute that renewable electricity is a product.").

[3] In this regard, it should be noted that the *Shorter Oxford English Dictionary* does not define "product" as any "object," as Canada suggests. Instead, it defines "product" as a "*thing* produced by an action, operation,

turned in a magnetic field to cause a quantity of electrons (the electric current) to flow as a result of a difference in potential (the voltage). As a technical matter, electric power (measured in watts or kilowatts) is the result of current multiplied by voltage. Electric energy (measured, for example, in kilowatt-hours) is electric power multiplied by time.[4]

7. At the time that the GATT was negotiated, the classification of electric power under the provisions of the GATT was raised in a discussion of the Article XX exception for exhaustible natural resources. According to the New York (Drafting Committee) Report, "As it seemed to be generally agreed that electric power should not be classified as a commodity, two delegates did not find it necessary to reserve the right for their countries to prohibit the export of electric power."[5] It is clear, then, that there was some doubt as to whether electric power was considered to be a "product" for purposes of the GATT at the time the GATT was negotiated.

8. This doubt appears to continue to exist even today. For example, while the Harmonized Tariff System does include a heading for electrical energy (HTS Code 27.16.00), it also indicates that this heading is "optional."[6] In other words, the HTS takes the position that it is possible, but not necessary, to classify electrical power as a commodity for tariff purposes.

9. Furthermore, even if electric power is properly classified as a "product" for purposes of Article III:8(a), it is not clear that "renewable energy" — the term used by Canada and the Complaining Members for electricity generated using wind, solar photovoltaic, or other "clean" alternatives — is a distinct product. The WTO jurisprudence has consistently defined "products" in terms of the characteristics of the item in question, and not in terms of the "processes and production methods" (or "PPM") used to make them.[7] While the Appellate Body's decision in *US – Shrimp* suggests that certain restrictions based on the method of production may be permitted when justified under Article XX of the GATT, such restrictions represent an exception to the normal GATT disciplines, and not an application of a definition of "product" based on production methods.

10. It therefore remains an open question whether, in the circumstances of this dispute, electricity should be considered a "product," or whether a definition of "product" that considers the methods used to produce the electric power would be appropriate where the definition is intended to achieve important environmental objectives. The Panel will need to consider these issues carefully using all of the tools for the interpretation of treaties. It is not, in Korea's view, sufficient just to cite a single

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or natural process;" and it defines, a "thing" as an "inanimate material object." *See* Shorter Oxford English Dictionary (6th ed.2007) at 2359 and 3239.

On the other hand, other dictionaries indicate that a "product" may be a "good" or a "service" that is marketed or sold as a commodity. *See* Merriam Webster's Collegiate Dictionary (11th ed. 2003) at 991.

[4] In mathematics, the result of multiplying two figures together is referred to as the "product" of those figures. *Id.* However, there is no indication that the drafters of Article III:8 intended to adopt this mathematical usage.

[5] *See* Analytical Index: Guide to GATT Law and Practice (6th ed. 1995) at 585, citing New York Report, p. 31, general comments on Article 37, and EPCT/C.6/89, p. 4.

[6] *See* World Customs Organization, Harmonized Nomenclature 2007, Chapter 27, available at «www.wcoomd.org/home_hsoverviewboxes_tools_and_instruments_hsnomenclaturetable2007.htm».

[7] *See, e.g., United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, Panel Report, WT/DS381/R, 15 September 2011, paras. 7.216 to 7.219. *See also id.* at 4.244 (reporting Mexico's argument that: "The obligations in the WTO Agreements must not be interpreted so as to allow a WTO Member to condition access to its domestic market based on compliance with that Member's unilateral policy relating to actions outside its territory including unincorporated process and production methods. The only circumstances where such actions should be permitted are where they can be justified under one of the specific exceptions to the WTO obligations.").

dictionary definition and assert that there can be no dispute as to the meaning of the term or its application in the circumstances of this case.

11. At the same time, relying on a dictionary definition of the term "purpose," Canada asserts that "'a purchase for governmental purposes' is a purchase for an aim of the government." And, because "Governments express their aims through legislation, regulations, policies and executive directions," Canada claims that any "purchase by a governmental agency which is directed in legislation, regulations, policy or an executive direction is a purchase for governmental purposes."[8]

12. Under Canada's interpretation, however, there would be no reason for Article III:8 to refer to purchases for government purposes, because almost all procurements made by a government would be "for government purposes." In short, in order to avoid rendering the "government purposes" language of Article III:8 inutile, that term must imply something more than an act consistent with "legislation, regulations, policies or executive directions."

13. Canada also seems to suggest that "governmental purposes" can be discerned from the societal interest in the alleged aim of the government action. Canada certainly is correct in stressing the importance of adequate and reliable electrical energy supplies to the public welfare.[9] But the same description could be applied to almost any other field of economic activity: Adequate and reliable food supplies, health care, education, information collection and dissemination, clothing, transportation, employment, arts and entertainment, and individual expression are all important, in their own way, to the public welfare. Consequently, if the term "government purpose" is to provide any meaningful limitation under Article III:8, a test that requires only some connection of the purchase to some matter relevant to public welfare would appear to be inadequate.

B. Ontario's Feed-In-Tariff System and the SCM Agreement

14. In the present dispute, Complaining Members also contend that the incentives provided under Ontario's FIT program should be prohibited under Article 3 of the SCM Agreement, because they are, in their view, subsidies contingent upon the use of domestic over imported goods.

15. There appears to be a factual dispute between Complaining Members and the Responding Member concerning whether the disbursements to electric-power generators under Ontario's FIT system represent payments for purchases of electric power, or other transfers of monies that are distinct from electricity purchase transactions. Furthermore, to the extent that the disbursements are payments for purchases of electric power, a further question arises whether the electric power represents goods, services, or some other category. In Korea's view, a proper analysis of the transactions under Article 1.1(a)(1) of the SCM Agreement is not possible until these complex factual issues are satisfactorily resolved.

16. Articles 2 and 14 of the SCM Agreement require the application of a benchmark, to the extent feasible, in the analysis of "benefit." Because "benefit" is a relational concept that requires a comparison between a transaction under a government program with a transaction with market terms, identifying a proper market benchmark is critical to a proper benefit analysis. At the very least, a benchmark should provide an objective yardstick for measuring the existence and amount of the benefit, based on consideration of actual situations in the market for business transactions.

17. Korea notes that selection of a "market price" (and, thus, the benchmark for the benefit analysis) at times requires a complex analysis that may involve an examination of returns over a

[8] *See* Canada's First Written Submission, para. 86.
[9] *See, e.g.* Canada's First Written Submission, paras. 16 to 17.

longer period of time. Because individuals have different time horizons, rational market participants may assign different weights to the short-term and long-term consequences of a transaction, and thus value the overall return quite differently. More generally, it is common for profit-maximizing businesses to accept a short-term loss in order to obtain a greater long-term profit. Research and development programs — whether funded by corporations or by governments — would provide good examples of such long-term thinking.

18. Viewed from this perspective, it seems far from easy or simple to select a benchmark where, as in this case, complex long-term business and policy considerations, and investments with lengthy pay-back periods, are involved. In these circumstances, a snap shot at a single moment of time may not necessarily ensure a reliable comparison that takes into account the real market situation, as mandated by Article 14 of the SCM Agreement.

ANNEX B-8

INTEGRATED EXECUTIVE SUMMARY
OF MEXICO[1]

I. INTRODUCTION

1. Mexico expressed its intention to participate as a third party in this proceeding because it raises important systemic issues in connection with the SCM Agreement, the TRIMs Agreement, and certain provisions of the GATT 1994. Moreover, we take this opportunity to state our position on another procedural matter of considerable relevance to Mexico, namely the interpretation of Article 6.2 of the DSU.

2. We acknowledge that the WTO rules do not prevent Members from promoting the creation of infrastructure to generate alternative, environmentally friendly sources of energy. We also underscore the importance that countries should encourage the generation of this type of energy, provided that the obligations in the covered agreements are met. However, the parties' submissions give us to understand is that this is not a dispute concerning trade and the environment.

3. This submission addresses two issues of systemic importance to Mexico: (i) analysis of the request for the establishment of a panel under Article 6.2 of the DSU; and (ii) relationship between the SCM Agreement and Article III of the GATT 1994 and the TRIMs Agreement, in the case of subsidies contingent upon the use of domestic over imported goods.

II. DISCUSSION

A. INTERPRETATION OF ARTICLE 6.2 OF THE DSU

4. Mexico notes that many dispute settlement cases recently referred to the WTO have seen preliminary objections being put forward in relation to Article 6.2 of the DSU. Mexico's concern is that such preliminary objections should become the rule rather than the exception and be used as a dispute strategy that impedes and delays the proceedings.

5. Canada contends in its preliminary objections that the panel requests filed by Japan and the European Union do not meet the requirements of Article 6.2 of the DSU in respect of their complaints relating to the SCM Agreement.

6. Firstly, we note that Article 6.2 of the DSU stipulates, in its relevant part, that a request for a panel "shall . . . identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

7. As is evident from the text of Article 6.2 of the DSU, a request for the establishment of a panel calls for no more than: (i) the identification of the specific measures at issue; and (ii) a brief summary of the legal basis of the complaint sufficient to present the problem clearly. The text of Article 6.2 requires identification, rather than an explanation, of the measures at issue, and a summary of the legal basis of the complaint, rather than a set of arguments - provided that this is sufficient to present the problem clearly.

[1] This Executive Summary was originally made in Spanish.

8. Article 6.2 of the DSU has been interpreted as meaning that the panel request not only determines the Panel's terms of reference, but also serves the due process objective of notifying the respondent of the nature of the case to be defended. In *EC - Fasteners (China)* (paragraph 562) and *China - Raw Materials* (paragraph 219), the Appellate Body noted as follows:

> Article 6.2 of the DSU lays out the key requirements for a panel request and, by implication, the establishment of a panel's terms of reference under Article 7.1 of the DSU. The complaining party must identify the specific measure at issue and provide a brief summary of the legal basis of the complaint, sufficient to present the problem clearly. The Appellate Body has found that the panel request "assists in determining the scope of the dispute" in respect of each measure, and "consequently, establishes and delimits the jurisdiction of the panel". The panel request also serves the important due process objective of notifying the respondent of the nature of the case it must defend. As the Appellate Body stated in *EC and certain member States - Large Civil Aircraft*, "[t]his due process objective is not constitutive of, but rather flows from, the proper establishment of a panel's jurisdiction". The panel request must therefore be examined "as it existed at the time of filing" in order to determine whether a particular claim falls within the panel's terms of reference. For its part, a panel must "scrutinize carefully the panel request, read as a whole, and on the basis of the language used", in order to determine whether it is "sufficiently precise" to comply with Article 6.2 of the DSU.
>
> The Appellate Body has explained that Article 6.2 of the DSU serves a pivotal function in WTO dispute settlement and sets out two key requirements that a complainant must satisfy in its panel request, namely, the "identification of the specific measures at issue, and the provision of a brief summary of the legal basis of the complaint (or the claims)". Together, these two elements constitute the "*matter* referred to the DSB", so that, if either of them is not properly identified, the matter would not be within the panel's terms of reference. Fulfilment of these requirements, therefore, is "not a mere formality". As the Appellate Body has noted, a panel request forms the basis for the terms of reference of panels, in accordance with Article 7.1 of the DSU. Moreover, it serves the due process objective of notifying the respondent and third parties of the nature of the complainant's case. The identification of the specific measures at issue and the provision of "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" are therefore central to defining the scope of the dispute to be addressed by the panel.

9. Mexico recognizes the importance of the role played by the panel request, not only in determining the panel's terms of reference but also in meeting the due process objective. However, the preliminary objections provided for in Article 6.2 of the DSU should lie only in the event of exceptional circumstances and where an actual deficiency jeopardizes due process.

10. In its panel request, we note that Japan identifies the specific measures at issue as "those taken by the Government of Canada or its provinces relating to the FIT Program established by the Canadian province of Ontario in 2009 providing for guaranteed, long-term pricing for the output of the renewable energy generation facility that contain a defined percentage of domestic content". For its part, the European Union identifies the measures as "those relating to the FIT Program established by the Canadian province of Ontario in 2009 providing for guaranteed, above-market, long-term pricing for the output of renewable energy generation facilities that contain a minimum percentage of domestic content".

11. In their requests, Japan and the European Union also identify the legal instruments pertaining to the measure. Finally, both requests advance three complaints, specifying the type of violation involved, in other words, stating the legal basis of the complaint. In Mexico's view, this is sufficient to present the problem clearly in terms of Article 6.2 of the DSU.

12. Canada argues, moreover, that a complaint relating to a subsidy in accordance with the SCM Agreement requires identification of the relevant elements of the subsidy in order to satisfy the requirements of Article 6.2 of the DSU, that is, the financial contribution, the government, public body or private body entrusted with granting it, and the benefit conferred.

13. As regards the constitutive elements of the subsidy which Canada argues should be identified in order to meet the requirements of Article 6.2 in subsidy complaints - and without prejudging whether the argument is correct or whether the elements identified actually fall within the corresponding definitions in the SCM Agreement - we can identify the authority granting the subsidy, i.e. the Government of Canada or its provinces, specifically, the province of Ontario, from the panel requests filed by Japan and the European Union. Likewise, Mexico is of the view that a reading of the requests shows that the financial contribution can be identified as guaranteed, long-term pricing for the output of renewable energy generation facilities that contain a defined percentage of domestic content. Lastly, we can see that the benefit conferred would be that obtained from the guaranteed fixed rates.

14. Although the European Union and Japan could have been more specific regarding the public bodies granting the subsidy and also been clearer in noting that the guaranteed rates were provided through the contracts under the FIT Program, Mexico therefore considers that the panel requests filed by the two complainants were sufficiently specific and clear for Canada to know what the case involved, thus meeting the requirements of Article 6.2 of the DSU to identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. Moreover, it seems to us that the identification of the subsidy is sufficient to fulfil the requirements of Article 6.2 of the DSU.

15. We thus reiterate our concern that the preliminary objections relating to Article 6.2 of the DSU could become a mere dispute strategy intended to avoid going into the substance of a matter instead of being a legitimate recourse to ensure that the defence in a case could be put forward properly.

B. RELATIONSHIP BETWEEN THE SCM AGREEMENT, ARTICLE III OF THE GATT AND THE TRIMS AGREEMENT

16. As Mexico understands it, where the SCM Agreement is determined to have been violated owing to the existence of a prohibited subsidy contingent upon the use of domestic over imported goods, this necessarily implies a breach of the principle of national treatment contained in Article III of the GATT 1994. In other words, a programme contingent upon the use of domestic over imported goods is discriminatory in that it grants less favourable treatment to foreign goods. Moreover, these types of programme contingent upon the use of national products constitute investment-related measures, and in contravening Article III of the GATT 1994, they automatically violate Article 2.1 of the TRIMs Agreement.

17. However, an additional element of complexity in the case before us is Canada's argument that the measures constitute government procurement and that therefore Article III of the GATT 1994 does not apply. The Panel's determination as to whether or not the measures constitute government procurement will be decisive in resolving this case.

18. As Mexico sees it, in the case of government procurement a violation of the SCM Agreement would not automatically entail a breach of Article III of the GATT 1994: Article III of the GATT 1994 contains specific provisions excluding government procurement from its scope of application (i.e. Article III:8(a) of the GATT 1994). Furthermore, where Article III of the GATT 1994 does not apply to government procurement there would be no violation of Article 1.2 of the TRIMs Agreement.

19. We have found no specific provision in the SCM Agreement excluding government procurement from its scope. Nonetheless, it remains an open question whether government procurement, by virtue of the fact that the government receives something in exchange for payment, may be construed as a financial contribution for purposes of the definition of a subsidy within the meaning of the SCM Agreement.

20. However, if the Panel were to determine that this is not a case of government procurement, the measure would not fall under the exception set forth in Article III of the GATT 1994 and could therefore be in violation of GATT Article III and the TRIMs Agreement. If so, it should also be determined whether the elements for the definition of a subsidy under the SCM Agreement are met.

21. In view of the foregoing, the Panel's determination whether or not the measure constitutes government procurement will define, in this particular case, the relationship between the three agreements in this dispute.

III. CONCLUSION

22. Mexico hopes that the Panel will give consideration to the viewpoints expressed in this third party submission, because the decision in this dispute involves issues that are of systemic importance in the interpretation of the relevant provisions of the SCM Agreement, the TRIMs Agreement and the GATT 1994.

ANNEX B-9

NORWAY'S THIRD-PARTY STATEMENT

Mr. Chairman, Members of the Panel,

1. Norway welcomes this opportunity to present its views on the issues raised in these panel proceedings. Norway's comments relate to both DS412 and DS 426. Norway did not present a written third party submission to the Panel, and will therefore in this oral statement briefly set out its views on one legal issue; the applicability of the GATT Article III:8.[1]

2. In response to Japan's and the European Union's claims that the "FIT Program" is contrary to Canada's obligations under the GATT Article III:4, Canada argues that this provision is not applicable in this case because the measure falls within the scope of the GATT Article III:8.

3. According to the GATT Article III:8, Article III of the GATT "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".

4. Canada asserts that the Ontario Power Authority (the OPA) is a governmental agency which procures the product of renewable energy for governmental purposes. Norway notes that there is disagreement between the parties as to whether there is any "procurement" in this case. In this respect, Norway agrees with Japan and the European Union that the crucial question is whether the OPA is *actually* "purchasing" renewable energy or whether the Authority is just an intermediary, some sort of "clearing house".[2] As we see it, it is not sufficient that the activities of the OPA is called or referred to as "procurement". The FIT program may only fall within the ambit of GATT Article III:8 if the OPA *actually* acquires renewable energy. Without going too deeply into the facts of this dispute, Norway tends to agree with the European Union that the OPA seems to be more of an intermediary than an entity actually purchasing – or procuring – renewable energy.[3]

5. If the Panel, however, should reach the conclusion that the OPA is actually procuring renewable energy, it will need to consider whether this purchase – or procurement – is for "governmental purposes". Canada stresses that the purchase is "in furtherance of aim of the Government of Ontario", and that this constitutes "governmental purposes".[4] This interpretation by Canada would in practice allow every single purchase made by a government to constitute a "governmental purpose" as every such purchase will have some sort of aim by that entity.

6. Like other third parties in their written submissions, Norway would urge the Panel to show caution when interpreting the term "governmental purpose". If Canada's interpretation is accepted, this could, as noted by others, have the consequence that every governmental procurement effected

[1] The General Agreement on Tariffs and Trade 1994 ("the GATT").

[2] Japan's first written submission, paras. 287-289; European Union's first written submission, paras. 114-115.

[3] European Union's first written submission, para. 57.

[4] Canada's first written submission para. 88.

through purchase would fall under Article III:8. This would result in the language "governmental purposes" being made inutile, and also circumvent the obligation of the GATT Article III:4.[5]

7. Before concluding, Mr. Chairman, Norway notes that some of the third parties have discussed the term "public body" and other questions related to the case *US – Anti-Dumping and Countervailing Duties*.[6] Although this has not been extensively raised by the Parties in this case, Norway would like to support Saudi-Arabia in urging that the principles with respect to the terms "public body" and "governmental control" as established by the Appellate Body in the above-mentioned case should be respected.

8. Thank you for your attention. Norway stands ready to respond to any questions the Panel may have.

[5] Australia's third party submission, para. 41. Korea's third party submission, para. 32. China's third party submission, para. 15.

[6] Saudi Arabia' third party submission, paras. 2-17 . El Salvador's third' party submission paras. 5-8.

ANNEX B-10

INTEGRATED EXECUTIVE SUMMARY OF
SAUDI ARABIA, KINGDOM OF

I. INTRODUCTION

1. The Kingdom of Saudi Arabia has joined as a Third Party in these disputes to provide its views on two important issues relating to the interpretation of the Agreement on Subsidies and Countervailing Measures (the SCM Agreement). These issues are of systemic importance to all WTO Members.

II. A "PUBLIC BODY" IS AN ENTITY THAT POSSESSES, EXERCISES OR IS VESTED WITH GOVERNMENTAL AUTHORITY

2. The Appellate Body ruling in *US — Anti-Dumping and Countervailing Duties (China)* sets out the authoritative standard that a Panel must use to determine whether an entity is a "public body". The Appellate Body established in that decision that a public body is an entity that possesses, exercises or is vested with governmental authority. The Appellate Body found that only governmental authority is determinative of whether an entity is a public body, and that other factors, such as government ownership, are not sufficient to satisfy the legal standard.[1]

A. "GOVERNMENTAL AUTHORITY" IS THE POWER TO COMMAND OR COMPEL PRIVATE BODIES

3. Saudi Arabia respectfully requests that the Panels recognize the unique defining elements of "governmental authority" – the authority to command or compel. The Appellate Body in *US — Anti-Dumping and Countervailing Duties* defined "government" as the "continuous exercise of authority over subjects; authoritative direction or regulation and control".[2] The Appellate Body found that the "defining elements" of the term "government" – "the effective power to regulate, control, or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority" – necessarily inform the meaning of the term "public body".[3]

4. In elaborating on "governmental authority", the Appellate Body explained that a public body must have the power to "entrust or direct" a private body to act, as provided for in Article 1.1(a)(1)(iv) of the SCM Agreement[4], and that such "direction" requires the authority "to compel or command a private body, or govern a private body's actions".[5] Thus, a public body must possess the ability to compel, command, control or govern a private body. This is the essence of "governmental authority", consistent with the plain text of Article 1.1 of the SCM Agreement.

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[1] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 318, 346.
[2] Ibid. para. 290.
[3] Ibid.
[4] Ibid. paras. 293-294.
[5] Ibid. para. 294.

B. NON-DISCRETIONARY ADHERENCE TO A GOVERNMENT MANDATE DOES NOT CONSTITUTE THE EXERCISE OF GOVERNMENTAL AUTHORITY

5. If an entity's role is merely to follow a governmental mandate and it is powerless as to the manner in which it pursues governmental functions, then it has no "governmental authority" and is instead merely acting at the direction of the government. WTO jurisprudence has distinguished between "discretionary" action – "involving an exercise of judgment and choice" – and "implementation of a hard-and-fast rule".[6] If an entity is required by law to implement a certain policy or program, without discretion, implementation of the law does not indicate that the entity possesses or exercises governmental authority. Under such circumstances, a Panel's analysis of whether the entity's transactions may constitute a "financial contribution" must be based on the "entrustment or direction" standard of Article 1.1(a)(1)(iv) of the SCM Agreement.

C. PUBLIC BODY DETERMINATION REQUIRES OBJECTIVE EVALUATION OF ALL EVIDENCE WITHOUT UNDUE EMPHASIS ON ANY SINGLE FACTOR

6. Panels have an affirmative obligation to examine objectively all evidence related to the question of public body, and not to give undue emphasis to any one characteristic of the entity in question. According to the Appellate Body, this examination requires a Panel to analyse thoroughly the legal status and actions of the entity in question.[7] A Panel "must point to positive evidence" establishing that the relevant entity is a public body, *i.e.*, that it possesses or exercises governmental authority.[8] If no such evidence exists, then the entity cannot be found to be a "public body", although a Panel may subsequently consider whether the entity has been "entrusted or directed" by the government.

D. EVIDENCE OF GOVERNMENTAL CONTROL IS NOT SUFFICIENT TO SATISFY THE "PUBLIC BODY" STANDARD

7. The government's exercise of "meaningful control" over an entity alone is not sufficient to determine that the entity is a public body. Instead, government control is merely one element of evidence that may be considered when determining whether the entity at issue possesses "governmental authority", as defined above. The Appellate Body in *US — Anti-Dumping and Countervailing Duties (China)* made this point clear.[9]

8. Although evidence of a government's exercise of meaningful control over an entity may establish a rebuttable presumption that the entity is a "public body", the Appellate Body has held that such evidence alone is not dispositive of the issue, and may be rebutted by evidence that the entity at issue does not possess or exercise any governmental authority.[10] The Panels therefore must ensure that any determination that an entity is a public body is supported by positive evidence that the relevant entity possesses governmental authority and exercises that authority in the performance of governmental functions. Evidence of government control may be considered, but only insofar as it serves to establish the entity's possession of governmental authority.

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[6] Panel Report, *China – Audiovisual Services*, para. 7.324. See also Panel Report, *Turkey – Rice*, para. 7.128.

[7] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 319.

[8] Ibid. para. 326.

[9] Ibid. paras. 318-319.

[10] Ibid. para. 318.

III. EXTERNAL SUBSIDY BENCHMARKS ARE GENERALLY INAPPROPRIATE

9. In determining the existence and magnitude of a subsidy benefit, resort to external benchmarks, such as international market prices or prices in third countries, is generally inappropriate. WTO rules establish that the domestic market, not external markets, provides the most appropriate benchmark.

1. Measurement of a Benefit Should Be Based on a Domestic Market Benchmark

10. The home market of the country at issue is the starting point for any determination of benefit under Article 1.1(b) of the SCM Agreement. The term "benefit" is not defined in the Agreement, but the Appellate Body in *Canada – Aircraft* stated that the term "implies some kind of comparison", which measures whether the "financial contribution" at issue has made "the recipient 'better off' than it would otherwise have been, absent that contribution".[11] The Appellate Body added that the benchmark for measuring a subsidy benefit must be based in the "marketplace".

11. Article 14 of the SCM Agreement, which the Appellate Body has used as context to interpret benefit under Article 1.1(b), expressly establishes that the "marketplace" is the home market of the WTO Member providing the "financial contribution". Article 14(d) states that the adequacy of remuneration "shall" (not "may" or "should") be determined in relation to prevailing market conditions in the country of provision.

2. External Benchmarks Are Not Permitted Except In "Very Limited" Circumstances

12. Although the Appellate Body has not ruled on the use of external, out-of-country subsidy benchmarks to calculate a benefit under Article 1.1(b), its rulings on Article 14(d) strictly limit the use of such external benchmarks. Price is foremost among the "prevailing market conditions" enumerated in Article 14(d), and it should be the first reference point used to determine benefit.

13. The Appellate Body confirmed this interpretation in *US – Softwood Lumber IV*, where it stated that Article 14(d) "emphasize[s] 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…".[12] The Appellate Body also has made clear 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".[13] The Appellate Body emphasized that the circumstances under which an investigating authority could use alternative benchmarks are "very limited" – only when it has been *proven* that private prices are distorted.[14] The Appellate Body also warned in this regard that subsidy disciplines must not be used to "offset differences in comparative advantages between countries".[15]

14. Thus, a Panel may not use external benchmarks to measure the amount of "benefit", if any, conferred upon the recipient of a financial contribution unless it establishes the "very limited" circumstances necessary to permit such a benchmark.

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[11] Appellate Body Report, *Canada – Aircraft*, para. 157. (emphasis added)
[12] Appellate Body Report, *US – Softwood Lumber IV*, para. 90. (emphasis added)
[13] Ibid.
[14] Ibid. paras. 102-103.
[15] Ibid. para. 109.

IV. CONCLUSION

15. Saudi Arabia respectfully urges the Panels to consider the Kingdom's positions on the interpretive issues set out above.

ANNEX B-11

INTEGRATED EXECUTIVE SUMMARY
OF THE UNITED STATES

I. INTERPRETATIVE QUESTIONS RELATING TO ARTICLE III:4

1. Japan discusses past reports concerning Article III:4 of the GATT 1994. The United States supplements the discussion of "likeness" in one respect: several panels, including the panel in *Canada – Wheat*, have found significant the fact that a measure distinguishes between a domestic and an imported product solely on the basis of origin. The panel in *US – FSC (Article 21.5)* upon finding that the statute at issue in that dispute made a distinction between imported and domestic articles solely on the basis of origin, stated that "there is no need to demonstrate the existence of actually traded like products in order to establish a violation of Article III:4."

II. INTERPRETATIVE QUESTIONS RELATING TO ARTICLE III:8(A)

2. Canada has improperly assigned an "object and purpose" to Article III:8(a), employed an overly broad interpretation of "governmental purposes", and incorrectly identified the relevant product for purposes of Article III:8(a).

A. OBJECT AND PURPOSE OF THE GATT 1994

3. Canada states that the object and purpose of Article III:8(a) is to allow governments to pursue public policy through procurements.

4. The *Vienna Convention on the Law of Treaties* ("Vienna Convention") instructs that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The reference to "its object and purpose" is in the singular. In contrast, the other two interpretive tools set out in Article 31 of the Vienna Convention – ordinary meaning and context – are with reference to "the terms of the treaty" (plural). The reference in the singular – "its object and purpose" – therefore relates back to "[a] treaty." Thus, the object and purpose that must inform the interpretation of treaty provisions is the object and purpose of the entire agreement.

5. Accordingly, proper identification of the object and purpose of an agreement is not derived by reviewing an isolated subsection of an agreement. The object and purpose that must inform the Panel's interpretation of Article III:8(a) is the object and purpose of the GATT 1994. Canada assigns an object and purpose to Article III:8(a) and then attempts to use this self-proclaimed object and purpose to inform the interpretation of Article III:8(a). That approach is incorrect.

6. Moreover, aside from the fact that Canada's approach to object and purpose is incorrect, Canada has provided no support for its chosen object and purpose. The passage Canada relies on for its alleged object and purpose of Article III:8(a) is not the text of the agreement, an interpretation of the Ministerial Conference or General Council, or guidance from a panel or the Appellate Body. Rather, Canada bases its entire theory for the object and purpose of Article III:8(a) on one statement found in a Japanese government document. A single Member's views are not authority or guidance upon which Canada can rely to make its case about the object and purpose of Article III:8(a).

B. GOVERNMENTAL PURPOSES IN ARTICLE III:8(**a**)

7. Building from this concept of object and purpose, Canada puts forth an overly broad definition of "purchased for governmental purposes" in Article III:8(a). Canada states that a purchase for a governmental purpose is a purchase made with any aim of the government in mind. Moreover, Canada argues that aims of governments are expressed through documents promulgated by a government, and any procurement that occurs pursuant to a government document is procurement pursuant to a governmental purpose.

8. This definition of governmental purpose is clearly too broad. First, Article III:8(a) already specifies that it only applies to "laws, regulations, or requirements governing the procurement by governmental agencies." It is difficult to conceive of a situation in which a government would say it is not acting with a governmental aim in mind. An interpretation of "governmental purposes" that amounts to saying that if a procurement is by a government agency then it is for government purposes is circular and would render the phrase "for governmental purposes" inutile.

9. Second, nearly every government procurement is "directed by" a government document of some sort. As a practical matter, Canada's definition would collapse "for governmental purposes" into the very act being considered in the first place – the purchase of a product by a government. Such a definition would render meaningless the phrase "purchased for governmental purposes" in Article III:8(a) and is therefore incorrect.

C. PRODUCT AT ISSUE

10. Canada takes the position that in this dispute the relevant "products" for purposes of Article III:8(a) of the GATT 1994 are "electricity." Assuming for the sake of argument that Ontario is procuring electricity, it would then be important to determine what are the relevant "products" in this dispute for purposes of invoking Article III:8(a) in order to assess whether the local content requirements at issue are justified.

11. Canada's reliance on the purported procurement of electricity appears misplaced. The particular purchases to which the Ontario FIT local content requirements apply – sales of equipment by equipment manufacturers to private power generators – appear to differ in nature and by contract from the purported governmental procurement of electricity that is at the core of Canada's Article III:8(a) defense. Although Canada consistently identifies "electricity" as the "product" covered by Article III:8(a), it seeks to justify local content requirements that apply to "equipment." Yet the two products are not the same. It does not follow that a purported governmental procurement of one class of goods under Article III:8(a) justifies a local content requirement covering private purchases of a different class of goods. Indeed, Canada's approach would appear to read into Article III:8(a) language that is not there, in effect adding a sentence at the end of Article III:8(a) along the lines: "Additionally, the provisions of this Article shall not apply to laws, regulations or requirements governing the purchase by private parties of other products."

12. Furthermore, the interpretation advanced by Canada would extend the scope of Article III:8(a) well beyond its ordinary meaning, effectively broadening it to permit a government procurement of a good to be used to leverage all manner of domestic content requirements. For example, it would appear to permit a government to condition the procurement of a good on the supplier discriminating against imported products throughout a supplier's operations. A government could require that a supplier use only domestically manufactured equipment for all of its manufacturing, its facilities to be built only with domestic materials, and that it purchase its inputs only from those who met similar discriminatory requirements. Because the local content requirement

at issue here applies to private purchases of renewable energy equipment, Article III:8(a) cannot be cited to justify those local content requirements on the bases cited by Canada.

III. INTERPRETATIVE QUESTIONS RELATING TO ARTICLE 6.2

13. In its submission, Canada reiterates its claim that Japan violated Article 6.2 of the DSU by failing to provide a brief summary of the legal basis of its complaint sufficient to present the problem clearly. The United States notes that Canada's argument that Japan's panel request did not include a brief summary of the legal basis of its complaint is similar to that recently addressed in the preliminary ruling of the panel in *China – EPS*. As that panel stated, "the term 'legal basis' in Article 6.2 of the DSU refers to the claim made by the complaining party." It further explained that "[a] claim 'sets forth the complainant's view that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement'."

14. It appears to the United States that Japan has satisfied that requirement. Japan identified the measures at issue and then provided a brief summary of the legal basis of its complaint by setting forth its view that the measures violated specific provisions of the WTO Agreement. As such, Japan's panel request satisfied Article 6.2 of the DSU.

15. Canada's argument that a Member cannot claim a measure violates Article 3 of the SCM Agreement without identifying specifically "the form of the subsidy, as well as who provided the subsidy, who benefitted from the subsidy and the form of the benefit" is also without merit. As Canada acknowledges, Article 1.1(a) defines a type of measure – a subsidy. Japan properly stated in its panel request that it believed the measures it identified were subsidies. It then stated which provisions of the SCM Agreement it believes these measures violated. Article 6.2 does not require that Japan provide arguments as to why it believes the measures meet the definition of subsidy. Rather, Japan was required to state the legal basis of its complaint, and it is apparent that it did.

ANNEX C

REQUESTS FOR THE ESTABLISHMENT OF A PANEL

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ANNEX C-1

REQUEST FOR THE ESTABLISHMENT OF
A PANEL BY JAPAN

WORLD TRADE ORGANIZATION

WT/DS412/5
7 June 2011

(11-2786)

Original: English

CANADA - CERTAIN MEASURES AFFECTING THE RENEWABLE ENERGY GENERATION SECTOR

Request for the Establishment of a Panel by Japan

The following communication, dated 1 June 2011, from the delegation of Japan to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

My authorities have instructed me to request the establishment of a Panel on behalf of the Government of Japan ("Japan").

On 13 September 2010, Japan requested consultations with the Government of Canada ("Canada") pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), Article 8 of the *Agreement on Trade-Related Investment Measures* ("*TRIMs Agreement*"), and Articles 4.1 and 30 of the *Agreement on Subsidies and Countervailing Measures* ("*SCM Agreement*"), with respect to Canada's measures relating to domestic content requirements in the feed-in tariff program ("the FIT Program").[1] The request was circulated on 16 September 2010 as document WT/DS412/1, G/L/926, G/TRIMS/D/27, G/SCM/D84/1.

Consultations were held on 25 October 2010 with a view to reaching a mutually satisfactory solution. Unfortunately, the consultations failed to resolve the dispute.

As a result, Japan respectfully requests that a Panel be established to examine this matter pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of the GATT 1994, Article 8 of the *TRIMs Agreement*, and Articles 4.4 and 30 of the *SCM Agreement*.

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[1] The reference to "FIT Program" in this request includes both projects over 10 kilowatts and projects of 10 kilowatts or less (*i.e.*, microFIT). *See* http://fit.powerauthority.on.ca/; http://fit.powerauthority.on.ca/what-feed-tariff-program; and http://microfit.powerauthority.on.ca/.

The measures that are the subject of this request are those taken by the Government of Canada or its provinces relating to the FIT Program established by the Canadian province of Ontario in 2009 providing for guaranteed, long-term pricing for the output of renewable energy generation facilities that contain a defined percentage of domestic content. These measures include, but are not limited to, the following:

- the *Electricity Act, 1998*,[2] as amended,[3] including in particular Part II (Independent Electricity System Operator), Part II.1 (Ontario Power Authority) and Part II.2 (Management of Electricity Supply, Capacity and Demand) thereof, including in particular Section 25.35 (Feed-in tariff program);

- an Act to enact the *Green Energy Act, 2009* and to build a green economy, to repeal the *Energy Conservation Leadership Act, 2006* and the *Energy Efficiency Act* and to amend other statutes (the "*Green Energy and Green Economy Act, 2009*"),[4] including in particular Schedule B amending the *Electricity Act, 1998*;

- an Act to amend the *Electricity Act, 1998* and the *Ontario Energy Board Act, 1998* and to make consequential amendments to other Acts (the "*Electricity Restructuring Act, 2004*"),[5] including in particular Schedule A, Sections 29-32, enacting Part II.1 of the *Electricity Act, 1998*, and Sections 33-38, enacting Part II.2 of the *Electricity Act, 1998*, and Schedule B, Sections 17-18, enacting Sections 78.3-78.4 of the *Ontario Energy Board Act, 1998*;

- *Ontario Regulation 578/05* made under the *Ontario Energy Board Act, 1998* entitled "Prescribed Contracts Re Sections 78.3 and 78.4 of the Act";

- Independent Electricity System Operator ("IESO") Market Manual, including in particular Part 5.5 ("Physical Markets Settlement Statements");

- IESO Market Rules, including in particular Chapter 7 ("System Operations and Physical Markets"), Chapter 9 ("Settlements and Billing") and Chapter 11 ("Definitions");

- FIT direction dated 24 September 2009, from George Smitherman, Deputy Premier and Minister of Energy and Infrastructure, to Colin Andersen, Chief Executive Officer, Ontario Power Authority ("OPA"), directing OPA to develop a FIT Program and include a requirement that the applicant submit a plan for meeting the domestic (*i.e.*, Ontario) content goals in the FIT rules;

- individual FIT and microFIT contracts executed by the OPA since the inception of the FIT Program on 24 September 2009;[6]

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[2] S.O. 1998, c. 15, Sched. A.
[3] The latest amendment was by: 2010, c. 15, s. 223.
[4] S.O. 2009, c. 12.
[5] S.O. 2004, c. 23.
[6] These contracts include, but are not limited to, those referenced at "http://fit.powerauthority.on.ca/Storage/10989_FIT_Contracts_Offered_April_8_10_-_Applicant_Legal_Name_Order3.pdf" and http://fit.powerauthority.on.ca/Storage/11216_FIT_Contract_Awards_-_Final_List_-_February_24,_2011.pdf.

- the FIT Rules, Version 1.4 (8 December 2010), and the microFIT Rules, Version 1.6 (8 December 2010), issued by the OPA;

- the FIT Contract, Version 1.4 (8 December 2010), including General Terms and Conditions, Exhibits, and Standard Definitions, the microFIT Contract, Version 1.6 (8 December 2010), including Appendices, and the Conditional Offer of microFIT Contract, Version 1.0, issued by the OPA;

- the FIT Application Form (1 December 2009), and online microFIT Application, issued by the OPA;

- the FIT Price Schedule (13 August 2010), and the microFIT Price Schedule (13 August 2010), issued by the OPA;

- the FIT Program Interpretations of the Domestic Content Requirements (14 December 2009, as updated on 4 October 2010 and 26 April 2011), issued by the OPA; and

- any amendments or extensions of the foregoing, any replacement measures, any renewal measures, any implementing measures, and any related measures.[7]

These measures are inconsistent with Canada's obligations under the *SCM Agreement*, the GATT 1994, and the *TRIMs Agreement* because they constitute a prohibited subsidy, and also discriminate against equipment for renewable energy generation facilities produced outside Ontario. In particular, Japan considers that these measures are inconsistent with the following provisions:

1. Articles 3.1(b) and 3.2 of the *SCM Agreement*, because the measures are subsidies within the meaning of Article 1.1 of the *SCM Agreement* that are provided contingent upon the use of domestic over imported goods, namely contingent upon the use of equipment for renewable energy generation facilities produced in Ontario over such equipment imported from other WTO Members such as Japan;[8]

2. Article III:4 of the GATT 1994, because the measures accord less favourable treatment to imported equipment for renewable energy generation facilities than accorded to like products originating in Ontario; and

3. Article 2.1 of the *TRIMs Agreement*, in conjunction with paragraph 1(a) of the Agreement's Illustrative List, because the measures are trade-related investment measures inconsistent with Article III:4 of the GATT 1994 which require the purchase or use by enterprises of equipment for renewable energy generation facilities of Ontario origin.

[7] Japan notes that, as a matter of convenience, the above list identifies the most recent versions available as of the date of this request of the FIT Rules, microFIT Rules, FIT Contract, microFIT Contract, FIT Application Form, microFIT Application, FIT Price Schedule, microFIT Price Schedule, and FIT Program Interpretations of the Domestic Content Requirements. Japan's request, however, encompasses all versions of these measures adopted since the inception of the FIT Program on 24 September 2009.

[8] As subsidies falling under the provisions of Article 3 of the *SCM Agreement*, the measures are deemed to be specific under Article 2.3 of the *SCM Agreement*.

Further, Japan considers that Canada's measures nullify or impair benefits accruing to Japan directly or indirectly under the cited Agreements in a manner described in Article XXIII:1 of the GATT 1994.

Japan requests the establishment of a Panel with standard terms of reference in accordance with Article 7.1 of the DSU.

ANNEX C-2

REQUEST FOR THE ESTABLISHMENT OF A PANEL
BY THE EUROPEAN UNION

WORLD TRADE ORGANIZATION

WT/DS426/5
10 January 2012

(12-0144)

Original: English

CANADA – MEASURES RELATING TO THE FEED-IN TARIFF PROGRAM

Request for the Establishment of a Panel by the European Union

The following communication, dated 9 January 2012, from the delegation of the European Union to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 11 August 2011, the European Union requested consultations with the Government of Canada ("Canada") pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("*DSU*"), Article XXII:1 of the *General Agreement on Tariffs and Trade 1994* ("*GATT 1994*"), Article 8 of the *Agreement on Trade-Related Investment Measures* (the "*TRIMs Agreement*"), and Articles 4(1) and 30 of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*"), regarding Canada's measures relating to domestic content requirements in the feed-in tariff program (the "FIT Program").[1] The request was circulated on 16 August 2011 as document WT/DS426/1, G/L/959, G/TRIMS/D/28, G/SCM/D87/1.[2]

Consultations were held on 7 September 2011 with a view to reaching a mutually satisfactory solution. Unfortunately, the consultations failed to resolve the dispute.

As a result, the European Union respectfully requests that a Panel be established to examine this matter pursuant to Articles 4.7 and 6 of the *DSU*, Article XXIII of the *GATT 1994*, Article 8 of the *TRIMs Agreement*, and Articles 4.4 and 30 of the *SCM Agreement*.

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[1] "FIT Program" referred to in this request includes both projects over 10 kilowatts (kW) and projects of 10 kW or less (microFIT). *See* http://fit.powerauthority.on.ca/.

[2] An addendum to the European Union's request for consultations was circulated on 24 August 2011 since the statement of available evidence with regard to the existence and nature of the subsidies in question was erroneously omitted from the request for consultations.

The measures that are the subject of this request are those relating to the FIT Program established by the Canadian province of Ontario in 2009 providing for guaranteed, above-market, long-term pricing for the output of renewable energy generation facilities[3] that contain a minimum percentage of domestic content. These measures include the following:

- the Electricity Act, 1998,4 as amended,5 including in particular Part II (Independent Electricity System Operator), Part II.1 (Ontario Power Authority) and Part II.2 (Management of Electricity Supply, Capacity and Demand) thereof, including in particular Section 25.35 (Feed-in tariff program);

- an Act to enact the *Green Energy Act, 2009* and to build a green economy, to repeal the *Energy Conservation Leadership Act, 2006* and the *Energy Efficiency Act* and to amend other statutes (the "*Green Energy and Green Economy Act, 2009*"),[6] including in particular Schedule B amending the *Electricity Act, 1998*;

- an Act to amend the *Electricity Act, 1998* and the *Ontario Energy Board Act, 1998* and to make consequential amendments to other Acts (the "*Electricity Restructuring Act, 2004*"),[7] including in particular Schedule A, Sections 29-32, enacting Part II.1 of the *Electricity Act, 1998*, and Sections 33-38, enacting Part II.2 of the *Electricity Act, 1998*, and Schedule B, Sections 17-18, enacting Sections 78.3-78.4 of the *Ontario Energy Board Act, 1998*;

- *Ontario Regulation 578/05* made under the *Ontario Energy Board Act, 1998* entitled "Prescribed Contracts Re Sections 78.3 and 78.4 of the Act";

- Independent Electricity System Operator ("IESO") Market Manual, including in particular Part 5.5 ("Physical Markets Settlement Statements");

- IESO Market Rules, including in particular Chapter 7 ("System Operations and Physical Markets"), Chapter 9 ("Settlements and Billing") and Chapter 11 ("Definitions");

- FIT direction dated 24 September 2009, from George Smitherman, Deputy Premier and Minister of Energy and Infrastructure, to Colin Andersen, Chief Executive Officer, Ontario Power Authority ("OPA"), directing OPA to develop a FIT Program and include a requirement that the applicant submit a plan for meeting the domestic (*i.e.*, Ontario) content goals in the FIT rules;

- the FIT Rules, Version 1.5.1 (31 October 2011), and the microFIT Rules, Version 1.6.1 (10 August 2011), issued by the OPA;

- the FIT Contract, Version 1.5.1 (31 October 2011), including General Terms and Conditions, Exhibits, and Standard Definitions, the microFIT Contract, Version 1.6.1 (31 October 2011), including Appendices, and the Conditional Offer of microFIT Contract, Version 1.6.1, issued by the OPA;

[3] In particular, facilities utilising windpower with a contract capacity greater than 10 kW, and facilities utilising solar (PV).
[4] S.O. 1998, c. 15, Sched. A.
[5] The latest amendment was by: 2010, c. 15, s. 223.
[6] S.O. 2009, c. 12.
[7] S.O. 2004, c. 23.

- the FIT Application Form (1 December 2009), and online microFIT Application, issued by the OPA;

- the FIT Price Schedule (3 June 2011), and the microFIT Price Schedule (13 August 2010), issued by the OPA;

- the FIT Program Interpretations of the Domestic Content Requirements (14 December 2009, as updated on 4 October 2010 and 26 April 2011), issued by the OPA;[8]

- individual FIT and microFIT contracts executed by the OPA since the inception of the FIT Program on 24 September 2009;[9] and

- any amendments or extensions of the foregoing, any replacement measures, any renewal measures, any implementing measures, and any related measures.[10]

These measures are inconsistent with Canada's obligations under the *SCM Agreement*, the *GATT 1994*, and the *TRIMs Agreement* because they constitute a prohibited subsidy, and also discriminate against imports of equipment and components for renewable energy generation facilities. In particular, the European Union considers that these measures are inconsistent with the following provisions:

1. Articles 3.1(b) and 3.2 of the SCM Agreement, because the measures are subsidies within the meaning of Article 1.1 of the SCM Agreement that are provided contingent upon the use of domestic over imported goods, namely contingent upon the use of equipment and components for renewable energy generation facilities produced in Ontario over such equipment and components imported from other WTO Members, including the European Union;

2. Article III:4 of the *GATT 1994*, because the measures accord less favourable treatment to imported equipment and components for renewable energy generation facilities than accorded to like products originating in Ontario; and

3. Article 2.1 of the *TRIMs Agreement*, in conjunction with paragraph 1(a) of the Agreement's Illustrative List, because the measures are trade-related investment measures inconsistent with Article III:4 of the *GATT 1994* which require the purchase or use by enterprises of equipment and components for renewable energy generation facilities of Ontario origin or source.

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[8] *See* "http://fit.powerauthority.on.ca/domestic-content-0, and http://fit.powerauthority.on.ca/table-final-interpretations".

[9] These contracts include, but are not limited to, those referenced at "http://fit.powerauthority.on.ca/Storage/10989_FIT_Contracts_Offered_April_8_10_-_Applicant_Legal_Name_Order3.pdf" and http://fit.powerauthority.on.ca/Storage/11216_FIT_Contract_Awards_-_Final_List_-_February_24,_2011.pdf.

[10] The European Union notes that, as a matter of convenience, the above list identifies the most recent versions available as of the date of this request of the FIT Rules, microFIT Rules, FIT Contract, microFIT Contract, FIT Application Form, microFIT Application, FIT Price Schedule, microFIT Price Schedule, and FIT Program Interpretations of the Domestic Content Requirements (*see* "http://fit.powerauthority.on.ca/what-feed-tariff-program/; and http://microfit.powerauthority.on.ca/". The European Union's request, however, encompasses all versions of these measures adopted since the inception of the FIT Program on 24 September 2009.

Accordingly, the European Union respectfully requests the establishment of a Panel with standard terms of reference in accordance with Article 7.1 of the *DSU*. The European Union asks that this request be placed on the agenda for the meeting of the Dispute Settlement Body to be held on 20 January 2012.