WORLD TRADE ORGANIZATION

WT/DS412/R
WT/DS426/R
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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

Note by the Secretariat:

The Panels issue these Reports in the form of a single document constituting two separate Panel Reports: WT/DS412/R and WT/DS426/R. Each Panel Report relates to one of the two complaints in these disputes. The cover page, preliminary pages, Sections I through VII, Section IX and the Annexes are common to both Panel Reports. The page header throughout the document bears two document symbols, WT/DS412/R and WT/DS426/R, with the following exceptions: Section VIII on page JPN-139, which bears the document symbol for and contains the Panel's conclusions and recommendations in the Panel Report WT/DS412/R; and Section VIII on page EU-140, which bears the document symbol for and contains the Panel's conclusions and recommendations in the Panel Report WT/DS426/R.

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TABLE OF CASES CITED IN THESE REPORTS

Short Title	Full Case Title and Citation
Canada – Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377
Canada – Autos	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985
Canada – Dairy	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R and Corr.1, adopted 27 October 1999, DSR 1999:V, 2057
China – Auto Parts	Appellate Body Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, adopted 12 January 2009, DSR 2009:I, 3
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, adopted 22 February 2012
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, 3
EC – Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359
EC – Selected Customs Matters	Panel Report, *European Communities – Selected Customs Matters*, WT/DS315/R, adopted 11 December 2006, as modified by Appellate Body Report WT/DS315/AB/R, DSR 2006:IX-X, 3915
EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011
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
Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1 and 2, adopted 23 July 1998, and Corr. 3 and 4, DSR 1998:VI, 2201
Japan – Agricultural Products II	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 277
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97

Short Title	Full Case Title and Citation
Japan – DRAMs (Korea)	Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R and Corr.1, adopted 17 December 2007, DSR 2007:VII, 2703
Korea – Various Measures on Beef	Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by Appellate Body Report WT/DS161/AB/R, WT/DS169/AB/R, DSR 2001:I, 59
Thailand – Cigarettes (Philippines)	Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/R, adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R
US – Anti-Dumping and Countervailing Duties (China)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011
US – Anti-Dumping and Countervailing Duties (China)	Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R
US – COOL	Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619
US – FSC	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/R, adopted 20 March 2000, as modified by Appellate Body Report WT/DS108/AB/R, DSR 2000:IV, 1675
US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55
US – FSC (Article 21.5 – EC)	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/RW, adopted 29 January 2002, as modified by Appellate Body Report WT/DS108/AB/RW, DSR 2002:I, 119
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
US – Large Civil Aircraft (2nd complaint)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012
US – Large Civil Aircraft (2nd complaint)	Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/R, adopted 23 March 2012, as modified by Appellate Body Report WT/DS353/AB/R
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, 571
US – Softwood Lumber IV	Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/R and Corr.1, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R, DSR 2004:II, 641

Short Title	Full Case Title and Citation
US – Tuna II (Mexico)	Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3
US – Upland Cotton	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Corr.1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, 299
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323
US – Zeroing (EC)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R, adopted 9 May 2006, as modified by Appellate Body Report WT/DS294/AB/R, DSR 2006:II, 521

GATT PANEL REPORTS

Short Title	Full Case Title and Citation
US – Sonar Mapping	GATT Panel Report, *United States – Procurement of a Sonar Mapping System*, GPR.DS1/R, 23 April 1992, unadopted

TABLE OF ABBREVIATIONS USED IN THESE REPORTS

Abbreviation	Full Reference
CAD	Canadian dollar
CES	Clean Energy Supply
CHP	Combined Heat and Power
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
ECSTF	Electricity Conservation and Supply Task Force
FIT	Feed-in tariff
GA	Global Adjustment
GATT 1994	General Agreement on Tariffs and Trade 1994
GPA	Agreement on Government Procurement
GWh	Gigawatt hour
HCI	Hydroelectric Contract Initiative
HEPCO	Hydro-Electric Power Commission of Ontario
HOEP	Hourly Ontario Electricity Price
IESO	Independent Electricity System Operator
IPPs	Independent Power Producers
kV	Kilovolts
kWh	Kilowatt hour
LDC	Local distribution company
MCP	Market clearing price
MW	Megawatt
NUGs	Non-Utility Generators
OEB	Ontario Energy Board
OEFC	Ontario Electricity Financial Corporation
OPA	Ontario Power Authority
OPG	Ontario Power Generation
PV	Photovoltaic
RES	Renewable Energy Supply
RESOP	Renewable Energy Standard Offer Programme
RPP	Regulated Price Plan
SCM Agreement	Agreement on Subsidies and Countervailing Measures
TRIMs	Trade-related investment measures
TRIMs Agreement	Agreement on Trade-Related Investment Measures

I. INTRODUCTION

A. COMPLAINTS OF JAPAN AND THE EUROPEAN UNION

1.1 On 13 September 2010, Japan requested consultations with Canada pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (the "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")[1]. On 11 August 2011, the European Union requested consultations with Canada pursuant to the same, above-mentioned provisions[2]. In both complaints, the consultations concerned certain measures relating to domestic content requirements in the feed-in tariff programme (the "FIT Programme"), established by the Canadian Province of Ontario. These measures included the following: (i) the *Electricity Act of 1998*; (ii) the *Green Energy and Green Economy Act of 2009*; (iii) the *Electricity Restructuring Act of 2004*; (iv) the *Ontario Regulation 578/05*; (v) the Independent Electricity System Operator (the "IESO") Market Manual; (vi) the IESO Market Rules; (vii) the FIT direction dated 24 September 2009 from the Deputy Premier and Minister of Energy and Infrastructure; (viii) individual FIT and microFIT Contracts executed by the Ontario Power Authority (the "OPA"); (ix) the FIT Rules and microFIT Rules issued by the OPA; (x) the FIT and microFIT Contracts issued by the OPA; (xi) the FIT Application Form and the online microFIT Application issued by the OPA; (xii) the FIT and microFIT Price Schedules issued by the OPA; (xiii) the FIT Programme Interpretations of the Domestic Content Requirements; and (xiv) any amendments or extensions of the foregoing, any replacement, renewal, implementing or related measures[3].

1.2 Consultations were held between Japan and Canada on 25 October 2010, and between the European Union and Canada on 7 September 2011. These consultations failed to resolve the disputes.

1.3 Japan and the European Union each requested, respectively on 1 June 2011 and 9 January 2012, the establishment of a panel 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[4].

B. ESTABLISHMENT AND COMPOSITION OF THE PANELS

1.4 At its meetings on 20 July 2011 and 20 January 2012, the Dispute Settlement Body (the "DSB") established two Panels pursuant to, respectively, Japan's request in document WT/DS412/5, and the European Union's request in WT/DS426/5, in accordance with Article 6 of the DSU.

1.5 The terms of reference for the respective disputes are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Japan in document WT/DS412/5 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

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[1] WT/DS412/1.

[2] WT/DS426/1 and WT/DS426/1/Add.1.

[3] WT/DS412/1; WT/DS426/1 and WT/DS426/1/Add.1. Japan's request for consultations did not expressly refer to the *Ontario Regulation 578/05*, the IESO Market Manual and the IESO Market Rules. However, these measures were included in Japan's request for the establishment of a panel (WT/DS412/5).

[4] WT/DS412/5 and WT/DS426/5.

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the European Union in document WT/DS426/5 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

1.6 On 26 September 2011, Japan requested the Director-General to determine the composition of the Panel in WT/DS412, pursuant to Article 8.7 of the DSU. On 6 October 2011, the Director-General composed the Panel as follows:

Chairperson:	Mr Thomas Cottier
Members:	Mr Alexander Erwin
	Mr Daniel Moulis

1.7 With respect to WT/DS426, following the agreement of the parties, the Panel was composed with the same persons on 23 January 2012. Following consultations with the parties, the Panels in the two disputes decided to harmonize their timetables to the greatest extent possible, in accordance with Article 9.3 of the DSU[5].

1.8 Australia, Brazil, China, El Salvador, India, Korea, Mexico, Norway, the Kingdom of Saudi Arabia, Chinese Taipei, and the United States reserved their rights to participate in the Panel proceedings as third parties in both disputes. In addition, the European Union and Honduras reserved their rights to participate as third parties with respect to WT/DS412, and Japan and Turkey reserved their third party rights to participate in the Panel proceedings with respect to WT/DS426[6].

1.9 The Panel met with the parties to the disputes on 27-28 March 2012 and 15-16 May 2012, and with the third parties on 28 March 2012. At the request of the parties, the Panel's meetings with the parties were open to the public. A portion of the Panel's meeting with the third parties was also open to the public.

1.10 The Panel submitted its interim report to the parties on 20 September 2012 and submitted its final report to the parties on 16 November 2012.

C. ENHANCED THIRD-PARTY RIGHTS

1.11 At Canada's request, and as accepted by Japan and the European Union, enhanced third-party rights were granted to all third parties. Third parties in both disputes had the right to: (i) attend the entirety of all substantive meetings between the parties and the Panel; and (ii) receive copies of the parties' written submissions made in advance of the issuance of the interim report to the parties, including first written submissions, written rebuttals, and responses to questions from the Panel at the time that they were submitted to the Panel[7].

D. *AMICUS CURIAE* BRIEFS

1.12 On 14 May 2012, the Panel received an unsolicited *amicus curiae* brief relating to both disputes from the following organizations: Blue Green Canada; the Canadian Auto Workers (CAW); the Communications, Energy and Paperworkers Union of Canada (CEP); the Canadian Federation of Students (CFS); the Council of Canadians; the Canadian Union of Public Employees (CUPE); and the

[5] For the reader's convenience, the Panels in WT/DS412 and WT/DS426 are herein collectively referred to as the "Panel".

[6] WT/DS412/6 and WT/DS426/6/Rev.1.

[7] Working Procedures for the Panel, paras. 14 and 18.

Ontario Public Service Employees Union (OPSEU). On 15 May 2012, the Panel in WT/DS412 received a second unsolicited *amicus curiae* brief from the following organizations: the International Institute for Sustainable Development (IISD); the Canadian Environmental Law Association (CELA); and Ecojustice Canada.

1.13 During the second substantive meeting of the Panel with the parties, Japan, the European Union and Canada recalled that it is within the discretion of the Panel to accept or reject the unsolicited *amicus curiae* briefs[8]. Subsequently, and consistent with the approach taken by previous panels[9], the Panel informed the parties that it would take the briefs into account only to the extent the parties decided to incorporate them into their own submissions. Canada informed the Panel that it had no comments to add on this issue beyond what Canada had already stated at the second substantive meeting with the Panel, namely that it is within the discretion of the Panel to accept or reject the unsolicited *amicus curiae* briefs. Japan and the European Union (the "complainants") informed the Panel that they did not consider it necessary to incorporate any of the observations made in the *amicus curiae* briefs. In the light of the parties' views, the Panel did not find it necessary to take the briefs into account in its analysis of the claims and arguments made in these disputes.

E. PRELIMINARY RULING ON THE PANELS' TERMS OF REFERENCE

1.14 On 4 November 2011, Canada submitted to the Panel in WT/DS412 a request for a preliminary ruling concerning the consistency of Japan's request for the establishment of a panel (WT/DS412/5) with Article 6.2 of the DSU. In particular, Canada argued that the claims made under the SCM Agreement described in Japan's request for the establishment of a panel failed to provide a "brief summary of the legal basis" that is "sufficient to present the problem clearly", and should therefore be struck out of the Panel's terms of reference[10]. On 17 November 2011, Japan responded to Canada's preliminary ruling request rejecting Canada's arguments. On 21 November 2011, the Panel announced to the parties that, without prejudice to any views that the Panel may develop on Canada's request during the course of the proceeding, it was not convinced of the merit of Canada's request at that time. On 14 February 2012, Canada submitted to the Panel in WT/DS426 a request for a preliminary ruling concerning the consistency of the European Union's request for the establishment of a panel (WT/DS426/5) with Article 6.2 of the DSU, on the basis of essentially the same arguments used to justify its request for a preliminary ruling in WT/DS412[11]. On 21 February 2012, the European Union responded to Canada's request for a preliminary ruling. The Panel announced its conclusions on the merits of Canada's requests for preliminary rulings at the opening session of the first substantive meeting with the parties on 27 March 2012. The Panel subsequently issued its preliminary rulings to the parties in written form on 11 May 2012. After consulting with the parties, the Panel decided: (a) to circulate its preliminary rulings to all Members; and (b) that the circulated preliminary rulings would form an integral part of the final Panel Reports, subject to any revisions necessary in the light of comments received from the parties during interim review. The Panel's preliminary rulings were circulated on 25 May 2012 in documents WT/DS412/8 and WT/DS426/7.

[8] Appellate Body Report, *US – Shrimp*, para. 108.

[9] Panel Reports, *US – COOL*, para. 2.10; *US – Tuna II (Mexico)*, para. 7.2; *Thailand – Cigarettes (Philippines)*, para. 2.5; *EC – Salmon (Norway)*, para. 1.13; *US – Zeroing (EC)*, para. 1.7; and *US – Softwood Lumber IV*, fn. 75.

[10] Canada's request for a preliminary ruling (DS412), paras. 2 and 25; and first written submission (DS412), paras. 102-113.

[11] Canada's letter to the Panel of 14 February 2012 (DS426); and first written submission (DS426), paras. 48-50.

II. FACTUAL ASPECTS

2.1 These disputes concern the domestic content requirements attached to the FIT and microFIT Contracts, granted under the FIT Programme established by the Canadian Province of Ontario, for certain wind and solar photovoltaic ("PV") electricity generation projects. The complainants challenge the WTO consistency of these specific measures:

(1) the FIT Programme, as evidenced by the following measures[12]:

i. the *Electricity Act of 1998*, as amended, 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);

ii. an Act to enact the *Green Energy Act of 2009* and to build a green economy, to repeal the *Energy Conservation Leadership Act of 2006* and the *Energy Efficiency Act* and to amend other statutes (the "*Green Energy and Green Economy Act of 2009*"), including in particular Schedule B amending the *Electricity Act of 1998*;

iii. an Act to amend the *Electricity Act of 1998* and the *Ontario Energy Board Act of 1998* and to make consequential amendments to other Acts (the "*Electricity Restructuring Act of 2004*"), including in particular Schedule A, Sections 29-32, enacting Part II.1 of the *Electricity Act of 1998*, and Sections 33-38, enacting Part II.2 of the *Electricity Act of 1998*, and Schedule B, Sections 17-18, enacting Sections 78.3-78.4 of the *Ontario Energy Board Act of 1998*;

iv. the *Ontario Regulation 578/05* made under the *Ontario Energy Board Act of 1998* entitled "Prescribed Contracts Re Sections 78.3 and 78.4 of the Act";

v. the Independent Electricity System Operator ("IESO") Market Manual, including in particular Part 5.5 (Physical Markets Settlement Statements);

vi. the IESO Market Rules, including in particular Chapter 7 (System Operations and Physical Markets), Chapter 9 (Settlements and Billing) and Chapter 11 (Definitions);

vii. the FIT direction dated 24 September 2009, from George Smitherman, Deputy Premier and Minister of Energy and Infrastructure, to Colin Andersen, Chief Executive Officer, 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;

viii. all versions of the FIT Rules, and the microFIT Rules, issued by the OPA since the inception of the FIT Programme;

ix. all versions of the FIT Contract, including General Terms and Conditions, Exhibits, and Standard Definitions; and the microFIT Contract, including Appendices, and the Conditional Offer of microFIT Contract, issued by the OPA since the inception of the FIT Programme;

[12] WT/DS412/5 and WT/DS426/5.

x. all versions of the FIT Application Form, and online microFIT Application, issued by the OPA since the inception of the FIT Programme;

xi. all versions of the FIT Price Schedule, and the microFIT Price Schedule, issued by the OPA since the inception of the FIT Programme;

xii. all versions of the FIT Program Interpretations of the Domestic Content Requirements, issued by the OPA since the inception of the FIT Programme;

(2) the individual FIT Contracts for wind or solar PV sources, executed by the OPA since the inception of the FIT Programme; and

(3) the individual microFIT Contracts for solar PV source, executed by the OPA since the inception of the FIT Programme.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. COMPLAINANTS

1. Japan

3.1 Japan requests the Panel to find that:

(a) through the FIT Programme, 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;

(b) the domestic content requirement of the FIT Programme, as well as individually executed FIT and microFIT Contracts for wind and solar PV projects, accords less favourable 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

(c) the FIT Programme, as well as individually executed FIT and microFIT Contracts for wind and solar PV projects, constitute trade-related investment measures inconsistent with the provisions of Article III of the GATT 1994, and are therefore in violation of Article 2.1 of the TRIMs Agreement.

3.2 Japan requests that the Panel recommend that Canada:

(a) withdraw its allegedly prohibited subsidies without delay, as required by Article 4.7 of the SCM Agreement, by eliminating the domestic content requirement of the FIT Programme, as well as that of individually executed FIT and microFIT Contracts for wind and solar PV projects; and

(b) bring the FIT Programme, 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.

3.3 Japan also requests that the Panel reject Canada's request for preliminary rulings with respect to any alleged failure on Japan's part to comply with Article 6.2 of the DSU.

2. European Union

3.4 The European Union requests the Panel to find that:

(a) Canada violates Articles 3.1(b) and 3.2 of the SCM Agreement since the FIT Programme 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;

(b) Canada violates Article 2.1 of the TRIMs Agreement, in conjunction with Paragraph 1(a) of its Annex, because the FIT Programme 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

(c) Canada violates Article III:4 of the GATT 1994 because the FIT Programme and its related contracts established by the Government of Ontario are TRIMs falling under Paragraph 1(a) of the Annex to the TRIMs Agreement and, in any event, 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 European Union origin.

3.5 The European Union requests that the Panel recommend that Canada:

(a) withdraw its allegedly prohibited subsidies without delay (and, in no case, no more than within 90 days), as required by Article 4.7 of the SCM Agreement; and

(b) bring the FIT Programme and its related contracts into conformity with the covered agreements as required by Article 19.1 of the DSU.

3.6 The European Union also requests that the Panel reject Canada's request for preliminary rulings with respect to any alleged failure on the European Union's part to comply with Article 6.2 of the DSU.

B. CANADA

3.7 Canada requests that the Panel reject the complainants' claims, finding instead that Canada has not acted inconsistently with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement. Canada also requests that the Panel find, by means of a preliminary ruling, that it does not have jurisdiction over the complainants' claims under the SCM Agreement or, in the alternative, that Canada has not acted inconsistently with Articles 3.1(b) and 3.2 of the SCM Agreement.

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties, as set forth in the executive summaries of their submissions provided to the Panel, are attached to these Reports as annexes (see List of Annexes, page vi).

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the third parties, as set forth in the executive summaries of their submissions provided to the Panel, are attached to these Reports as annexes (see List of Annexes, page vi)[13].

VI. INTERIM REVIEW

A. INTRODUCTION

6.1 The Interim Reports in these disputes were issued to the parties on 20 September 2012. The parties submitted written requests for review of precise aspects of the Interim Reports on 4 October 2012. Written comments on the written requests were submitted by the parties on 17 October 2012. None of the parties requested an additional meeting with the Panel.

6.2 The Panel's response to issues of a substantive nature raised by the parties in their requests and comments on the Interim Reports is set out below following the organization of the reports themselves, with the parties' requests for review and comments addressed sequentially. Due to changes made as a result of our review, the numbering of paragraphs and footnotes in the Final Reports has changed from the Interim Reports. The text below refers to the paragraph and footnote numbers in the Interim Reports, with the corresponding paragraph or footnote numbers in the Final Reports (if different) in parentheses for ease of reference.

6.3 In addition to the modifications made as a result of the interim review requests that are discussed below, we have corrected a number of typographical errors and made other non-substantive changes (including in relation to misdescriptions of facts and arguments identified by the parties) throughout the Final Reports.

B. PARTIES' REQUESTS FOR CHANGES TO THE INTERIM REPORTS AND PANELS' EVALUATION

1. Paragraph 2.1

6.4 The European Union requests that the Panel add a footnote the first time the "FIT Programme" is cited in paragraph 2.1 to clarify that the references to the FIT Programme also include the "microFIT Programme". Canada has not commented on this request.

6.5 The Panel has decided not to accommodate the European Union's request. Paragraph 2.1 reflects the requests for establishment of a panel by Japan and by the European Union, and no reference to a "microFIT Programme" was made. In addition, it is clear from paragraph 2.1 that FIT and microFIT Contracts are granted under the FIT Programme.

[13] Australia, Brazil, China, El Salvador, the European Union (in WT/DS412), Japan (in WT/DS426), Korea, Mexico, Norway, the Kingdom of Saudi Arabia, and the United States provided written submissions and/or made oral statements at the meeting of the Panel with the third parties.

2. Paragraph 7.8

6.6 Japan requests that the Panel set forth in paragraph 7.8 its preliminary rulings as circulated on 25 May 2012 in documents WT/DS412/8 and WT/DS426/7, in order to enhance the clarity of those preliminary rulings. Canada has not commented on Japan's request.

6.7 In our view, it is not necessary to incorporate the body of our preliminary rulings in the Final Reports. Paragraph 7.8 already includes a reference to documents WT/DS412/8 and WT/DS426/7, in which the preliminary rulings were set out in full and circulated. However, for the sake of clarity, we have added a sentence to paragraph 7.8 summarizing our conclusions from the preliminary rulings.

3. Paragraphs 7.9, 7.64, 7.124, 7.165, 7.166, 7.216 and 7.322-7.324

6.8 Japan and the European Union request that the Panel delete the term "small-scale" in the first sentence of paragraph 7.9, and in paragraphs 7.64, 7.124, 7.165, 7.166, 7.216, and 7.322-7.324, because they argue that the FIT Programme and the "Minimum Required Domestic Content Level" do not apply solely to "small-scale" solar PV and wind facilities. The complainants recall that there is no maximum capacity for wind projects, and state that it would be inappropriate to qualify solar PV projects as "small-scale", since the maximum capacity for these projects is 10 MW. Canada has not commented on this request.

6.9 We have decided to accept the complainants' requests and have accordingly made a number of adjustments to the relevant paragraphs.

4. Paragraphs 7.11-7.13 and 7.32

6.10 Japan requests the Panel to revise the facts stated in paragraphs 7.11-7.13 and 7.32. Japan submits that the adjectives "large", "vast" and "massive, respectively in the second, sixth and seventh sentences of paragraph 7.11 should be struck from the Reports, as they are highly subjective, not supported in the record, and do not accurately describe the type or size of a system or infrastructure required to maintain electricity systems. In addition, Japan requests a series of changes to paragraphs 7.11-7.13 and 7.32, as it is clear that not all electricity consumers obtain electricity through the systems described by the Panel. Canada submits that these requests should be rejected because the inclusion of the relevant adjectives to describe aspects of electricity systems is amply supported by the record[14].

6.11 The Panel has reflected on the terminology used in paragraphs 7.11-7.13 and 7.32 and, where appropriate, has made some adjustments in the light of Japan's requests and Canada's comments.

5. Paragraph 7.12

6.12 The European Union requests the Panel to add a footnote to the second sentence of paragraph 7.12, mentioning the fact that, in the specific case of Ontario, the IESO Market Rules foresee the possibility of entering into bilateral electricity supply contracts, under certain conditions (Chapter 8 of the Market Rules). Canada considers that the European Union's request is unnecessary, noting that the Panel's statement is qualified by the word "generally" and, as such, means that it was clearly not intended to be comprehensive. Moreover, Canada submits that while the European Union's understanding of the IESO Market Rules is correct, there is no evidence of any such contracts in the record.

[14] Canada refers to the European Union's requests. However, we understand that Canada intended to refer to Japan's requests.

6.13 The Panel has decided to decline the European Union's request. As noted by Canada, the second sentence in paragraph 7.12 is qualified by the term "generally". Thus, this sentence is not meant to include the possibility referred to in Chapter 8 of the IESO Market Rules.

6. Paragraph 7.21

6.14 Canada requests that the Panel change the word "recognized" to "establish" in the third sentence of paragraph 7.21. The European Union submits that this request should be rejected, arguing that Canada has not justified its request on any evidence available to the Panel. Japan has not commented on Canada's request. The Panel has decided not to accommodate Canada's request. Paragraph 7.21 cites Ontario's Long-Term Energy Plan, Exhibit CDA-6, p. 5, and the same term found therein ("recognized") has been used by the Panel.

7. Paragraph 7.22

6.15 Japan requests that the Panel revise paragraph 7.22 to clarify the facts stated therein, and to add a sentence at the end indicating that the OEB was designated the regulator of the new electricity market. Canada has not commented on Japan's request. The Panel has decided to accommodate most of Japan's requests and has made the adjustments sought, albeit not in the precise manner proposed by Japan.

8. Paragraphs 7.23, 7.24, and 7.285-7.292

6.16 The European Union alleges that the descriptions in paragraphs 7.23, 7.24, and 7.285-7.292 do not reflect uncontested facts, in particular regarding the question whether "Ontario's competitive wholesale electricity market" started and ended in 2002. Were the Panel to consider these paragraphs to set out its factual findings on the nature and operation of Ontario's wholesale market before and after November 2002, the European Union requests that the Panel identify the specific qualitative changes which took place at that specific moment in time.

6.17 Canada submits that the Panel should reject the European Union's request. Canada notes that throughout paragraphs 7.23, 7.24, and 7.285-7.292, the Panel has carefully relied on evidence in the record to support its factual findings. Moreover, Canada recalls that the Panel has already set out the specific qualitative changes that took place after November 2002 in paragraphs 7.285 to 7.292, and that the European Union has apparently agreed that the current IESO market mechanism may not be the classical competitive market where supply and demand meet, as described in paragraph 7.294 of the Interim Reports.

6.18 Paragraphs 7.23 and 7.24 provide a brief description of Ontario's experience with the competitive wholesale market that was opened in 2002. In our view, none of what is stated in these paragraphs has been contested by the parties. In this regard, we note that the European Union has not denied that it has asserted that the market which operated in Ontario in 2002 was competitive. Neither has the European Union contested that the operation of this market was put to an end by the Government of Ontario following a period of relatively high prices. The European Union has also not disputed that the *Electricity Restructuring Act of 2004* was a response to the failed 2002 market opening experience. Thus, we see no reason to make any modifications to paragraphs 7.23 and 7.24.

6.19 Paragraphs 7.285-7.291 set out a more detailed description of the events that took place around Ontario's 2002 competitive market opening experience, based on a number of pieces of evidence that are referenced in this passage. Paragraph 7.292 articulates the Panel's conclusion that the evidence demonstrates that the competitive market opening experience failed to attract sufficient investment in electricity production into Ontario. In addition, we note that paragraphs 7.293-7.298

describe and evaluate the nature of the IESO-administered wholesale electricity market that replaced the 2002 competitive market on the basis of the parties' arguments and submitted evidence. Here the Panel concludes that the IESO-administered wholesale electricity market produces the HOEP, which the Panel considers cannot be used as an appropriate benchmark for what the price of electricity would be in Ontario in a competitive wholesale electricity market. In our view, the factual descriptions and findings made in these passages are sufficiently clear and referenced to the relevant pieces of evidence. Therefore, again, we see no reason to accommodate the European Union's requested changes to paragraphs 7.285-7.292.

9. Paragraph 7.24

6.20 Japan requests that the Panel revise the second sentence of paragraph 7.24 in order to clarify the description of the reforms introduced by the *Electricity Restructuring Act of 2004*. In particular, Japan requests that the terms "responsibility for" be replaced with "engaging in". Canada submits that the Panel should reject Japan's request. The Panel's description relies upon and is consistent with Section 25.2(1) of the *Electricity Act of 1998*, as amended by the *Electricity Restructuring Act of 2004*. According to Canada, this Section demonstrates that the OPA does more than just "engage in" overall long-term system planning.

6.21 We consider that the wording of the second sentence of paragraph 7.24 is appropriate in the light of the facts that are before us, as evidenced by the record. Thus, we have declined Japan's requested modifications.

10. Paragraph 7.25

6.22 Japan requests that the second sentence of paragraph 7.25 be struck from the Reports, because it is vague and not supported by the record before the Panel. Canada submits that the Panel should reject Japan's request. Canada points out that Japan does not state which particular aspect of this sentence is supposedly "vague and not supported by the record". In any case, Canada submits that each aspect of the second sentence of paragraph 7.25 is specific and amply supported by the record.

6.23 Paragraph 7.25 follows the description in paragraphs 7.21-7.24 of the essentially government-owned and managed electricity system that existed in Ontario from 1906 to 2002 and Ontario's experience with a liberalized wholesale market in 2002. Paragraph 7.25 is an introduction to section VII.A.4(c)(iii) of the Panel's findings which describes Ontario's *current* "hybrid" system and must be read in the light of these preceding paragraphs. It is intended to emphasize the fact that Ontario's electricity system continues today to be characterized by a significant degree of government involvement. The Government of Ontario's role in generation, transmission, distribution and regulation is described in the paragraphs that follow paragraph 7.25. Thus, we do not find paragraph 7.25 vague and unsupported by the record of facts. We therefore have declined Japan's requested modifications.

11. Paragraph 7.28

6.24 Canada suggests that the Panel amend the second sentence of paragraph 7.28 in order for it to read as follows: "Of these, the IPPs, which generate around 40% of Ontario's electricity supply, receive prices … including: NUG contracts; contracts with Bruce Power; the Clean Energy Supply ("CES") contracts for natural gas …". Neither Japan nor the European Union has commented on Canada's request.

6.25 As we understand it, Canada asks the Panel to modify paragraph 7.28 in such a way that would lead it to explain that the prices for electricity produced by IPPs are set under OPA initiatives

and contracts which include NUG contracts and contracts with Bruce Power. However, Canada has not explained how the prices for IPPs are set under NUG contracts or contacts with Bruce Power. Moreover, Canada has not pointed to any factual source to support its requested change. As such, we have declined Canada's requested modifications.

12. Paragraphs 7.29 and 7.202

6.26 The European Union requests the Panel to include footnotes in paragraphs 7.29 and 7.202 recording the fact that the European Union has argued that the alleged 11% rate of return on equity is an abstract construct that does not correspond to the actual rates of return of individual projects. Moreover, the European Union requests that the Panel modify paragraph 7.202 to clarify that whether the FIT Programme is construed in such a way as to cover generation costs plus a reasonable rate of return on investment is a contested issue.

6.27 Canada objects to the European Union's requests, recalling that the relevant passage in the Interim Reports uses language that is almost identical to that found in the exhibits upon which it relies. In addition, Canada notes that paragraph 7.29 is contained in the Panel's factual background section and not in its summary of the parties' arguments. Moreover, in Canada's view, the specific argument the European Union refers to does not address whether the rate of return was 11%. Rather, the European Union seems to be instead raising arguments about whether a particular generator can actually achieve such a return on equity. Finally, Canada submits that the Interim Reports adequately summarize the European Union's argument that the 11% rate of return on equity is an abstract construct in paragraph 7.258, and therefore, according to Canada, there is no need to add the footnotes requested by the European Union.

6.28 We have modified paragraph 7.29 to more accurately reflect the facts surrounding the 11% rate of return used by the OPA to determine the FIT prices. However, we have declined the European Union's other requests because, as Canada notes, the factual assertion made in the sentence the European Union submits must be changed is based on record evidence cited in footnote 372 (now footnote 392) found in paragraph 7.202. This information explicitly states that "prices in the [FIT] Price Schedule are intended to cover development costs plus a reasonable rate of return for Projects meeting certain assumptions relating to cost and efficiency". The language used in paragraph 7.202 repeats this text almost verbatim. On the other hand, we have decided to add a reference to the European Union's arguments concerning the allegedly "abstract" nature of the 11% rate of return used to determine the FIT Price Schedule in paragraph 7.325 of the Reports. We have also decided to add a reference to Exhibit CDA-46, slide 30, in footnote 374 (now footnote 394). This exhibit clearly discloses that an after tax return on equity rate of 11% was included in the Discounted Cash Flow model used to determine the FIT Price Schedule.

13. Paragraph 7.30

6.29 The European Union requests that the abbreviation "PV" be struck from the second sentence of paragraph 7.30. In addition, the European asks the Panel to add the relevant figures concerning aboriginal and community projects, in order for paragraph 7.30 to be entirely accurate as regards FIT prices. Canada has not commented on this request. The Panel has deleted "PV" from paragraph 7.30. However, we see no need to add any information about Aboriginal and Community Projects in this paragraph, as this information is already set out in paragraph 7.202.

14. Paragraph 7.31

6.30 The European Union submits that the third sentence in paragraph 7.31 should start with "Canada has not provided precise prices for these contracts", instead of "[w]hile precise prices for

these contracts are not publicly available", given that the information exists and is available to the Canadian authorities. The European Union asserts that, despite several questions asked by the Panel, Canada has failed to provide the relevant information. Alternatively, the European Union asks the Panel to reflect in a footnote the fact that Canada failed to provide those precise prices in the course of these proceedings, even upon the Panel's request.

6.31 Canada asks the Panel to reject the European Union's request. Canada notes that precise rates for electricity are subject to the privacy and commercial interests of the counter-party to the relevant NUG contract. However, Canada has provided the Panel with an average NUG contract rate, and the European Union does not explain why this average is insufficient evidence of the rates NUGs earn for their sale of electricity to the OEFC.

6.32 The Panel has reflected on the phrasing of the third sentence in paragraph 7.31, and considers it appropriate in the light of the record. Thus, we have declined the European Union's request.

15. Paragraph 7.46

6.33 Canada asserts that while it is true that certain consumers of electricity can vary their electricity consumption, this is the case for only a very small number of consumers. Thus, Canada asks the Panel to add the following after the first sentence in paragraph 7.46: "The consumers that can easily vary their electricity consumption are very small in number".

6.34 The complainants ask the Panel to reject Canada's request. Japan disagrees with Canada's comments that only a very small number of consumers can vary their electricity consumption. Japan refers to Ontario's Long-Term Energy Plan where it is anticipated that all types of consumers can vary their consumption through innovative conservation or demand response-type programmes[15]. The European Union considers that the reference to "very small number" is vague. Finally, the complainants point out that Canada has not justified its requests on any evidence available to the Panel.

6.35 We note that Canada does not challenge the accuracy of what is described in paragraph 7.46, but rather asks for the factual description to be elaborated so as to provide more detail about the alleged nature of the consumers of electricity in Ontario. We see no need to make such a change, and have therefore declined Canada's request.

16. Paragraph 7.50

6.36 Canada asks the Panel to replace the word "most" with "almost all" in the fourth sentence of paragraph 7.50 for greater accuracy. The complainants point out that Canada has not justified its request on any evidence available to the Panel, and ask the Panel to reject Canada's request. While we recognize the qualitative difference between using the words "most" and "almost all", we do not think that the choice of these words in the context of paragraph 7.50 would have any bearing on the relevance of the description of the IESO stack system that is described in this part of the Reports. Moreover, we note that Canada has not justified its request on the basis of evidence from the record of these proceedings. Thus, we have declined to make the requested modification to paragraph 7.50.

[15] Government of Ontario, "Ontario's Long-Term Energy Plan", 2010, ("Ontario's Long-Term Energy Plan"), Exhibit CDA-6, p. 40.

17. Paragraph 7.54

6.37 Japan asks the Panel to delete the words "market rate" from the first sentence of paragraph 7.54, in order to conform with the language used in paragraph 7.53. Canada has not commented on Japan's request. We see no need to make the requested change given that the words "market rate" are immediately followed by "(i.e. MCP/HOEP)". We have therefore declined Japan's request.

18. Paragraph 7.55

6.38 Canada suggests that the Panel replace the terms "a charge to generators" with "a credit to consumers" in the second sentence of paragraph 7.55 because, according to Canada, the GA is always either a charge or payment to the consumer depending on fluctuations in the HOEP. Canada submits that generators will always receive their contracted or regulated rates – or in the instance of unregulated OPG assets, the HOEP – regardless of HOEP/GA fluctuations. Finally, Canada notes that Exhibit JPN-1, which is referenced at the end of the second sentence, does not use such a phrase.

6.39 Japan submits that Canada provides no support in the record for its assertion, and that the Panel would be justified in using either phrase because the GA is both a charge to generators and a credit to consumers. Japan notes that where the OPA contract is a contract for differences – e.g. contracts for gas-fired facilities – and the contracted price is less than HOEP, the generator is "charged" the difference, thus reducing the GA and resulting in a credit to consumers. Were the Panel to accept Canada's proposed modification, Japan requests that the Panel cite evidence from the record to support such modification. The European Union has not commented on Canada's request.

6.40 We have decided to modify paragraph 7.55 to reflect the fact that, as Canada and Japan have highlighted, the GA can be both a charge to generators and a credit to consumers, and vice versa, depending upon the level of the HOEP.

19. Paragraph 7.56

6.41 The European Union requests the Panel to clarify that the GA is not collected from all consumers according to the same methodology, contrary to what the European Union asserts is suggested by the first sentence of paragraph 7.56. Canada submits that the European Union's request is unnecessary, and argues that the Panel's statement is true as the GA is allocated to *all* consumers in proportion with the electricity they consume. Nevertheless, Canada proposes language that it considers could be inserted before the last sentence in paragraph 7.56 to address the European Union's concern.

6.42 The Panel has decided to accommodate the European Union's request and has made the appropriate adjustments on the basis of the language proposed by Canada.

20. Paragraph 7.57

6.43 Canada asks the Panel to modify the first sentence of paragraph 7.57, with a view to increasing accuracy, in order for it to read as follows: "Prices paid by retail consumers are generally determined by adding to the wholesale price (i.e. the total of MCP/HOEP), the GA, other fees and charges, plus an additional distribution charge to cover the cost of delivering electricity to consumer".

6.44 Japan asks the Panel to reject Canada's request. Japan notes that the wholesale price is comprised of not only the MCP/HOEP but also GA and other fees and charges. Japan also points out

that Canada fails to explain why it would be necessary for the Panel to single out distribution charges in the manner suggested by Canada.

6.45 The Panel has modified paragraph 7.57 to clarify the first sentence.

21. Paragraph 7.70

6.46 Japan requests that the Panel provide an explanation in paragraph 7.70 of its reasons to conclude that the TRIMs Agreement is the WTO agreement that deals most directly, specifically and in detail with the FIT Programme. In addition, Japan requests that the Panel provide its reasons for rejecting the complainants' arguments that the claim under the SCM Agreement should be examined first in the Panel's order of analysis of their complaints. Canada has not commented on Japan's request.

6.47 In response to Japan's requests, we note that paragraph 7.70 already sets out: (i) that the complainants assert (and Canada has not contested) that the challenged measures are TRIMs; and (ii) that, in the Panel's view, this suggests that the TRIMs Agreement deals most directly, specifically and in detail, with the challenged measures. The Panel therefore considers that its reasons for deciding to begin its evaluation of the complainants' claims with those made under the TRIMs Agreement (as opposed to those made under the SCM Agreement) are sufficiently clear. Thus, we have declined Japan's requested modifications.

22. Paragraph 7.73

6.48 Japan requests that the Panel insert the phrase "before addressing its claims under the TRIMs Agreement" after "Japan also argues" at the beginning of the first sentence of paragraph 7.73, in order to clarify that Japan considers its claim under the GATT 1994 to be the primary claim when compared to Japan's claim under the TRIMs Agreement. Japan also requests that the terms "internal" and "sale" should be set off separately in quotation marks to accurately reflect Japan's arguments. Canada has not commented on Japan's request.

6.49 We have summarized the parties' arguments following the order of analysis adopted in the Reports. Therefore we do not consider it necessary to insert the phrase requested by Japan. Nothing in paragraph 7.73 suggests that Japan's claim under the GATT 1994 was presented as a subsidiary claim to the one made under the TRIMs Agreement. Furthermore, in our view, the insertion of the language Japan has requested be added to paragraph 7.73 would not address the relationship between Japan's claims under the GATT 1994 and the TRIMs Agreement. As to Japan's second requested change, the Panel has made the appropriate adjustment.

23. Paragraph 7.78

6.50 The European Union requests that the Panel insert the phrase "in conjunction with Paragraph 1(a) of its Annex" after "Article 2.1 of the TRIMs Agreement", and make a minor change to the wording in paragraph 7.78, in order to better reflect the European Union's claims, as summarized in paragraph 3.4 of the Interim Reports. Canada has not commented on the European Union's request.

6.51 The Panel has made an adjustment to paragraph 7.78, albeit not in the precise manner proposed by the European Union.

24. Paragraph 7.120

6.52 The European Union asks the Panel to insert a series of sentences into paragraph 7.120 in order to better reflect the European Union's arguments. Canada considers that the European Union's request is unnecessary, as the Interim Reports accurately record the European Union's submissions. Were the Panel to accept the European Union's requested additions, Canada asks that the Panel also address Canada's argument that the European Union's interpretation is inconsistent with the texts of the TRIMs Agreement and Article XI:2 of the GATT 1994.

6.53 We have modified the wording of paragraph 7.120 (and consequently also paragraph 7.80) in order to more accurately reflect the European Union's argument, albeit not in the precise manner proposed by the European Union. Given that we have rejected the European Union's argument, we do not find it necessary to address Canada's argument relating to Article XI:2 of the GATT 1994 in order to resolve the disputes. We have therefore made no change to paragraph 7.120 in response to Canada's comment and request.

25. Paragraph 7.124

6.54 Canada agrees with the Panel's conclusion that the "Minimum Required Domestic Content Level" is a "requirement[] governing" the procurement of electricity for purposes of Article III:8(a) of the GATT 1994. Canada requests that the Panel also conclude that Section 25.35 of the *Electricity Act of 1998*, the Ministerial Direction and the FIT and microFIT Rules and Contracts are laws and requirements that govern the procurement of electricity for the purposes of Article III:8(a).

6.55 The European Union does not consider Canada's request appropriate since this section of the Interim Reports refers to the Panel's understanding of the matter. The European Union observes that Canada's arguments are well reflected in paragraph 7.88 of the Interim Reports and, thus, there is no need for the Panel to make a reference to those arguments therein.

6.56 As noted by the European Union, Canada's arguments relating to this matter are summarized in paragraph 7.88 of the Interim Reports. Moreover, paragraph 7.124, and our findings in general on this point, are focused only on the question whether the "Minimum Required Domestic Content Level" is a "requirement[]" for purposes of Article III:8(a) of the GATT 1994. Thus, we see no need to make the requested changes.

26. Paragraph 7.125

6.57 The European Union requests (i) some minor changes to the wording of the fifth sentence of paragraph 7.125 and (ii) that the Panel insert an additional sentence at the end in order to better reflect the European Union's argument. Canada does not consider these amendments necessary, because the Interim Reports accurately record the European Union's arguments. In case the Panel accepts the European Union's requested modifications, Canada requests that the Panel also address Canada's argument that the European Union's interpretation is inconsistent with the scope of the Agreement on Government Procurement.

6.58 The Panel has decided to partly accommodate the European Union's request and has made the minor adjustments sought to the wording of the fifth sentence of paragraph 7.125. As the European Union's argument was already accurately described in the second, third and fourth sentences, the Panel has decided not to insert the additional sentence proposed by the European Union. With respect to Canada's comments and request, we recall that in the subsequent paragraphs we have explained our difficulty in accepting the European Union's interpretation and stated our conclusion that the "Minimum Required Domestic Content Level" should be properly

characterized as one of the "requirements governing" the alleged procurement of electricity for the purpose of Article III:8(a) of the GATT 1994. Thus, it is not necessary for us to address Canada's argument relating to the Agreement on Government Procurement in order to resolve the disputes before us. We have made no change to this paragraph in response to Canada's comments and request.

27. Paragraph 7.134

6.59 Japan requests that the Panel explain why the fact that the GATT panel report in *US – Sonar Mapping* was not adopted diminishes the relevance of that GATT panel's findings, in the light of the Appellate Body's understanding in *Japan – Alcoholic Beverages II*, that "a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant"[16]. Japan also requests the Panel to explain the particular facts of this case that have led the Panel to conclude that the reasoning of the unadopted GATT panel report in *US – Sonar Mapping* is not relevant.

6.60 Canada does not consider that the Reports need to be supplemented in response to Japan's request. Canada recalls that the Appellate Body in *Japan – Alcoholic Beverages II* simply stated that the reasoning of an unadopted panel report could be useful if it was relevant. Canada stresses that the Panel in these disputes extensively explained why the GATT panel report in *US – Sonar Mapping* did not provide relevant guidance for these disputes.

6.61 Paragraph 7.134 sets out a number of features of the facts and law at issue in *US – Sonar Mapping* which, in our view, significantly diminish its relevance in these disputes. Therefore, we consider this paragraph to sufficiently explain why we were not persuaded by Japan's references to this GATT panel. Moreover, in the last sentence, we have simply noted "that the GATT panel report was not adopted". As this last sentence is not strictly necessary to our reasoning, we have deleted it.

28. Paragraph 7.138

6.62 Japan requests the Panel to revise this paragraph, and proposes a series of changes. Japan explains that its argument relating to the interpretation of the terms "governmental purposes" in Article III:8(a) of the GATT 1994 does not take issue with whether the meaning of "governmental purposes" is broad or narrow. Thus, Japan considers that it is highly misleading to simply qualify Japan's arguments as the narrowest compared to the other parties' arguments. Canada has not commented on Japan's request.

6.63 The Panel has decided not to accommodate Japan's request. We have carefully reviewed Japan's arguments and, in particular, its view that "a Vienna Convention analysis of the term 'for governmental purposes' suggests that it means for *government use, consumption, or benefit*, where again Japan uses the term 'benefit' to refer to that of using the product allegedly procured"[17]. Based on this statement, we do not believe it is inaccurate to characterize Japan's interpretation of the expression "governmental purposes" as the "narrowest meaning", when compared to the other parties' interpretations.

29. Paragraphs 7.139 and 7.140

6.64 The European Union understands that the Panel's statements with regards to the terms "governmental purposes" refer to the English version of the GATT 1994, since the Panel has not specifically addressed the meaning of the terms used in the Spanish and French versions, which in the

[16] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 15.
[17] Japan's opening statement at the second meeting of the Panel, para. 33. (footnote omitted)

European Union's view differ from the English version. Thus, the European Union requests that the Panel modify these paragraphs to remove the reference that the ordinary meaning of "governmental purposes" is "relatively broad" or to clarify that the Panel's understanding refers only to the English version of the GATT 1994.

6.65 Canada does not consider the European Union's request appropriate at this stage of the proceedings, since the European Union is asking the Panel to reverse its view that the ordinary meaning of "governmental purposes" is relatively broad. Canada notes that there is nothing in the Interim Reports that confines the Panel's statement on the ordinary meaning of "governmental purposes" to the English version of the GATT 1994.

6.66 We have adjusted the first sentence of paragraph 7.139 to clarify that our understanding is not limited to the English language version of the GATT 1994.

30. Paragraph 7.149

6.67 Canada submits that Hydro One and LDCs are intended to make returns from the transmission and distribution *assets*, as explained in Exhibit CDA-64. Thus, Canada requests that the Panel amend the fifth sentence of paragraph 7.149 by replacing the term "activities" with "assets".

6.68 Japan does not agree with Canada's request. Japan states that, notwithstanding Canada's assertion, Exhibit CDA-64 does not explain that the returns made are from transmission and distribution assets owned by Hydro One and LDCs, rather than their transmission and distribution activities. Moreover, Japan argues that Hydro One and LDCs are intended to make profits from all of their regulated activities, and not just from transmission and distribution. For example, Japan explains that any party has the right to connect to the system if that party meets all required legal and other standards. Hydro One and the LDCs respectively conduct the System Impact Assessments and Connection Impact Assessments, receiving payments from generators, including FIT generators[18].

6.69 The European Union considers that the Panel should reject Canada's request. First, it is unclear what the relevance of the distinction between "activities" and "assets" is in the present case. Pursuant to the European Union, it is undisputed that Hydro One and the LDCs are engaged in the transmission and distribution of electricity as their principal activity or business, and that they obtain their returns out of the transmission and distribution of electricity in Ontario. Second, the language suggested by Canada would appear to indicate that Hydro One and the LDCs do not generate their revenue from their operations or business but merely from their assets, e.g. such as renting their premises or infrastructure, which is clearly not the case.

6.70 The Panel has reflected on the terminology used in paragraph 7.149 and, where it considers appropriate, has made some adjustments in the light of the interim review requests and comments.

31. Paragraphs 7.163 and 7.166

6.71 Japan recalls that it made two distinct arguments to establish that the "Minimum Required Domestic Content Level" is inconsistent with Canada's national treatment obligation under

[18] Japan cites the following Exhibits: Transmission-connected Generators, Hydro One website, ("Transmission-connected Generators"), Exhibit JPN-39; Transmission System Code, Ontario Energy Board, 10 June 2010, ("Transmission System Code"), Exhibit JPN-69, Section 4.3.3; Distribution System Code, Ontario Energy Board, 1 October 2011, ("Distribution System Code"), Exhibit JPN-70, Section 6.2.11; and Ontario Power Authority, Feed-in Tariff Contract, Version 1.5.1, 15 July 2011, ("FIT Contract"), Exhibit JPN-127, Article 2.4(b)(iv).

Article III:4 of the GATT 1994. However, Japan notes that the Panel's evaluation of Japan's claim has only addressed one of those arguments. Japan asks that the Panel address Japan's other argument and that it do so by undertaking a separate analysis of Article III:4 of the GATT 1994. Japan considers that this separate analysis is necessary in order for the Panel to discharge its responsibilities under Articles 3 and 11 of the DSU. Canada has not commented on Japan's request.

6.72 Paragraph 7.163 sets out our conclusions on the extent to which the "Minimum Required Domestic Content Level" requires the purchase or use of products of Canadian origin or from a Canadian source, as part of our analysis of whether the challenged measures fall within the scope of Paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement. On the basis of these and other conclusions (including those made in paragraph 7.166), we have found that the challenged measures are TRIMs falling within the scope of Paragraph 1(a) of the Illustrative List, and that in the light of Article 2.2 of the TRIMs Agreement and the chapeau to Paragraph 1(a) of the Illustrative List, the challenged measures are inconsistent with both Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994. Having made this finding, we do not believe it is necessary for the purpose of resolving the disputes before us to also address Japan's other argument and perform an entirely separate and stand-alone analysis of Japan's claim under Article III:4 of the GATT 1994. Thus, we have declined Japan's request.

32. Paragraph 7.165

6.73 The European Union requests that the Panel start the third sentence in paragraph 7.165 with the words "According to Canada". Canada states that this request should be rejected, as the Panel's statement that the European Union seeks to change is a finding of fact that is amply supported by the record.

6.74 The Panel has decided not to accommodate the European Union's request. The relevant sentence reflects our understanding of the facts and, as summarized in paragraph 7.68, it is properly supported by the evidence submitted in these disputes.

33. Paragraph 7.174

6.75 Japan requests that the language in the second sentence of this paragraph be changed to clarify that the submission made by Japan that is described in this sentence is not a conditional one but rather an argument that is true in all cases. To support this request, Japan asserts that the Appellate Body made clear in *US – Large Civil Aircraft (Second Complaint)* that a transaction may be covered by multiple subparagraphs of Article 1.1(a)(1). Canada asks the Panel to reject Japan's request, arguing that Japan is incorrect to argue that the Appellate Body's ruling that Japan relies upon is "true in all cases". According to Canada, the Appellate Body's ruling should be understood as indicating that a transaction "may" be covered by multiple subparagraphs of Article 1.1(a)(1) of the SCM Agreement. If the proper characterization of the challenged measure is under only one sub-paragraph, as Canada recalls the Panel has found in the present disputes, then that is the end of the matter.

6.76 We have declined Japan's requested modification. The focus of Japan's request is the phrase "would be" that is found in the second sentence of paragraph 7.174. This phrase refers to a possibility that depends upon the Panel making a particular finding - namely, the possibility that the challenged measures could be characterized under multiple subparagraphs of Article 1.1(a)(1) of the SCM Agreement even *if the Panel were to conclude that they could be legally characterized as a "government purchases [of] goods" under the terms of Article 1.1(a)(1)(iii) of the SCM Agreement*. As such, we consider the use of the conditional phrase "would be" to be correct and appropriate.

34. Paragraph 7.206

6.77 Japan submits that the characterization of the global adjustment in paragraph 7.206 is inaccurate because it does not reflect the fact that all OPA contracts (including non-FIT contracts) that have a contract price in excess of HOEP cause increases to the global adjustment to the extent of the excess, and that other expenses associated with procurement contracts, such as expenses for conservation measures and programmes, also directly increase the global adjustment. To this end, Japan requests that paragraph 7.206 be modified and has submitted text for this purpose. Canada has not commented on Japan's requested modification. We accept Japan's requested changes and have modified paragraph 7.206 accordingly.

35. Paragraph 7.223

6.78 The European Union requests that the Panel modify paragraph 7.206 to clarify that whether the FIT Programme is construed in such a way to cover generation costs plus a reasonable rate of return on investment is a contested issue. Canada asks the Panel to reject the European Union's request on the same grounds Canada advanced to justify its objection to the European Union's similar request with respect to paragraph 7.202 (see above). We have declined the European Union's request for the same reason we rejected the European Union's requested modification to paragraph 7.202.

36. Paragraph 7.242

6.79 Japan requests that the Panel address in paragraph 7.242 the argument presented by Japan that basing the interpretation of WTO obligations on the characterization of terms in municipal law "would be tantamount to enabling the responding Member to determine whether the measures are consistent with its WTO obligations". In addition, Japan requests that the Panel provide its reasoning that the characterization of the Government of Ontario was not "contrived" in light of the concern regarding the adoption of protectionist policies that was raised in a debate before the Ontario Legislative Assembly. Canada submits that there is no need for the Panel to make the changes requested by Japan, arguing that paragraph 7.242 already addresses Japan's argument concerning the interpretation of WTO obligations in the light of the characterization of the challenged measures under municipal law. Furthermore, Canada argues that the Panel's conclusion that the message articulated in various instruments that the Government of Ontario "purchases" electricity through the FIT Programme is "by no means contrived" is supported by evidence that is on the record including documents emanating from the private sector. As such, Canada submits that the Panel need not make the requested changes.

6.80 We believe that paragraph 7.242 already addresses Japan's first concern in that it explicitly states that the Panel's consideration of the municipal law characterization of the challenged measures "is not dispositive of the analysis that we must undertake for the purpose of WTO law". Moreover, we see no need to explain why we find that the references to "purchases" and "procurement" contained in various Government of Ontario instruments are not "contrived" in light of the evidence Japan has submitted in Exhibit JPN-106. We fail to see how the suggestion in the record of the debate before the Ontario Legislative Assembly that is contained in Exhibit JPN-106 has any bearing on determining whether the description of the OPA's powers and responsibilities (which include the "purchase" and "procurement" of electricity) in various legal instruments is contrived. In particular, the fact that a member of Ontario's Legislative Assembly suggested that a local content rule may be protectionist does not, in our view, imply that the Government of Ontario's decision to grant the OPA the power to "purchase" and "procure" electricity (including under the FIT Programme) cannot be characterized as one that is not contrived. Thus, we have decided not to make any changes to paragraph 7.242.

37. Paragraphs 7.245 and 7.247

6.81 Japan makes a number of requests for the Panel to clarify the reasoning articulated in paragraphs 7.245 and 7.247 in support of its conclusion that a transaction properly characterized as involving "government purchases [of] goods" under Article 1.1(a)(1)(iii) of the SCM Agreement cannot also be a "direct transfer of funds" under Article 1.1(a)(1)(i) of the SCM Agreement. First, Japan asks the Panel to explain the reasoning behind its conclusion in paragraph 7.245 in the light of the finding of the Appellate Body in *US – Large Civil Aircraft (Second Complaint)* that the "examples" referred to in Article 1.1(a)(i) are illustrative and non-exhaustive. Secondly, Japan asks the Panel to provide additional explanations, in the light of certain alleged findings of the Appellate Body in *US – Large Civil Aircraft (Second Complaint)*, for what it describes as the Panel's finding in paragraph 7.247 that "Article 1.1(a)(1) does not explicitly spell out the relationship between subparagraphs (i) and (iii)". In this regard, Japan considers that the Panel has failed to provide an adequate explanation as to how its finding is consistent with the Appellate Body's conclusions in *US – Large Civil Aircraft (Second Complaint)*, or any explanation as to why the Appellate Body's alleged findings in footnotes are any less important than its findings in the body of its reports. Finally, Japan asks the Panel to explicitly state whether it is rejecting the Appellate Body's findings in *US – Large Civil Aircraft (Second Complaint)*, and if so, to adequately explain its rationale for doing so.

6.82 Canada submits that Japan's requests should be rejected, arguing that the Panel has thoroughly explained its findings and reasons with respect to the issue Japan raises in paragraphs 7.245-7.248. As regards Japan's particular concerns about paragraph 7.247, Canada is of the view that the Panel's statements are in accordance with the Appellate Body's general findings in *US – Large Civil Aircraft (Second Complaint)*. In particular, Canada argues that in this paragraph, the Panel notes that the Appellate Body's finding is permissive (i.e. the Appellate Body said "does not expressly preclude" and did not say, as Japan seems to imply, "permits" or "allows"). In addition, according to Canada, the Panel properly interprets the relationship between "purchases [of] goods" and "direct transfer[s] of funds". Thus, according to Canada, Japan is wrong to suggest that the Panel has not adequately explained its legal reasoning.

6.83 Japan's first request for review relates to paragraph 7.245. As we understand it, Japan takes issue with the following statement:

> In this regard, we observe that the only two examples of 'direct transfer[s] of funds' involving reciprocal rights and obligations that Article 1.1(a)(1)(i) identifies are 'loans' and 'equity infusion[s]'. Government 'purchases of goods' could have easily been added to these examples had the drafters considered that they should also be viewed as falling within the scope of Article 1.1(a)(1)(i) of the SCM Agreement, particularly given that they are explicitly mentioned in Article 1.1(a)(1)(iii) of the SCM Agreement.

Japan asks us to explain this statement in the light of the Appellate Body's finding in *US – Large Civil Aircraft (Second Complaint)* that the "examples" in Article 1.1(a)(1)(i) of the SCM Agreement are illustrative and non-exhaustive. In our view, there is no need to provide the requested explanation because there is no contradiction between our statements in this paragraph and the Appellate Body's finding that is cited by Japan. In particular, the fact that the "examples" set out in Article 1.1(a)(1)(i) of the SCM Agreement are illustrative and non-exhaustive does not detract from our observation that the words "purchases of goods" could have easily been added to the text of Article 1.1(a)(1)(i) *given that such transactions are "explicitly mentioned in Article 1.1(a)(1)(iii) of the SCM Agreement"*. Indeed, in our view, it would be expected that having explicitly referred to "government purchases [of] goods" in Article 1.1(a)(1)(iii) of the SCM Agreement, the drafters of the SCM Agreement would, in the light of the principle of effective treaty interpretation, have also made an explicit

reference to such transactions in Article 1.1(a)(1)(i) of the SCM Agreement had they considered them to fall under both sub-paragraphs. Finally on this point, it must be recalled that our reasons for finding that transactions properly characterized as "government purchases [of] goods" cannot also be "direct transfer[s] of funds" are not only set out in paragraph 7.245 but also in paragraphs 7.246-7.247.

6.84 With respect to Japan's comments regarding paragraph 7.247, we note that contrary to Japan's contentions, the Panel did not find in this paragraph that Article 1.1(a)(1) "explicitly spell[s] out the relationship between subparagraphs (i) and (iii)". Moreover, the Panel has nowhere in this paragraph stated that Appellate Body findings are "less important" when they are set out in footnotes compared with the body of reports. Rather, as pointed out by Canada, in paragraph 7.247 the Panel notes that when it comes to the relationship between the sub-paragraphs of Article 1.1(a)(1) of the SCM Agreement, the Appellate Body statements set out in a footnote in *US – Large Civil Aircraft (Second Complaint)* do not express any definitive conclusion. Moreover, consistent with the Appellate Body's observations in *US – Large Civil Aircraft (Second Complaint)*, the Panel recognizes in paragraph 7.247 that it may be possible in certain circumstances to characterize a measure as different types of "financial contributions". However, in our view, the customary rules of interpretation of public international law (and in particular the principle of effective treaty interpretation) do not allow for such an outcome *on the basis of the facts of the present disputes*. It is therefore incorrect to suggest that the Panel disagrees or rejects the Appellate Body's observation that it may be possible to characterize a measure under more than one sub-paragraph of Article 1.1(a)(1) of the SCM Agreement.

6.85 Finally, footnote 453 (now footnote 473) explicitly states that the extract from the panel's reasoning in *US – Large Civil Aircraft (Second Complaint)* that was rejected by the Appellate Body is referred to in the present proceedings only as a "useful exposition of the interpretative problem that we believe is created by the complainants' arguments in these proceedings". Thus, we are not relying upon or agreeing with the panel's *finding* in *US – Large Civil Aircraft (Second Complaint)*, which related to the question whether government purchases of services (transactions that are not explicitly mentioned in Article 1.1(a)(1) of the SCM Agreement) could be characterized as "direct transfer[s] of funds". Rather, by recalling the panel's *reasoning* on this question in *US – Large Civil Aircraft (Second Complaint)* our focus is on the interpretative dilemma that the panel draws attention to, namely, the consequence for the utility of the "purchases goods" language in Article 1.1(a)(1)(iii), in the light of the principle of effective treaty interpretation, of an interpretation that would allow transactions involving government purchases of goods to be characterized as both government "purchases [of] goods" under Article 1.1(a)(1)(iii) and as "direct transfer[s] of funds" under Article 1.1(a)(i) of the SCM Agreement.

38. Paragraph 7.249

6.86 Japan requests that the Panel make findings with respect to its arguments concerning the question whether the challenged measures amount to "income or price support" within the meaning of Article 1.1(a)(2) of the SCM Agreement, and consequently, to undertake a separate review of the merits of its related benefit arguments. While Japan agrees with the Panel that the benefit arguments it has advanced are "essentially the same" irrespective of whether the challenged measures are characterized as "financial contributions" or "income or price support", Japan emphasizes that they are not identical. Japan believes that Panel findings with respect to its "income or price support" line of argument could have a material impact on any review conducted by the Appellate Body, and are necessary in order to not only achieve the prompt settlement of its dispute with Canada but also to secure a positive resolution to the dispute in accordance with Articles 3.3 and 3.7 of the DSU.

6.87 Canada submits that Japan's request is without merit as it relies upon the same set of inappropriate benefit benchmarks that the Panel rejected in subsequent parts of its findings. Moreover,

according to Canada, the interim review stage is not the appropriate point in these proceedings to ask for new factual and legal findings or attempt to re-argue one's case. Thus, Canada submits that Japan's request should be rejected.

6.88 We have once again closely reviewed the arguments that Japan has advanced to support its contention that the challenged measures confer a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement when they are characterized as a form of "income or price support" under Article 1.1(a)(2) of the SCM Agreement. While the arguments are not identical to those Japan has advanced in relation to its contention that the challenged measures confer a "benefit" when characterized as "financial contributions", they do, by explicit cross-reference, rely upon the same "market rates" to establish the alleged existence of benefit. Because the very same "market rates" are rejected by the Panel majority in its benefit analysis, the outcome of the Panel's evaluation of the merits of Japan's "income or price support" arguments, *and therefore the merits of Japan's claims concerning prohibited subsidization*, would be the same irrespective of whether the Panel examined Japan's contention that the challenged measures should be legally characterized as a form of "income or price support" under Article 1.1(a)(2) of the SCM Agreement. Thus, we see no compelling reason to grant Japan's request for review.

39. Paragraphs 7.251, 7.308, 7.313(a) and footnote 588

6.89 Japan requests that the Panel make a number of modifications to paragraph 7.251 in order to ensure that it more accurately reflects Japan's arguments in respect of the electricity price benchmarks that it has advanced in these proceedings for the purpose of establishing the existence of benefit. First, Japan submits that the Panel incorrectly characterized one of the price benchmarks that it advanced as the "weighted average HOEP" when Japan had in fact described this benchmark as the "weighted average 'wholesale rate'". Secondly, Japan states that contrary to what is described in paragraph 7.251, Japan did not refer to the "price offered by two private retail operators" in its arguments as "alternative" benchmarks. Rather, Japan argues that this evidence was advanced to "confirm" that the retail rate functions as a "ceiling" price. Japan asks the Panel to revise the fourth sentence of paragraph 7.251 accordingly and submits draft text for this purpose. Thirdly, Japan finds that the fifth sentence in paragraph 7.251 is inaccurate when it states that Japan has asserted that retail prices in Ontario represent a "proxy" for the maximum level of the wholesale price of electricity in Ontario. Japan asks the Panel to delete this sentence. Finally, to reflect the above requests for review, Japan asks the Panel to modify the first sentence of paragraph 7.251 to include a reference to not only wholesale market prices but also retail market prices. Japan suggests a small modification to this sentence for this purpose.

6.90 Japan makes another request for review that is related to the changes it seeks to paragraph 7.251. In particular, Japan asks the Panel to consider making separate and additional findings to those made in paragraphs 7.308 and 7.313(a) with respect to whether the Regulated Price Plan ("RPP") prices are an appropriate market benchmark for the purpose of establishing the existence of benefit. Japan submits that it has made a distinct and "alternative" argument with respect to the RPP prices that the Panel has not evaluated. According to Japan, it has argued that the RPP prices confirm the existence of benefit because "they act as a ceiling for what consumers actually pay for electricity within the regulated Ontario market, taking into account all the various sources of electricity produced in Ontario, and all the subsidies that may be provided by the government to electricity generators in Ontario".

6.91 Canada explains that it understands Japan's arguments concerning the electricity price benchmarks it has advanced to include the following two proposed benchmarks: "the weighted average 'wholesale rate' during 2010 for generators other than FIT and RESOP generators" and "the commodity charge portion of retail prices". Canada asserts that contrary to Japan's suggestions, a

more accurate fourth sentence in paragraph 7.251 should refer to these benchmarks. As regards Japan's requests for modifications to paragraphs 7.308 and 7.313(a) and footnote 588 (now footnote 610), Canada recalls that the purpose of interim review is not to request further factual or legal findings. In any case, Canada submits that it has answered Japan's assertion that the RPP prices "serve as a ceiling on the market price of electricity" recalling that the RPP is "simply a regulated price for Ontario electricity consumers that aggregates the cost of paying for all electricity generated for the province".

6.92 We have revised paragraph 7.251 (and consequently also footnote 588 (now footnote 610)) to correct the misdescription of Japan's argument concerning the "weighted average 'wholesale rate'" benchmark. The first sentence of paragraph 7.251 has also been amended to indicate that Japan has advanced not only wholesale level prices but also prices at the retail level of trade as suggested benchmarks for the benefit analysis. We have also taken note of Japan's clarification that it did not submit the evidence referred to in paragraph 7.251 on private retail prices for the purpose of advancing an alternative benchmark, but rather only to confirm that the RPP acts as a ceiling on the electricity price. Thus, we have deleted the fifth sentence of paragraph 7.251, and described Japan's alternative benchmark argument that is based on RPP prices in more detail. Japan's clarification means that there is no longer any need for the Panel to evaluate the merits of the evidence concerning private retail prices as alternative electricity price benchmarks. However, because Japan has clarified that the basis of its alternative retail price argument was *RPP* prices (and not *private* retail prices), we have revised paragraph 7.317 so that it now addresses the correct scope of Japan's alternative benefit argument. We have also made consequential changes to paragraph 7.319.

40. Paragraph 7.252

6.93 Japan notes that in paragraph 7.252, the Panel recognizes Japan's argument that the existence of benefit can also be demonstrated by the history of the electricity market in Ontario and the design and structure of the FIT Programme. However, according to Japan, the Panel has not addressed this argument in its findings. Japan therefore asks the Panel to do so. In addition, Japan asks the Panel to modify the language used to describe the argument that is summarized in paragraph 7.252 in order to more accurately reflect what Japan has actually stated in its submissions. To this end, Japan proposes a number of modifications. Canada submits that Japan's request asks the Panel to make additional findings despite the fact that the interim review stage of proceedings is limited to verifying precise aspects of the Interim Reports. Thus, Canada urges the Panel to reject Japan's request because, Canada's view, it amounts to the improper use of the interim review process to re-litigate Japan's case.

6.94 We have modified paragraph 7.252 to more accurately reflect Japan's argument. However, we disagree with Japan when it asserts that the Panel did not address this line of argument in its findings. It is clear from Japan's submissions that it is arguing that the recent history of the electricity market in Ontario and the design and structure of the FIT Programme demonstrate the existence of benefit because both of these factors show that Ontario's *wholesale electricity market* could not support the existence of renewable electricity generators on the basis of the terms and conditions (including price) available to electricity generators. This point is made in a number of places by Japan, but most clearly in Japan's opening statement at the second meeting of the Panel where, after recalling Ontario's market opening experience in 2002, the enactment of the *Electricity Restructuring Act of 2004* and the 2009 Ministerial Direction establishing the FIT Programme, Japan states: "This history demonstrates that the market price of MCP/HOEP is insufficient to support the existence of FIT generators in the Ontario market. The Government's intervention, through the OPA, to offer prices above those available in the market is the only reason FIT generators operate in the Ontario market today"[19]. Japan

[19] Japan's opening statement at the second meeting of the Panel, paras. 10-13.

elaborated on this statement in its comments on Canada's response to Panel question No. 42 following the second substance meeting, where it explained:

> In the present case, the history of Ontario's electricity market confirms that FIT generators would not have received anything like the terms they receive under FIT contracts absent the FIT Program.{} This was Japan's point at paragraphs 10-13 of its opening statement at the second meeting of the Panel. Canada confirmed this point as early as its first written submission, where it wrote: 'The experience with a competitive market in 2002 demonstrated that *the market alone would not be sufficient* to encourage the construction of new generation facilities [(e.g., wind and solar PV facilities)] able to provide the additional long-term supply needed by Ontario residents'.{} Canada has again just confirmed this point in response to question 1 above, where it explained that the Government of Ontario decided to put an end to the period of liberalization in November 2002 because '[s]upply was hampered by the [liberalized] market structure, which *did not encourage sufficient entry of new generators*', and in order to '*facilitate investment in new generation*'[20].

6.95 Thus, the premise underlying Japan's historical and objective design and structure argument is that these two factors demonstrate that the FIT generators would not exist in the absence of the Government of Ontario's intervention in the wholesale electricity market. This line of argument is recognized in paragraph 7.276 and subsequently addressed by the Panel, in particular, in paragraphs 7.309-7.313. There is therefore no basis for Japan's request to make additional findings.

41. Paragraph 7.259

6.96 Canada submits that the references to its submission in footnote 471 (now footnote 492) are not exhaustive concerning Canada's arguments as to why the complainants' proposed benchmarks are inappropriate. Canada asks that this be reflected in footnote 471 (now footnote 492) by adding the words "See for instance" at the beginning. In addition, Canada asks that a reference be added in footnote 471 (now footnote 492) to paragraphs 136-142 of Canada's opening statement at the second meeting of the Panel because this passage is where its comments on the analytical approach that might have been taken in this case are most comprehensively discussed. Neither Japan nor the European Union has commented on Canada's request. We have made the requested changes to footnote 471 (now footnote 492).

42. Paragraphs 7.272 and 7.308

6.97 Canada argues that the description of the challenged FIT generators that is set out in paragraphs 7.272 and 7.308 is overly broad and captures electricity generators operating under the FIT Programme whose activities have not been challenged by the complainants. To correct this misdescription, Canada proposes two textual modifications to the respective paragraphs. The European Union proposes its own modifications for the same purpose. Japan has not commented on Canada's request. We have made the appropriate amendments to the text of these two paragraphs to address Canada's concern.

43. Footnote 503

6.98 The European Union observes that footnote 503 (now footnote 524) reproduces the same content in terms of the background of Professor Hogan as stated in footnote 30 (now footnote 47) and

[20] Japan's comments on Canada's response to Panel question No. 1 (second set) (footnotes omitted, emphasis original).

suggests that the Panel eliminate this repetition. Canada has not commented on the European Union's suggestion. We have made an appropriate modification to footnote 503 (now footnote 524).

44. Paragraph 7.297

6.99 Canada submits that the last sentence in paragraph 7.297 is incorrect to the extent that it states that the OPG's "unregulated assets" receive the HOEP because they have been "directed by the Government of Ontario to accept whatever price is set regardless of whether this meets marginal costs". In particular, Canada objects to the use of the "whatever price is set" language, and requests that the sentence be revised to explain that the OPG's "unregulated assets" receive the HOEP because the Government of Ontario considers, as a matter of policy, that the HOEP is sufficient for "these older, largely depreciated assets". The European Union considers that the Panel's statement is factually correct, but that it could be drafted in a different manner to account for Canada's concerns without needing to add an explanation of the policy reason behind the Government of Ontario's direction. Japan has not commented on Canada's requested change. We have modified paragraph 7.297 to more accurately explain that the OPG's unregulated assets receive the HOEP, regardless of whether this price covers their marginal costs.

45. Paragraph 7.304

6.100 Canada requests that the first sentence in paragraph 7.304 be redrafted in a way that recognizes that Canada's arguments concerning the complainants' attempts to use out-of-jurisdiction benchmarks included the submission that neither party has satisfied the standards set in WTO case law for their application in the present disputes. Canada does not, however, challenge the accuracy of what is stated in the first sentence of paragraph 7.304. In other words, Canada asks that the description in paragraph 7.304 of Canada's position *vis-à-vis* the complainants' out-of-jurisdiction benchmarks be amplified to capture the full range of its arguments. Japan submits that Canada's request is inapposite to the subject addressed by the Panel in paragraph 7.304, and suggests that the Panel disregard them. Similarly, the European Union considers that Canada's request for clarification relates to an issue that is different to that addressed by the Panel in paragraph 7.304. We agree with Japan and the European Union. The subject matter of paragraphs 7.303-7.307 is the extent to which the out-of-Province benchmarks that have been advanced by the complainants are *derived from competitive wholesale electricity markets*. As all of the parties agree, paragraph 7.304 is accurate when it explains that on this specific issue, Canada has not challenged the complainants' allegations. Thus, we see no need to accept Canada's requested modifications.

46. Footnote 599

6.101 The European Union argues that its submissions concerning the "guarantee element" in the FIT Contract or the provision of more than reasonable remuneration on the basis of "construed" prices, may help to substantiate a finding that the challenged measures confer a benefit regardless of whether the Panel accepts or rejects Canada's contentions on the relevant market. Thus, the European Union asks the Panel to reconsider its conclusions on the merits of these arguments. Canada submits that the European Union's request goes beyond the scope of interim review, and should therefore be rejected.

6.102 The arguments the European Union refers to in its request for review were advanced on the basis of an approach to the question of benefit that requires acceptance of Canada's view that electricity produced by FIT generators is sold on a wholesale market that is separate from all other electricity. Although the European Union suggests in its interim review request that it made these arguments in the alternative, this is not at all clear from the actual submissions made during the proceedings. Rather, it appears that the European Union advanced the relevant arguments only in

response to Canada's benefit submissions *in the event that the Panel were to follow them in its evaluation of the question of benefit*[21]. As we have rejected Canada's contentions in this regard (indeed, in part on the basis of the European Union's own arguments), it is unnecessary for us to determine the merits of the European Union's arguments. There is therefore no basis for the Panel to reconsider its conclusions with respect of the European Union's arguments.

47. Paragraph 7.321

6.103 Japan asks the Panel to recognize in paragraph 7.321 that Japan has requested the Panel to provide guidance on the proper benchmark for determining the existence of benefit in the event that the Panel were to reject the benefit arguments it has advanced. The European Union also asks the Panel to more accurately reflect its own request for the Panel not to limit its analysis to rejecting the arguments it has advanced to substantiate its allegations of benefit. Canada finds the complainants' requests inappropriate because, in Canada's view, they are not supported by any authority under WTO law.

6.104 We agree with Canada that there is no authority in WTO law *requiring* a panel to consider alternative arguments to substantiate a claim when those arguments have not been advanced by the parties. However, we do not believe that the absence of any such *obligation* prevents the Panel majority in these proceedings from setting out its own *observations* on how the question of benefit could have been approached, provided, of course, that in doing so the Panel majority does not end up making the case for any of the parties[22]. In this regard, we note that the complainants have explicitly asked the Panel to provide additional guidance on the question of benefit, an issue that has been at the centre of substantial debate between the parties in the context of a dense and complicated fact pattern. In this light, and bearing in mind our duties and responsibilities under the DSU[23] as well as the objectives of the WTO dispute settlement system[24], we do not believe that the absence of any authority in WTO law compelling panels to consider the merits of arguments that have not been made by parties to a dispute prevents the Panel majority from outlining its own observations on the question of benefit in these proceedings, as requested by the complainants. We have therefore decided to accept the changes to paragraph 7.321 that have been requested by the European Union and Japan.

48. Paragraph 7.322

6.105 Canada suggests that the Panel should replace the words "those that currently exist" at the end of paragraph 7.322 with "prevailing market conditions". Japan submits that Canada has offered no explanation as to why the term from Article 14(d) of the SCM Agreement should be used in paragraph 7.322. In Japan's view, the terms advanced by Canada are not necessarily synonymous with those used by the Panel. Thus, in the absence of any explanation on the part of Canada as to why the language chosen by the Panel should be modified, Japan requests that the Panel reject Canada's request. The European Union also notes that there is a difference between the terms "prevailing market conditions" and "those that currently exist" in that the former refers to the prevailing market conditions (i.e. qualifying them as "prevailing") whereas the latter refers to those conditions (all or most, without qualifying them) that currently exist in Ontario. Therefore, not unlike Japan, the European Union asks the Panel to decline the changes that Canada has requested.

[21] See, for example, European Union's second written submission, paras. 72, 78 and 82; and opening statement at the second meeting of the Panel, paras. 24-25.

[22] See, e.g. Appellate Body Report, *Japan – Agricultural Products II*, para. 129.

[23] Article 11, DSU.

[24] See, in particular, Articles 3.2, 3.3 and 3.7 of the DSU.

6.106 Japan submits that the exhibits cited in footnote 603 (now footnote 632) do not support the proposition that the Government of Ontario has decided that part of its additional generating capacity must come "in particular" from "small-scale projects using solar PV and wind power technologies". Thus, Japan requests that the Panel remove the references to "small-scale" from this paragraph. Canada argues that Exhibits CDA-55 and CDA-45 refer to the scale of the projects referred to by the Panel, and therefore considers the Panel's statement justified and based on record evidence.

6.107 Turning first to Canada's requested modification, there is, in our view, very little, if any, difference between the expressions "current" or "prevailing" conditions of supply and demand in a particular market. Indeed, one of the definitions of the word "prevail" is "current". Nevertheless, it was not the Panel's intention to articulate in paragraph 7.322 the test for determining the amount of a subsidy in terms of benefit that is described under Article 14(d) of the SCM Agreement. We have therefore declined Canada's request.

6.108 As regards Japan's request for review, we have modified the language of the relevant passage in paragraph 7.322 as well as the references in footnote 603 (now footnote 632) to more accurately reflect the point the Panel intended to make.

49. Paragraphs 7.322-7.326 and 8.7

6.109 The European Union requests that the Panel complete the benefit analysis allegedly performed by the Panel in paragraphs 7.322-7.325 (now paragraphs 7.322-7.327) by undertaking any one or more of three specific actions. First, the European Union submits that the Panel may complete the benefit analysis on the basis of the existing set of facts that are on the record of these disputes. In this regard, the European Union points to: (i) the information it has provided on the costs of solar PV and windpower generation; (ii) the prices that windpower generators have offered in bidding processes in Quebec in 2008; (iii) its submissions on the "reasonable" rate of return offered to FIT generators; and (iv) its arguments relating to the possibility of obtaining electricity supply via an auction process or by direct negotiation with individual generators. Secondly, the European Union submits that even if the Panel were to consider that the facts on the record were insufficient to complete its analysis, it may find the existence of benefit by drawing adverse inferences in the light of what the European Union describes as the Panel's view that Canada has failed to sufficiently explain several pieces of information necessary to understand the 11% rate of return. Thirdly, and in any event, the European Union maintains that the Panel should exercise its authority under Article 13 of the DSU and seek the information necessary for it to complete its benefit analysis. In this regard, the European Union fails to see how the Panel's analysis could serve the purposes described in Articles 3.4 and 3.7 of the DSU if it were to stop at a given point because the Panel considers there are insufficient facts on the record to complete its work. The European Union finds particular support for this latter request in *US – Large Civil Aircraft (Second Complaint)*, where the Appellate Body found that "by failing to exercise its authority to seek out relevant information to satisfy its predominance approach in assessing the claim before it, the Panel acted inconsistently with its obligations under Article 11 of the DSU…"[25]. According to the European Union, the Panel in the present proceedings is in the same position as the panel in *US – Large Civil Aircraft (Second Complaint)*, which developed an alternative approach to examine one of the issues at stake but did not complete the analysis since neither party was given the opportunity to provide the necessary evidence based on the panel's approach. Finally, in the event that the Panel were to reject the previous three requests, the European Union asks the Panel to make a number of changes to paragraphs 7.326(ii) and 8.7 (now paragraphs 7.328(ii) and 8.7) to reflect its view on what would be a more accurate description of the Panel's findings.

[25] Appellate Body Report, *US – Large Civil Aircraft (Second Complaint)*, para. 1145.

6.110 Not unlike the European Union, Japan submits that there is sufficient evidence on the record of these disputes for the Panel to complete its benefit analysis and asks the Panel to do so. In particular, Japan points to a series of facts that it argues demonstrate that solar PV and windpower FIT projects, although carrying principally sovereign risk, have a targeted pre-tax rate of return on equity of 15.8%, whereas the long-term Canadian government bond yield is 4.25%. Moreover, Japan notes that while Ontario's regulated utilities, which do not operate on the basis of a price that is guaranteed for 20 years, were set a target rate of return for 2009 of 9.75%, the actual rate of return obtained by such entities in 2011 was 5%, whereas the pre-tax rate of return for FIT generators was, according to Japan, set at 15.8%. Thus, Japan argues that the record contains sufficient evidence for the Panel to complete its benefit analysis and find the existence of benefit.

6.111 Canada points out that there is nothing in WTO law requiring a panel to consider alternative approaches to an issue that have not been proposed by the parties, particularly after a panel has found that the complainant(s) have failed to make their case regarding that issue. Canada emphasizes that a panel is not entitled to make the case for any of the parties. Moreover, referring *inter alia* to *EC – Sardines* and *Japan – DRAMs*[26], Canada submits that it is well established that the interim review stage of a proceeding is not intended to be used to change a panel's decision, re-argue a case, introduce new evidence or make new arguments. Rather, in Canada's view, interim review is limited to reviewing "precise aspects" of a report. Finally, Canada maintains that the European Union's reliance on *US – Large Civil Aircraft (Second Complaint)* to support its contention that the Panel must seek new information is misplaced. In this regard, Canada notes that in the present proceedings, the panel's analysis amounts to a "discussion of theoretical benchmarks after its findings on the issue of benefit have been made", whereas in *US – Large Civil Aircraft (Second Complaint)*, the panel used a methodology that was not suggested by a party, nor discussed with the parties before the panel used it to make its findings. Thus, for all of these reasons, Canada submits that the complainants' requests for review should be rejected in their entirety.

6.112 The complainants requests for interim review of paragraphs 7.322-7.326 (now paragraphs 7.322-7.328) are focused on the Panel majority's observations that are set out in these paragraphs on how they consider the question of benefit could have been addressed in these disputes. As already explained[27], the Panel is of the view that there is no authority in WTO law *requiring* a panel to consider alternative arguments to substantiate a claim when those arguments have not been advanced by the parties. Nevertheless, in the light of the complainants' explicit requests for the Panel to explain its own position with respect to the question of benefit were it to reject the substantial and diverse range of submissions they themselves have made on the issue, the Panel majority decided to set out its own observations on one approach it considers could have been validly pursued in these proceedings. The Panel majority did so bearing in mind its duties and responsibilities under the DSU[28], which include the obligation not to make a *prima facie* case for a party that bears the burden of making it[29].

6.113 As is evident from the language used by the Panel to draft its overall conclusions and recommendations in Section 8 of the respective Reports, the Panel majority's observations in paragraphs 7.322-7.326 (now paragraphs 7.322-7.328) do not and should not be considered to form part of the Panel majority's *findings and conclusions* on the question of benefit. Rather, they should be viewed as an attempt by the Panel majority to respond to the complainants' specific requests in a manner that is consistent with a panel's tasks and obligations under WTO law. In other words, the

[26] In particular, Appellate Body Report, *EC – Sardines*, para. 301; and Panel Report, *Japan – DRAMs (Korea)*, para. 6.2.
[27] See above, para. 6.104.
[28] Article 11, DSU.
[29] See, for example, Appellate Body Report, *Japan – Agricultural Products II*, para. 129.

Panel majority's observations do not form part of the Panel majority's "benefit analysis" *for the purpose of determining the merits of the complainants' claims*. For this reason, there is no basis for the Panel to accept the complainants' requests for review. Thus, to the extent that the complainants' requests for interim review are premised on the view that the Panel majority's observations represent actual *findings* on the merits of their subsidization arguments that should be elaborated or further developed with a view to "completing the benefit analysis", they cannot be accepted. In any case, we are of the view that certain aspects of the complainants' requests that the Panel take account of particular facts that are allegedly already on the record, as well as the European Union's request for the Panel to seek additional information, go beyond the scope of interim review proceedings. In this respect, we agree with Canada that it is well established that the interim review stage of a proceeding is not intended to be used to re-argue a case, make new arguments or to introduce new evidence. Thus, we have rejected the complainants' requests also for this reason.

6.114 In order to clarify that the Panel majority's observations are not *findings* on the merits of the complainants' subsidization arguments, we have made a number of changes to paragraphs 7.321 and 7.325 (now paragraphs 7.321 and 7.325-7.327). In addition, we have made changes to paragraph 7.325 (now paragraphs 7.325-7.327) to reflect some of the facts the complainants have pointed to in their interim review comments that were not previously fully taken into account by the Panel majority.

VII. PANEL FINDINGS

A. INTRODUCTION

1. General principles of treaty interpretation, the applicable standard of review and burden of proof

(a) Treaty interpretation

7.1 With respect to the question of legal interpretation, Article 3.2 of the DSU provides that Members recognize that the dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Article 31 of the Vienna Convention on the Law of Treaties ("Vienna Convention")[30] is generally accepted to be one such customary rule. Paragraph 1 of this rule reads as follows:

> 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.

7.2 There is a considerable body of WTO case law dealing with the application of Article 31 of the Vienna Convention in WTO dispute settlement. It is clear that interpretation must be based above all on the text of the treaty[31], but that the context of the treaty also plays an important role. It is also well-established that customary principles of treaty interpretation "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended"[32]. Furthermore, panels "must be guided by the rules of treaty interpretation set out

[30] The Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, 1155 United Nations Treaty Series 331 (1980); 8 International Legal Materials 679 (1969).
[31] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 11.
[32] Appellate Body Report, *India – Patents (US)*, para. 45.

in the Vienna Convention, and must not add to or diminish rights and obligations provided in the WTO Agreement"[33].

(b) Standard of review

7.3 Panels generally are bound by the standard of review set forth in Article 11 of the DSU, which provides, in relevant part, that:

> [A] panel should make an *objective assessment of the matter* before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements … (emphasis added)

7.4 The obligation imposed by Article 11 of the DSU includes the consideration of all aspects of the matter, both factual and legal, and implies *inter alia* that a panel should consider the issues raised, without overstepping its terms of reference. Article 11 further provides that panels should also make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

(c) Burden of proof

7.5 The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim[34]. Therefore, the complainants bear the burden of demonstrating that the challenged measures are inconsistent with the SCM Agreement, the TRIMs Agreement and the GATT 1994. The Appellate Body has stated that a complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party[35]. Finally, it is generally for each party asserting a fact to provide proof thereof[36].

2. Measures at issue and summary of claims

7.6 The complainants have brought these disputes against Canada in order to challenge the WTO-consistency of the "Minimum Required Domestic Content Level" prescribed under the FIT Programme adopted by the Government of the Province of Ontario[37] in 2009, as well as all individual FIT and microFIT Contracts implementing this requirement since the FIT Programme's inception ("the measures at issue" or "the challenged measures"). According to the complainants, the "Minimum Required Domestic Content Level" renders the FIT Programme, and all relevant FIT and microFIT Contracts involving electricity generation projects using solar PV or windpower technology[38], measures incompatible with Article III:4 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), trade-related investment measures ("TRIMs") inconsistent with Article 2.1 of the Agreement on Trade-Related Investment Measures ("TRIMs Agreement"), and prohibited subsidies

[33] Appellate Body Report, *India – Patents (US)*, para. 46.
[34] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.
[35] Appellate Body Report, *EC – Hormones*, para. 104.
[36] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.
[37] It is not disputed that, under public international law, Canada is responsible for the actions of the Government of the Province of Ontario ("Government of Ontario").
[38] The "Minimum Required Domestic Content Level" is prescribed for solar PV facilities operating under either a FIT or microFIT Contract, as well as windpower facilities operating under a FIT Contract. A more detailed description of the FIT Programme and the FIT and microFIT Contracts, including the "Minimum Required Domestic Content Level", is set out below at paras. 7.64-7.68, 7.158-7.166, and 7.195-7.219.

under the terms of Articles 3.1(b) and 3.2 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").

7.7 Throughout these proceedings, however, the complainants have emphasized that in contesting the WTO-consistency of the challenged measures, they do not question the legitimacy of the objectives pursued by the Government of Ontario through the FIT Programme of reducing carbon emissions and promoting the generation of electricity from renewable energy sources. In particular, Japan has explained that "Japan does not take issue with Ontario's stated goal of enhancing renewable energy generation"[39] or "the government's intervention as such to internalize the positive externalities of renewable energy generation technologies"[40]. Likewise, the European Union does not "contest the general purpose of the FIT Program, as helping to promote electricity supply from renewable energy sources", highlighting that "[s]uch a purpose is legitimately valid and … WTO Members can and should actively support it"[41]. What the complainants call into question is limited to the alleged trade-distortive element of the challenged measures, which they identify to be the "Minimum Required Domestic Content Level" given effect through the FIT Programme and the FIT and microFIT Contracts. According to the complainants, this aspect of the challenged measures affords a form of WTO-inconsistent protection to producers of certain types of equipment used to generate electricity from solar and wind energy ("renewable energy generation equipment") that are based in Ontario to the detriment of competing industries in other WTO Members, and should therefore be eliminated[42]. Thus, as Japan has declared[43], these disputes cannot be properly characterized as "trade and environment" disputes, but rather, they should be thought of as "trade and investment" disputes.

3. Preliminary rulings

7.8 The Panel announced its conclusions on the merits of Canada's requests for preliminary rulings at the opening session of the first substantive meeting with the parties on 27 March 2012. The Panel dismissed Canada's requests finding that the legal bases of the complainants' prohibited subsidy claims were described with sufficient clarity in their respective Panel Request to "present the problem clearly". The Panel subsequently issued its preliminary rulings to the parties in written form on 11 May 2012. After consulting with the parties, the Panel decided: (a) to circulate its preliminary rulings to all Members; and (b) that the circulated preliminary rulings would form an integral part of the final Panel Reports, subject to any revisions necessary in the light of comments received from the parties during interim review. The Panel's preliminary rulings were circulated on 25 May 2012 in documents WT/DS412/8 and WT/DS426/7.

4. Factual background

(a) Introduction

7.9 As already mentioned, these disputes are about the "Minimum Required Domestic Content Level" that is applied by the Province of Ontario under the FIT Programme, and the FIT and microFIT Contracts, in relation to certain electricity generation facilities utilizing solar PV and windpower technology. In order to fully understand these measures and properly evaluate the merits of the complainants' claims, it is, in our view, essential to comprehend the role they play in Ontario's electricity system. In order to do so, we believe it is important to appreciate not only how Ontario's

[39] Japan's first written submission, para. 3.
[40] Japan's response to Panel question No. 44 (first set).
[41] European Union's first written submission, para. 2; and opening statement at the first meeting of the Panel, para. 3.
[42] Japan's first written submission, paras. 1-3; opening statement at the first meeting of the Panel, para. 5; European Union's first written submission, paras. 2-6; and second written submission, para. 1.
[43] Japan's first written submission, para. 3.

electricity system currently operates and has evolved over time, but also the main characteristics and features of electricity and electricity systems in general. The complexity of electricity systems and how electricity prices are determined in Ontario are germane to much of our analysis of the complainants' claims. Thus, in the following section of our Reports, we set out what we consider to be the overall factual background against which we will review and evaluate the parties' arguments[44]. We start by outlining the key characteristics of electricity and electricity systems in general, before briefly describing the history of Ontario's electricity system, and then turning to explain the structure and operation of the electricity system that exists in Ontario at present drawing largely from the description provided by Japan in its first written submission[45]. The section ends with a short summary of the key features of the challenged measures – the FIT Programme, and the FIT and microFIT Contracts.

(b) Electricity and electricity systems

7.10 Electricity is the lifeblood of modern society. Yet it is invisible to the naked eye and often unnoticed in the day-to-day lives of billions of people. There is little doubt, however, that reliable systems of electricity are the engines that drive economies world-wide, bringing power to a host of consumers for a myriad of uses and applications including in homes, factories, offices, farms, transportation systems and telecommunications networks. Most goods depend upon electricity for their production, as do essential services ranging from health-care to banking. Few discoveries can boast such wide-ranging impacts on the quality of human life as electricity.

7.11 Electricity has a number of specific properties compared to other goods[46]. The provision of a secure, safe, reliable and sustainable supply of electricity requires a large system that has to be in continuous operation to ensure that it remains energised. In general, electricity is a reliable form of energy but it is also extremely dangerous if the system is not secured against accidental leakage. A critical physical characteristic of electricity is that it is intangible and, with certain limited exceptions, cannot be effectively stored[47]. It is particularly because of the latter characteristic that electricity must

[44] The facts that are described in this section will, to the extent necessary, be further explained and elaborated in the course of our evaluation of the parties' arguments in the remainder of these Reports.

[45] We note that Japan's factual description of Ontario's electricity system was adopted by the European Union as part of its arguments in these proceedings, and to a large extent, has not been contested by Canada.

[46] We note that it is not contested in these disputes that electricity produced from electricity generation facilities (what the parties refer to as "commodity" electricity) is a good and a product for the purpose of the covered agreements that are at issue. Indeed, both the European Union and Canada argue this to be the case. In doing so, the European Union explains that a number of WTO Members (including the European Union and the United States) have relied upon the optional heading for "electrical energy" contained in the Harmonized Commodity Description and Coding System to take tariff commitments with respect to electricity in their GATT Schedules, or as in the case of Canada, simply include the relevant tariff line without setting a tariff binding. Although explicitly stating that Japan does not take a position on whether electricity qualifies as a good or a product, Japan describes electricity produced from generating facilities as a "commodity", and recognizes that it is treated as a good in the optional heading contained in the Harmonized Commodity Description and Coding System. Significantly, in our view, Japan has at no stage in these proceedings responded to Canada's argument that the challenged measures involve government purchases of *goods* by rejecting Canada's contention that electricity is a good and a product. See Japan's response to Panel questions No. 43 (first set) and No. 51 (second set); first written submission, paras. 85, 96-97, 99 and 224; European Union's response to Panel question No. 51 (second set); and Canada's response to Panel question No. 51(second set).

[47] Pumped-storage hydroelectric facilities provide a limited means of storing electricity. Such facilities use electricity to pump water into reservoirs at higher elevations when demand is low, and release it through turbines to generate electricity during peak-demand periods. William W. Hogan, "Overview of the Electricity System in the Province of Ontario", 21 December 2011, Exhibit CDA-2, ("Hogan Report"), fn. 6. Professor William W. Hogan is the Raymond Plank Professor of Global Energy Policy at Harvard University

be generated at precisely the time that it is consumed by end-users. Electricity is delivered to consumers through the operation of a vast integrated infrastructure of high-voltage transmission lines (connecting generators to distributors and large consumers) and lower-voltage distribution lines that ultimately link to individual consumers[48]. This is generally referred to as a grid and requires a massive infrastructure of complementary equipment to ensure that it functions. Access to this grid either to supply electricity into it or to take electricity out of it has to be tightly controlled to ensure the integrity of the system as a whole. Electricity delivery networks will fail if the quantity of electricity demanded (known as "load" in industry terminology) is greater or less than the quantity of electricity supplied for any length of time[49]. It is therefore necessary to maintain a continuous supply-demand balance between generators and consumers, a task complicated by the daily fluctuations in electricity demand as well as the physical capacity limits of transmission and distribution lines. When important imbalances occur, electricity networks can be destabilized, leading to brownouts, blackouts or, in extreme cases, the interruption of power to all consumers[50]. In the event of a major failure in a grid its restarting can take a significant period of time which is massively disruptive to modern economies and societies.

7.12 One important consequence of the need to maintain a continuous supply-demand balance across an entire electricity system is that uncoordinated bilateral trades between buyers and sellers of electricity cannot take place. In other words, because of the nature of how electricity must be produced and consumed, it is generally not possible for an individual consumer to enter into an individual supply contract with one or more specific generators. As a result, electricity systems require some kind of central coordination mechanism to ensure that the output of generators is exactly equal to the amount demanded by consumers (plus inevitable transmission losses) and that the physical limitations of the electricity system are not violated[51].

7.13 The fact that there are no close substitutes for electricity, combined with a lack of easily observable price signals for end users in general, implies that electricity demand is largely unresponsive to prices in the short run (i.e. it is relatively price inelastic). Thus, global electricity demand will fluctuate over the course of a day, week, month or year, as factors other than price (e.g. air temperature and hours of daylight) cause the demand for electricity to change. A typical pattern of electricity demand on a weekday in Ontario would show that most electricity is consumed during daylight hours, with consumption steadily increasing from 5.00 a.m. until reaching its peak at around 5.00 p.m.[52].

7.14 The fact that electricity cannot be stored in large quantities and that demand for electricity fluctuates over any day means that specific forms of generating capacity have to be developed to provide for this fluctuation. In addition, to keep a grid functional it has to be kept operational or "live" continuously. Therefore, in order to satisfy demand, electricity systems utilize a mix of generation technologies, each with different cost structures and operational requirements. According to industry practice, the different types of facilities may be described as "base-load", "intermediate" or "peaking",

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where he is *inter alia* the Research Director of the Harvard Electricity Policy Group. Professor Hogan has been actively engaged in the design and improvement of competitive electricity markets in many regions of the United States, as well as around the world, from England to Australia. His activities include designing the market structures and market rules by which regional transmission organizations, in various forms, coordinate bid-based markets for energy, ancillary services, and financial transmission rights.

[48] Electricity may also be obtained through cogeneration facilities. See Ontario' Long-Term Energy Plan, Exhibit CDA-6.

[49] Hogan Report, Exhibit CDA-2, p. 13.

[50] Hogan Report, Exhibit CDA-2, p. 13.

[51] Hogan Report, Exhibit CDA-2, p. 12.

[52] A graphical depiction of the patterns of weekday demand for electricity in Ontario in Summer and Winter can be found below at para. 7.279.

depending upon when and for how long they operate, whether they can raise or lower their output rapidly in a controlled manner ("dispatchability"), and whether their costs are mostly fixed or variable. The reliability of a generation facility's output is measured by its "capacity factor", which is defined as the percentage of hours during the year that it is able to operate.

7.15 Base-load generation is that portion of an electricity system's supply mix that is expected to be able to operate at all times, i.e. during both low and high demand periods. Base load generation is typically characterized by high fixed costs, low marginal costs, and high capacity factors. Hydroelectric and nuclear stations, both of which have large sunk capital costs and minimal fuel costs, are quintessential examples of base-load power, but this function may also be performed by other technologies (e.g. coal) depending on the supply mix in a given jurisdiction and on the cost of fuel. Although base-load generators have high capacity factors, they tend to have more limited dispatchability. Hydroelectric plants are an exception in that their output can be raised or lowered on relatively short notice.

7.16 Intermediate-load generation supplies power when system demand is above its minimum level but still below its maximum level. It is generally characterized by moderate fixed and marginal costs. Coal plants are frequently used for intermediate generation, but improvements in the efficiency of natural gas plants and falling fuel prices have made natural gas a viable option for intermediate supply. Coal-fired generation is less dispatchable than natural gas but more dispatchable than nuclear.

7.17 Peak-load generators tend to have lower fixed costs than other types of facilities, as well as relatively high marginal costs, and a high degree of dispatchability. Peaking generators may only run infrequently, usually at times when demand is near the system-wide capacity limit.

7.18 Up until fairly recent times, a mix of the above-mentioned "conventional" generation technologies has traditionally been considered to provide for the most economically efficient way of producing power for the purpose of reliable electricity systems. However, concerns over the environmental impact and cost of certain technologies have increasingly emerged as key considerations in the choice of supply mix[53]. To address these concerns, electricity systems around the world have gradually begun to include renewable technologies into their production mix.

7.19 Generation facilities utilizing renewable energy technologies, such as solar PV and windpower, resemble base-load generation in that most of their costs are capital costs, with fuel costs being minimal or non-existent. However, they differ from base-load generation in that their capacity utilization is lower due to intermittent output. Wind turbines only produce electricity when the wind is blowing, which may or may not coincide with consumer demand. In contrast to the uncertainty of wind generation, solar PV is more predictable, producing all of its output during the day and none at night. A downside of solar generation is that its output falls just when daily demand is increasing as the sun sets and households and businesses turn on their lights. The fact that solar production runs counter to daily load profiles forces conventional generators to ramp up their production at night in order to make up for lost output from solar generators. As a result, generation facilities utilizing solar PV and windpower technologies may need to be paired with conventional generation in order to minimize the potential for supply disruptions[54].

7.20 Until the 1970s, electricity generation in most countries was dominated by vertically integrated monopolies, structured as either state-owned enterprises or regulated private monopolies. Monopolies were tolerated due to the belief that economies of scale in electricity could only be captured by a single, large producer. Advances in generation technology and the desire of private

[53] Hogan Report, Exhibit CDA-2, p. 6.
[54] Hogan Report, Exhibit CDA-2, p. 11.

suppliers to gain full access to transmission networks eventually broke down this consensus. Since the 1970s, many countries have restructured their electricity systems to incorporate various elements of competition.

(c) Electricity in Ontario

(i) 1906 to 2002

7.21 The origins of Ontario's electricity system can be traced back to 1906, when the Government of Ontario established the Hydro-Electric Power Commission of Ontario ("HEPCO") as "the world's first publicly owned electric utility"[55]. In its early years, Ontario's electricity system relied almost entirely upon hydroelectric power, but as demand for electricity grew, the Province chose to diversify its supply mix, adding coal-fired power stations during the 1950s and nuclear power in the 1970s[56]. In 1974, HEPCO was recognized as a "crown corporation" and renamed Ontario Hydro.

7.22 As a vertically integrated public utility with generation, transmission and distribution functions, Ontario Hydro dominated the electricity sector until the *Energy Competition Act of 1998*, which enacted the *Electricity Act of 1998*, authorized its "unbundling" into five successor entities[57]. By this time, much of Ontario's electricity infrastructure, including its coal-fired power plants, needed to be refurbished or replaced[58]. In addition, cost overruns in Ontario Hydro's nuclear programme had left the utility heavily indebted, and provided a strong incentive to pursue market-oriented reforms along similar lines to what had been tried in other jurisdictions[59]. The successor entities to Ontario Hydro were: (i) the Independent Market Operator (subsequently renamed the Independent Electricity System Operator in 2005 (see below)), charged with administering Ontario's wholesale electricity market and directing the flow of electricity from generators to consumers through the transmission system; (ii) Ontario Power Generation ("OPG"), which inherited Ontario Hydro's generation assets, at the time accounting for approximately 90% of Ontario's electricity capacity; (iii) Hydro One Inc. ("Hydro One"[60]), which assumed Ontario Hydro's transmission network and rural local distribution businesses; (iv) the Ontario Electricity Financial Corporation ("OEFC"[61]), which inherited other Ontario Hydro assets and liabilities, including contracts with Non-Utility Generators ("NUGs"[62]) and CAD 20 billion in stranded debt; and (v) the Electrical Safety Authority, which was given responsibility for regulating the system's safety[63]. In addition, the *Ontario Energy Board Act of 1998* designated the OEB as the regulator of the new electricity market, with the authority to, *inter alia*, approve certain rates and prices applicable in the market[64].

[55] Ontario's Long-Term Energy Plan, Exhibit CDA-6, p. 5.
[56] Ontario's Long-Term Energy Plan, Exhibit CDA-6, p. 5.
[57] Ontario's Long-Term Energy Plan, Exhibit CDA-6, p. 5.
[58] Ontario's Long-Term Energy Plan, Exhibit CDA-6, p. 5; and Hogan Report, Exhibit CDA-2, p. 19.
[59] See e.g. Hogan Report, Exhibit CDA-2, pp. 18-19; and Report of the Advisory Committee on Competition in Ontario's Electricity System to the Ontario Minister of Environment and Energy, "A Framework for Competition", May 1996, ("A Framework for Competition"), Exhibit CDA-3, pp. 27-28.
[60] The basic corporate structure of Hydro One and the nature of its current operations in Ontario are discussed further below at paras. 7.34-7.35 and 7.234-7.238.
[61] The basic corporate structure of the OEFC and the nature of its current operations in Ontario, to the extent relevant to the arguments made in the present proceedings, are discussed further below at para. 7.43.
[62] The role of NUGs in Ontario's power system is explained below at paras. 7.26 and 7.31.
[63] Hogan Report, Exhibit CDA-2, pp. 20-21.
[64] Ontario Energy Board Act of 1998, Exhibit JPN-6.

(ii) The 2002 competitive wholesale market[65]

7.23 After several years of preparation, Ontario's competitive wholesale electricity market opened in May 2002. It was hoped that the restructuring of the electricity sector would attract private investment into the generation business, but despite a 30% rise in the price of electricity in the months following the market opening, the anticipated investment failed to materialize. Instead, the relatively high electricity prices, caused by increased demand due to record high temperatures in Ontario over the summer of 2002, led the Government of the day to temporarily freeze electricity prices for residential, institutional and small business consumers[66].

7.24 As a result of the problems encountered during the 2002 market opening experience, the Government of Ontario decided to once again restructure Ontario's electricity system in 2004, and to this end enacted the *Electricity Restructuring Act of 2004* in order to "restructure Ontario's electricity sector, to promote the expansion of electricity supply and capacity, including supply and capacity from alternative and renewable energy sources, facilitate load management and electricity demand management, encourage electricity conservation and the efficient use of electricity and to regulate prices in part of the electricity sector"[67]. One of the key reforms introduced under the *Electricity Restructuring Act of 2004* was the creation of the Ontario Power Authority ("OPA"), which was given a number of important tasks including responsibility for overall long-term system planning, activities in support of ensuring an adequate, reliable and secure electricity supply, and the promotion of the diversification of Ontario's electricity supply with a particular emphasis on renewable and clean energy[68]. The *Electricity Restructuring Act of 2004* laid the foundations for the electricity system that currently operates in Ontario.

(iii) Ontario's current "hybrid" electricity system

7.25 In its current incarnation, Ontario's electricity system has been described as a partially liberalized "hybrid"[69] system where both public and private entities participate in core generation, transmission, distribution and retail activities. Although far from the government-dominated system that characterized its first eight decades of operation, the Government of Ontario continues to play a critical role in all aspects of the system's functioning. The key participants in this system and their interactions are described in the following sections.

Generation

7.26 As of year-end 2010, there were approximately 34,700 MW of installed generation capacity in Ontario[70]. This capacity can be roughly separated into three groups of generators[71]: (i) the government-owned assets of OPG, which as already mentioned are the former generation assets of Ontario Hydro; (ii) NUGs, which are private generators that entered into supply contracts with

[65] A more detailed description and analysis of Ontario's competitive wholesale market opening experience are set out below at paras. 7.285-7.292.

[66] Ontario Energy Board, "History of the OEB" ("History of the OEB"), Exhibit CDA-17, p. 2.

[67] Highlights of the *Electricity Restructuring Act of 2004*, OEB website, ("Highlights of the *Electricity Restructuring Act of 2004*"), Exhibit JPN-9. See also *Electricity Restructuring Act of 2004*, S.O. 2004, c. 23, ("*Electricity Restructuring Act of 2004*"), Exhibit CDA-18, Section 1(a).

[68] *Electricity Act of 1998*, Chapter 15, Schedule A, as amended, ("*Electricity Act of 1998*"), Exhibit JPN-5, Section 25.2.

[69] Hogan Report, Exhibit CDA-2, p. 21.

[70] Power Outlook: Winter 2010-2011, ("IESO Power Outlook"), Exhibit JPN-10.

[71] Overview of Electricity Regulation in Canada, Blakes, ("Overview of Electricity Regulation in Canada"), Exhibit JPN-7, pp. 11-13; and Quick Takes: Electricity Pricing, Issue 19, IESO website, ("Quick Takes: Electricity Pricing"), Exhibit JPN-3, pp. 2-3.

Ontario Hydro in the 1980s and 1990s; and (iii) Independent Power Producers ("IPPs"), which comprise all the other generators in Ontario that have started to operate since the wholesale market was restructured. The IPPs include generators operating under the FIT Programme.

7.27 OPG is a wholly-owned corporation of the Government of Ontario that owns three nuclear, five thermal, 65 hydroelectric and two windpower generation facilities[72]. In 2010, the OPG produced approximately 58% of all electricity generated in Ontario. The OPG's nuclear and base-load hydroelectric generation facilities are classified as "OPG Regulated Assets". The prices received by the OPG for electricity produced by these facilities are set by the Ontario Energy Board ("OEB"[73]) on the basis of the principle of "cost recovery and a margin of return"[74]. For 2011, the return on equity for the OPG's regulated assets was set by the OEB at 9.43%[75]. However, payments to the OPG for the supply of electricity from its other "unregulated" hydroelectric and coal-fired facilities, which account for 8% of electricity generation in Ontario, are not guided by the principle of cost recovery and margin. These assets receive the Hourly Ontario Electricity Price ("HOEP"[76]), which is generally lower than the regulated price obtained by the OPG's regulated assets. Canada explains that the OPG's unregulated assets receive the HOEP because "most of these are state-owned facilities [that] are over 60 years old, and the capital costs of these facilities have largely been depreciated"[77]. Similarly, the OPG's coal-fired facilities either receive the HOEP because, again, they are facilities "whose costs have largely been depreciated" or a price under contract with the OEFC which allows the OPG to recover its costs[78]. The operations of these unregulated coal-fired assets will be shut down in 2014[79].

7.28 The remaining generators operating in Ontario account for 42% of electricity supply. Of these, the IPPs, which generate around 40% of Ontario's electricity supply, receive prices that are negotiated or set under different types of OPA initiatives and contracts including: the Clean Energy Supply ("CES") contracts for natural gas[80]; the Renewable Energy Supply ("RES") Requests for Proposals I, II and III[81]; the Hydroelectric Contract Initiative ("HCI") for grid-connected non-OPG-

[72] The OPG was established under Part IV.1 of the *Electricity Act of 1998*, Exhibit JPN-5. See also Investor Relations, OPG website, ("OPG Investor Relations"), Exhibit JPN-14.

[73] The nature of the OEB's operations and its relationship with the Government of Ontario are discussed below at para. 7.42.

[74] Canada's response to Panel question No. 26 (first set).

[75] OEB, "In the Matter of an Application by Ontario Power Generation Inc., Payment Amounts for Prescribed Facilities for 2011 and 2012: Decision with Reasons", EB-2010-0008, 10 March 2011 ("OEB Decision on Payment Amounts for Prescribed Facilities for 2011 and 2012"), Exhibit CDA-65, p.122. As of 1 March 2011, the OPG was paid CAD 5.59 cents and CAD 3.41 cents for each kWh of electricity that was generated, respectively, by its regulated nuclear and hydroelectric assets. See, Japan's first written submission, para. 36 and Payment Amounts Order (EB 2010-0008), Ontario Energy Board, 11 April 2011, ("OEB Payment Amounts Order"), Exhibit JPN-19, pp. 4-5.

[76] The HOEP is the price for electricity that is bought and sold through the operation of the IESO-administered wholesale electricity market. The average HOEP received by the OPG's unregulated assets in 2010 was CAD 3.7 cents/kWh. OPG Fact Sheet: Year End 2010, ("2010 OPG Fact Sheet"), Exhibit JPN-15. The mechanisms used to determine the HOEP as well as its relevance to the prices paid to generators for electricity delivered to Ontario's electricity grid are discussed below at paras. 7.45-7.53.

[77] Canada's response to Panel question No. 26 (first set).

[78] The average HOEP received by these assets in 2010 was CAD 4.3 cents/kWh. 2010 OPG Fact Sheet, Exhibit JPN-15.

[79] Canada's response to Panel question No. 26 (first set).

[80] Canada's first written submission (DS412), para. 31, referring to Direction from Dwight Duncan, Minister of Energy, to Jan Carr, Chief Executive Officer of the OPA, 24 March 2005, ("Direction from Minister of Energy to CEO of the OPA from March 2005"), Exhibit CDA-25.

[81] Hogan Report, Exhibit CDA-2, pp. 30-32; and Progress Report on Electricity Supply: Second Quarter 2011, Ontario Power Authority, ("OPA Progress Report: Second Quarter 2011"), Exhibit JPN-28, p. 1.

owned hydro facilities[82]; the Combined Heat and Power ("CHP") Requests for Proposals I, II, III[83]; the Renewable Energy Standard Offer Programme ("RESOP")[84]; and the FIT Programme.

7.29 Under the CES and RES initiatives, the OPA awarded supply contracts through a competitive bidding process which set prices for delivered electricity at the levels of the lowest bids meeting the specified conditions. Prices paid to generators operating under the HCI and CHP initiatives were negotiated with the OPA and, according to Canada, generally guided by the rates paid under competitive contracts determined through a request for proposal[85]. Under the RESOP, the prices paid to solar PV generators are based primarily on the principle of cost recovery. For non-solar RESOP generators, prices are based on those applied under the RES initiative. As regards the FIT Programme, the price received by qualified generators is guided by the principle of cost recovery and margin[86]. The after tax rate of return on equity used to develop the FIT Price Schedule in 2009 was 11%.

7.30 According to Japan, generators that do not operate under the RESOP or FIT Programme will receive between CAD 5.0 cents/kWh to CAD 23.9 cents/kWh[87]. Under the OPA's RESOP contracts, non-solar generators are paid CAD 11.04 cents/kWh with an additional payment of CAD 3.52 cents/kWh for electricity delivered during peak hours; while solar PV generators are paid CAD 42.0 cents/kWh[88]. The FIT Price Schedule provides for payments in a range from CAD 10.3 cents/kWh to CAD 80.2 cents/kWh. Windpower projects receive either CAD 13.5 cents/kWh (onshore) or CAD 19.0 cents/kWh (offshore) with a provision for 20% of the rate to "escalate" in accordance with inflation, and solar PV projects receive from CAD 44.3 cents/kWh to CAD 80.2 cents/kWh (depending on size and technology) with no escalation. All of the OPA's contracted rates "are generally higher than the [HOEP]"[89].

7.31 Finally, the prices paid to NUGs for delivered electricity were negotiated 20 years ago and are not based on the principle of "cost recovery and a margin". Instead, the prices paid to these generators are tied to the prices paid by large consumers of electricity[90]. While precise prices for these contracts are not publicly available[91], they are known to be "generally higher than HOEP"[92]. The average

[82] OPA, Hydroelectric Contract Initiative, OPA website, ("OPA, Hydroelectric Contract Initiative"), Exhibit CDA-26.

[83] OPA, Combined Heat and Power, OPA website, ("OPA, Combined Heat and Power"), Exhibit CDA-27.

[84] OPA, Standard Offer Program – Renewable Energy for Small Electricity Generators, An Introductory Guide, ("OPA's Standard Offer Program – Renewable Energy for Small Electricity Generators"), Exhibit JPN-206, p. 1.

[85] Canada's response to Panel question No. 26 (first set).

[86] Directive from Minister of Energy and Infrastructure to Ontario Power Authority Regarding FIT Program, 24 September 2009, ("Minister's 2009 FIT Direction"), Exhibit JPN-102, p. 2.

[87] Generation Procurement Cost Disclosure, OPA website, ("OPA Generation Procurement Cost Disclosure"), Exhibit JPN-29. Prices as of March 2009.

[88] OPA Generation Procurement Cost Disclosure, Exhibit JPN-29.

[89] OPA Cash Flows from the Global Adjustment Mechanism, OPA, November 2010, ("OPA Cash Flows: November 2010"), Exhibit JPN-23, p. 5.

[90] Canada explains that prior to 2002, the prices paid to NUGs were known as the "Direct Customer Rate", but has since become known as the "Direct Customer Rate new". Canada's response to Panel question No. 26 (first set).

[91] NUG contract rates are indexed to the "total market cost" of electricity, which is comprised of HOEP, the GA, and various service charges. See OEFC: Management of Power Supply Contracts, OEFC website, ("OEFC: Management of Power Supply Contracts"), Exhibit JPN-22.

[92] OPA Cash Flows: November 2010, Exhibit JPN-23, p. 5.

contract rate is estimated to be CAD 8.0 cents/kWh[93]. According to Japan, significant NUG contracts will begin to expire in 2012, with most contracts expiring by 2017[94].

Transmission and distribution

7.32 As already mentioned, electricity systems that use integrated networks of high-voltage transmission lines and relatively lower-voltage distribution lines deliver electricity from generating stations to the general end-user. In Ontario, high-voltage transmission lines carry electricity at voltages above 50 kilovolts ("kV") and are used to move electricity over long distances from generating stations to load or population centres to reduce power losses[95]. Once the electricity nears a distribution hub, voltage is reduced at a transformer station and carried to customers over distribution lines at voltages 50 kV and under[96].

7.33 Generators typically connect to the transmission system or to the distribution system based on their capacity. In particular, generators with capacity greater than 10 MW (including large-capacity FIT generators) typically connect to the transmission system, and generators with capacity of 10 MW or less (including small-capacity FIT and microFIT generators) typically connect to the distribution system[97]. Generators that connect to the transmission system must deliver electricity at voltages above 50 kV, while generators connected to the distribution system must deliver electricity at voltages of 50 kV or less.

7.34 Transmission-connected generators register with the IESO[98], and connect to the high-voltage transmission system, which is almost completely owned and operated by Hydro One[99]. Hydro One was established under Part IV of the *Electricity Act of 1998* as a holding company with the objective of owning and operating transmission systems and distribution systems through one or more subsidiaries[100]. The company is wholly owned and controlled by the Government of Ontario[101]. It is also an "agency" of the Government of Ontario[102]. A Hydro One subsidiary, Hydro One Networks

[93] Ontario Electricity Market: The Good, the Bad, and the Ugly, Energy Exchange, 11 May 2010, ("Ontario Electricity Market: Energy Exchange"), Exhibit JPN-24.

[94] OEFC: Management of Power Supply Contracts, Exhibit JPN-22.

[95] Electricity Transmission and Distribution in Ontario – A Look Ahead, Ontario Ministry of Energy, 21 December 2004, ("Electricity Transmission and Distribution in Ontario"), Exhibit JPN-36, p. 4.

[96] Electricity Transmission and Distribution in Ontario, Exhibit JPN-36, p. 4.

[97] Ontario Power Authority, Feed-in Tariff Program: Program Overview, ("FIT Programme Overview"), Exhibit JPN-37, p. 18; and Ontario Power Authority, Micro Feed-In Tariff Program: Program Overview, ("microFIT Programme Overview"), Exhibit JPN-38, p. 8.

[98] The IESO administers the flow of electricity across Ontario's electricity grid. The basic corporate structure of the IESO and the nature of its operations are discussed below at paras. 7.39-7.40.

[99] Transmission-connected Generators, Exhibit JPN-39; and Quick Facts, Hydro One website, ("Hydro One Quick Facts"), Exhibit JPN-40.

[100] *Electricity Act of 1998*, Exhibit JPN-5, Section 48(1).

[101] News Release: Hydro One Releases 2010 Year-End Financial Results Hydro One website, ("Hydro One Releases 2010 Year-End Financial Results"), Exhibit JPN-41.

[102] All Agencies List, Government of Ontario website, ("Government of Ontario: All Agencies List"), Exhibit JPN-49. The Government of Ontario defines "agency" as "a provincial government organization: [i] which is established by the government, but is not part of a ministry; [ii] which is accountable to the government; [iii] to which the government appoints the majority of the appointees; and, [iv] to which the government has assigned or delegated authority and responsibility, or which otherwise has statutory authority and responsibility to perform a public function or service". Agencies: Boards, Commissions, Councils, Authorities and Foundations, Government of Ontario website, ("Government of Ontario: Agencies"), Exhibit JPN-51.

Inc., owns and operates 97% of the transmission system in Ontario[103]. Four other private companies own and operate the remaining 3%[104].

7.35 Distribution-connected generators are connected to the distribution system via a local distribution company ("LDC")[105]. Hydro One owns and operates approximately one quarter of Ontario's distribution system through a number of subsidiaries serving 1.3 million of a total 4.7 million customers, mostly in rural areas[106]. The remainder of Ontario's distribution system is presently operated by 80 LDCs, 77 of which are owned by municipal governments[107].

Regulation and administration

7.36 Ontario's electricity system is currently administered and regulated by a number of public entities. Among the most important, for the purpose the present disputes, are the OPA, the IESO, the OEFC and the OEB.

- Ontario Power Authority

7.37 The OPA is an "agency"[108] of the Government of Ontario responsible for managing Ontario's electricity supply and resources in order to meet its medium and long-term needs. The OPA was established under the *Electricity Restructuring Act of 2004* as "[a] corporation without share capital"[109], and operates its business and affairs on a not-for-profit basis[110]. It falls within the "legislative responsibility" of the Government of Ontario's Ministry of Energy[111], and receives and executes directives from the Minister of Energy[112]. Among its statutory objectives are the goals of engaging in:

> [A]ctivities in support of the goal of ensuring adequate, reliable and secure electricity supply and resources in Ontario; [and]
>
> … activities to facilitate the diversification of sources of electricity supply by promoting the use of cleaner energy sources and technologies, including alternative energy sources and renewable energy sources; …[113]

To achieve these and other objectives, the OPA was given the power to *inter alia*:

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[103] Our Subsidiaries, Hydro One website, ("Hydro One: Our Subsidiaries"), Exhibit JPN-43.

[104] These companies are: Great Lakes Power; Canadian Niagara Power; Five Nations Energy; and Cat Lake Power Utility. IESO, The Power System, ("The Power System"), Exhibit JPN-44.

[105] Distribution-connected Generators, Hydro One website, ("Distribution-connected Generators"), Exhibit JPN-45; and Electricity Transmission and Distribution in Ontario, Exhibit JPN-36, p. 4.

[106] Hydro One: Our Subsidiaries, Exhibit JPN-43; Delivering Safe, Reliable and Environmentally Responsible Electricity to Ontarians, Electricity Distributors Association, July 2010, ("EDA: Delivering Electricity to Ontarians"), Exhibit JPN-46; and Overview of Electricity Regulation in Canada, Exhibit JPN-7, pp. 11 and 16.

[107] Find Your Local Utility, IESO website, ("LDCs operating in Ontario"), Exhibit JPN-47; and EDA: Delivering Electricity to Ontarians, Exhibit JPN-46.

[108] Government of Ontario: All Agencies List, Exhibit JPN-49; and Agency Details, Ontario Power Authority, Government of Ontario website, ("Agency Details, OPA"), Exhibit JPN-50.

[109] *Electricity Act of 1998*, Exhibit JPN-5, Section 25.1(1).

[110] *Electricity Act of 1998*, Exhibit JPN-5, Section 25.2(2).

[111] About the Ministry of Energy, Ministry of Energy website, ("About the Ministry of Energy"), Exhibit JPN-52.

[112] Directives to OPA from Minister of Energy, OPA website, ("Directives to OPA from Minister of Energy"), Exhibit JPN-55.

[113] *Electricity Act of 1998*, Exhibit JPN-5, Sections 25.2(1)(c) and (d).

> [E]nter into contracts relating to the procurement of electricity supply and capacity in or outside Ontario; [and]
>
> … enter into contracts relating to the procurement of electricity supply and capacity using alternative energy sources or renewable energy sources to assist the Government of Ontario in achieving goals in the development and use of alternative or renewable energy technology and resources; …[114]

7.38 The OPA's supply contracts provide guaranteed prices over a long-term period that is typically 20 years[115]. The OPA has used its contracting powers to secure actual and future electricity supply from a variety of private and publicly-owned generation facilities including those utilizing nuclear, gas, hydro, wind, solar and bioenergy technologies[116]. As of 30 June 2011, the OPA had 19,090 MW of electricity supply capacity under contract, of which 12,426 MW was in commercial operation[117].

- The Independent Electricity System Operator

7.39 The IESO is another "agency" of the Government of Ontario[118]. Like the OPA, the IESO is a not-for-profit "corporation without share capital"[119] and falls under the "legislative responsibility" of the Government of Ontario's Ministry of Energy[120]. Similarly, pursuant to the *Electricity Act of 1998*, the IESO is also controlled by the Government of Ontario.

7.40 The IESO administers Ontario's electricity markets and operates and maintains the IESO-controlled grid to ensure real-time coordination between electricity supply and demand[121]. In particular, the IESO manages Ontario's wholesale electricity market (the "physical market"), bringing together generators, traders, utilities, and large volume consumers[122]. This not only involves the IESO monitoring and directing the movement of electricity across the IESO-controlled grid, but also the settlement of payments between market participants. In this latter respect, the IESO explains its role as follows: "In the physical market, we collect funds from buyers and transfer funds to sellers. We do not actually take title to energy, and we are, by law, revenue neutral"[123]. The settlement process in the physical market comprises four steps: (i) gathering and processing metering data to produce settlement-ready data; (ii) using the settlement-ready data to determine revenue owed to suppliers,

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[114] *Electricity Act of 1998*, Exhibit JPN-5, Section 25.2(5)(c). This authority is repeated in Section 25.32(1)(a); while Section 25.32(4.1) reveals that the "Minister may direct the OPA to undertake … any other initiative or activity that relates to, (a) the procurement of electricity supply or capacity from renewable energy sources…"

[115] Canada's first written submission (DS412), para. 31.

[116] The range of supply contracts that the OPA has entered into or taken over from the OEFC are identified above at para. 7.28.

[117] OPA Progress Report: Second Quarter 2011, Exhibit JPN-28, p. 1.

[118] Government of Ontario: All Agencies List, Exhibit JPN-49; and Agency Details, Independent Electricity System Operator, Government of Ontario website, ("Agency Details, IESO"), Exhibit JPN-57.

[119] *Electricity Act of 1998*, Exhibit JPN-5, Sections 4(1) and 5(2).

[120] About the IESO, IESO website, ("About the IESO"), Exhibit JPN-59; and About the Ministry of Energy, Exhibit JPN-52.

[121] *Electricity Act of 1998*, Exhibit JPN-5, Section 5.

[122] IESO, Marketplace Training: Settlement Statements and Invoices, December 2010, ("IESO: Settlement Statements and Invoices"), Exhibit JPN-62, p. 1. The "physical market" refers to the real-time markets for the delivery and use of electricity. The IESO also administers a "financial market" for buying and selling transmission rights.

[123] IESO: Settlement Statements and Invoices, Exhibit JPN-62, p. 1.

costs for consumers, and various overhead costs payable by market participants; (iii) invoicing participants; and (iv) transferring funds between energy purchasers and suppliers[124].

7.41 The IESO also oversees the reliable operation of the provincial transmission system[125], and makes and approves the Market Rules, which define the IESO-administered markets and describe how they operate, and the Market Manuals, which provide detailed guidelines for various activities of market participants[126].

- Ontario Energy Board

7.42 The OEB is an "agency"[127] of the Government of Ontario that regulates Ontario's electricity and natural gas sectors in conformity with the public interest[128]. In the electricity sector, this regulation is done through the OEB's authority to set transmission and distribution rates, as well as its authority to license all market participants. As already noted[129], the OEB determines the prices at which the "regulated" assets of OPG are to be paid for electricity delivered into Ontario's electricity grid[130]. The OEB also maintains the Regulated Price Plan ("RPP"), which establishes the prices paid by retail consumers that purchase electricity from LDCs. As of 1 November 2011, the prices applied under the RPP ranged from CAD 7.1 cents/kWh to CAD 8.3 cents/kWh for customers with standard meters, and from CAD 6.2 cents/kWh to CAD 10.8 cents/kWh for customers with smart meters[131]. Finally, among other functions of the OEB is its responsibility for establishing, *inter alia*, codes for the transmission system, distribution system and retail settlement[132]. The Transmission System Code sets out the minimum standards that an electricity transmitter (i.e. Hydro One Networks Inc. and other smaller transmission companies) must meet in designing, constructing, managing and operating its transmission system[133]. The Distribution System Code sets out the minimum obligations that a licensed electricity distributor (i.e. LDCs, including Hydro One subsidiaries) must comply with in distributing electricity within the service area under its license[134]. The Retail Settlement Code sets out the minimum obligations that an electricity distributor (i.e. LDCs, including Hydro One subsidiaries) and retailer (i.e. entities that are licensed to re-sell electricity) must meet in conducting financial settlements[135].

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[124] IESO: Settlement Statements and Invoices, Exhibit JPN-62, p. 1. The processes used to settle payments between wholesale market participants are explained in more detail below at paras. 7.60-7.63.

[125] About the IESO, Exhibit JPN-59; and The Power Grid, IESO website, ("IESO: The Power Grid"), Exhibit JPN-60.

[126] Rules, Manuals and Forms, IESO website, ("IESO: Rules, Manuals and Forms"), Exhibit JPN-61.

[127] Government of Ontario: All Agencies List, Exhibit JPN-49; and Agency Details, Ontario Energy Board, Government of Ontario website, ("Agency Details, OEB"), Exhibit JPN-63.

[128] What We Do, OEB website, ("OEB functions"), Exhibit JPN-64.

[129] See above at para. 7.27.

[130] *Ontario Energy Board Act of 1998*, S.O. 1998, Chapter 15, Schedule B, as amended, ("*Ontario Energy Board Act of 1998*"), Exhibit JPN-6, Section 78.1; *Ontario Regulation 53/05, Payments Under Section 78.1 of the Act*, 19 February 2008, as amended, ("*Ontario Regulation 53/05, Payments Under Section 78.1 of the Act*"), Exhibit JPN-65, Section 6; and OPG – Payment Amounts, OEB website, ("OPG – Payment Amounts"), Exhibit JPN-17.

[131] Electricity Prices, OEB website, ("OEB: Electricity Prices"), Exhibit JPN-66; and Ontario Energy Board, Electricity Prices for Consumers on the Regulated Price Plan (April 2005 – November 2011), ("OEB: Electricity Prices for Consumers on the RPP"), Exhibit JPN-67.

[132] Rules, Codes, Guidelines and Forms, OEB website, ("OEB: Rules, Codes, Guidelines and Forms"), Exhibit JPN-68.

[133] Transmission System Code, Exhibit JPN-69.

[134] Distribution System Code, Exhibit JPN-70.

[135] Retail Settlement Code, Ontario Energy Board, 1 October 2011, ("Retail Settlement Code"), Exhibit JPN-71.

- Ontario Electricity Financial Corporation

7.43 The OEFC was established by the *Electricity Act of 1998* as a "corporation without share capital"[136] and is another "agency"[137] of the Government of Ontario. The OEFC is mandated to, *inter alia*, manage the contracts for the supply of electricity with NUGs[138]. The OEFC's contracts with NUGs were concluded prior to the establishment of the OPA in 2004. Significant OEFC contracts will begin to expire in 2012[139]. The OPA has been directed to pursue new contracts with the NUGs upon the expiry of the existing contracts with the OEFC or where an NUG and the OEFC have mutually agreed to end an existing arrangement before its contractual expiry date[140].

Wholesale prices and retail prices

- Wholesale prices

7.44 The price of electricity at the wholesale level varies based on the cost of the electricity, which is determined by adding together the "commodity" charge (made up of the HOEP plus the Global Adjustment[141]) and the costs associated with the services of transmission and market operation[142]. The wholesale price is paid to the IESO by all wholesale consumers, including LDCs and large industrial consumers directly connected to the IESO-controlled transmission grid.

The Hourly Ontario Energy Price

7.45 The Hourly Ontario Energy Price ("HOEP") is the price for electricity sold at the wholesale level that is established by the IESO through the operation of a computer-automated market 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 clearing price" ("MCP") and the HOEP for that electricity.

7.46 The IESO "stack system" is established on the premise that certain generators are capable of easily varying their electricity production while others are not, and likewise that certain consumers are capable of easily varying their electricity consumption while others are not. Generators and consumers that can easily vary their electricity production or consumption are termed "dispatchable", and receive "dispatch" instructions from the IESO every five minutes stating the quantity to be supplied or consumed. Those generators and consumers that cannot easily vary their electricity production or consumption are termed "non-dispatchable"; they do not receive "dispatch" instructions

[136] *Electricity Act of 1998*, Exhibit JPN-5, Section 54(1).
[137] Government of Ontario: All Agencies List, Exhibit JPN-49; and Agency Details, Ontario Electricity Financial Corporation, Government of Ontario website, ("Agency Details, OEFC"), Exhibit JPN-72.
[138] Ontario Electricity Financial Corporation – Mandate and Governing Legislation, OEFC website, ("OEFC: Mandate and Governing Legislation"), Exhibit JPN-73.
[139] OPA Generation Procurement Update, OPA website, ("OPA Generation Procurement Update"), Exhibit JPN-21, p. 15.
[140] Directive from Minister of Energy to Ontario Power Authority Regarding Negotiating New Contracts with Non-Utility Generators, 23 November 2010, ("Minister's Directive Regarding Negotiating New Contracts with NUGs"), Exhibit JPN-74.
[141] The nature and operation of the Global Adjustment is explained below at paras. 7.54-7.56.
[142] The latter charges include, *inter alia*, hourly uplift settlement charges and monthly uplift charges, IESO and OPA administration fees, and wholesale transmission charges to LDCs and large consumers. A full list of the other fees and charges can be found in A Guide to Electricity Charges – Market Participants, IESO website, ("IESO Guide to Electricity Charges"), Exhibit JPN-1.

from the IESO, but rather their supply and demand is considered fixed and automatically placed by the IESO at the front of the supply and demand stacks.

7.47 To determine which generators are to be physically dispatched, the IESO uses "security constrained economic dispatch" software that employs an optimization algorithm to find the least costly way of supplying forecast demand with available generation resources[143]. The software also utilizes a model of the transmission grid to discover whether this least-cost mix of generation might overload the transmission network. If the software observes that any transmission constraints have been violated, it iterates an optimization routine until it finds the least-cost solution that does not violate any constraints. Non-dispatchable generators do not receive any instruction from the IESO, but their expected supply is considered fixed and taken into account by the optimization routine.

7.48 Following the physical dispatch of electricity, the MCP and HOEP are calculated without taking into account transmission constraints[144]. First the IESO creates a supply stack by ranking supply offers in increasing order of cost, starting with non-dispatchable generators which are placed at the beginning of the stack[145]. Non-dispatchable generators do not submit formal "offers" for electricity they are willing to supply at every five-minute interval, but must still submit schedules of production (for self-scheduling generators) or forecasts of production (for intermittent generators), so that the IESO may take their quantity of supply into account at the beginning of the stack.

7.49 After taking into account such fixed supply, the IESO then turns to the variable supply offered by dispatchable generators. Again, supply by dispatchable generators is considered variable because such supply can be "dispatched on" or "dispatched off" upon instructions from the IESO. Dispatchable generators must submit price/quantity "offers" for every five minute interval. Although many dispatchable generators will in fact receive regulated or contracted prices for the electricity they deliver into the system, they must nonetheless submit price offers to the IESO to indicate the quantity they are willing to supply in a given five minute interval. These price offers by dispatchable generators serve as a dispatch signal – i.e. a mechanism for the IESO to select electricity supply – and not as the price that these generators actually receive. The IESO ranks the price offers from dispatchable generators in ascending order to complete its supply stack. This process is illustrated in the following diagram submitted by Japan[146].

[143] Hogan Report, Exhibit CDA-2, p. 38.
[144] Hogan Report, Exhibit CDA-2, p. 38.
[145] Fixed supply also includes imports, i.e. supply that is scheduled to enter Ontario from another jurisdiction, as imports are scheduled an hour ahead and will therefore flow for that entire hour regardless of the rate. IESO, Marketplace Training: Introduction to Ontario's Physical Markets, October 2010, ("IESO: Ontario's Physical Markets"), Exhibit JPN-80, p. 20.
[146] Japan's first written submission, Appendix II.

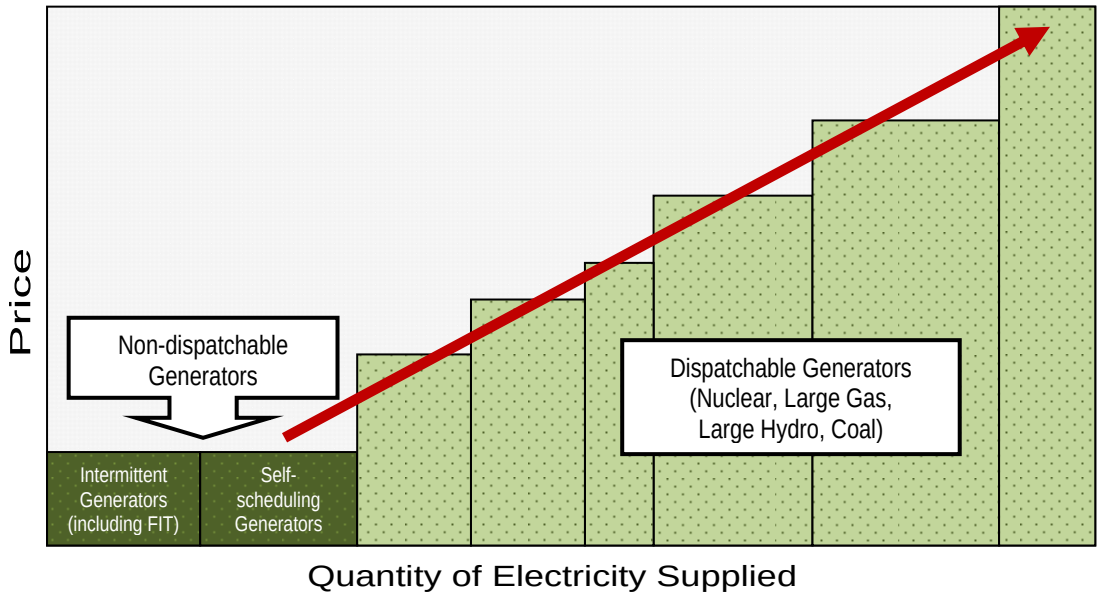

Diagram 1: IESO Supply Stack for Electricity

7.50 Similarly, the IESO stacks electricity demand, beginning with non-dispatchable loads followed by dispatchable loads. Non-dispatchable loads are those that simply draw electricity from the grid as needed and therefore cannot easily vary their consumption. Accordingly, they are considered by the IESO as fixed demand[147] that is automatically placed at the beginning of the stack. Non-dispatchable loads account for most of the energy consumed in Ontario. Dispatchable loads are those that may vary their electricity consumption; therefore, they submit "bids" to the IESO stating the price and quantity of the electricity they are willing to purchase. The IESO stacks these bids in descending order according to the price bid. This process is illustrated in the following diagram submitted by Japan[148].

[147] Fixed demand also includes exports (which, like imports, are fixed within the hour time window) and losses from moving electricity through the transmission and distribution systems (which create a need for an additional amount of energy). IESO: Ontario's Physical Markets, Exhibit JPN-80, p. 21.

[148] Japan's first written submission, Appendix II.

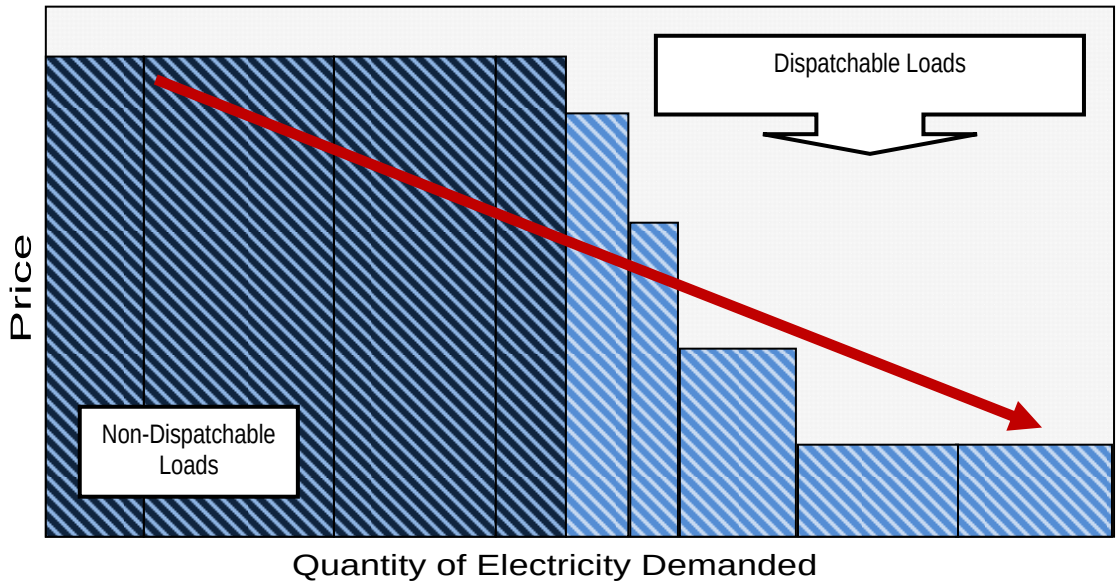

Diagram 2: IESO Demand Stack for Electricity

7.51 The IESO then sets the MCP for the five-minute interval at the intersection of these electricity supply and demand stacks. The HOEP is calculated as an average of the twelve MCPs determined over the course of a given hour. The weighted average HOEP based on Ontario demand for calendar year 2010 was CAD 3.79 cents/kWh[149]. The process used to arrive at the MCP is illustrated in the following diagram submitted by Japan[150].

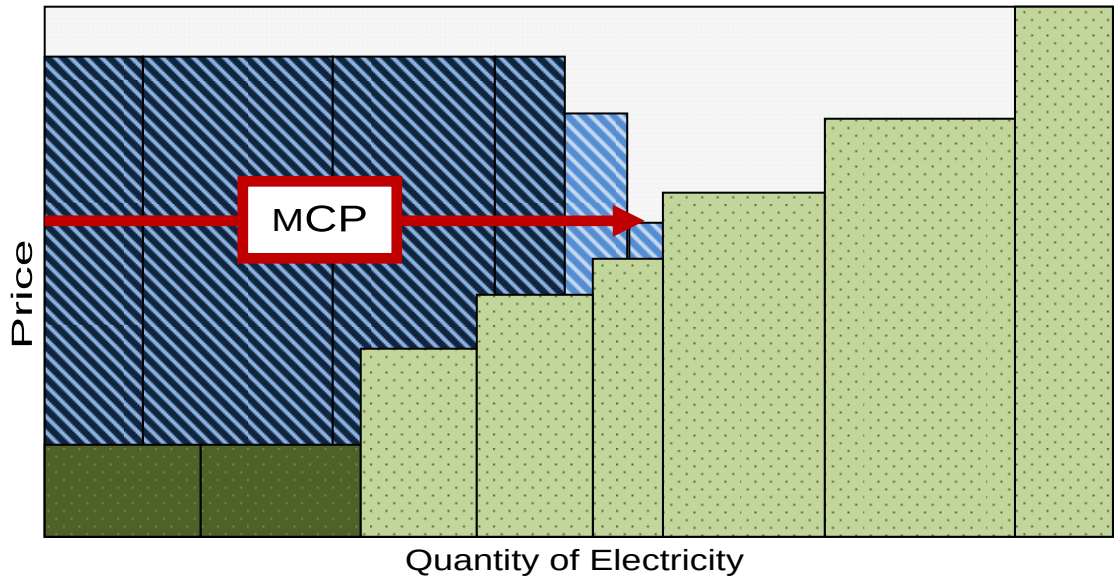

Diagram 3: Determination of Market Clearing Price by the IESO

[149] IESO Monthly Average Prices, Average Weighted Hourly Price, ("IESO: Average Weighted Hourly Price"), Exhibit JPN-83.
[150] Japan's first written submission, Appendix II.

7.52 The MCP/HOEP is an "unconstrained" price in that its calculation does not consider transmission constraints. As a result, it may not accord with dispatch orders, which do take transmission constraints into account. From time to time the IESO may compel a generator to run despite the fact that the MCP is below the generator's offer price. On other occasions the IESO may prevent a generator from operating even though its bid was below the MCP. To align the economic incentives of generators with those the system operator, the former are paid Congestion Management Settlement Credits whenever they are dispatched uneconomically[151].

7.53 All generators operating through the IESO-administered wholesale market will receive the MCP/HOEP for the electricity they deliver into the system[152]. In addition, for those generators that have additional arrangements – i.e. generators that receive regulated prices set by the OEB or contracted prices set by the OEFC or OPA – the prices they receive are subject to an adjustment to reconcile the difference between the MCP/HOEP and the generator's regulated or contracted price. This is done through the Global Adjustment[153].

The Global Adjustment

7.54 The purpose of the Global Adjustment ("GA") is to ensure that payments by consumers reflect the amounts payable to generators under regulated or contracted rates that differ from the market rate (i.e. MCP/HOEP). Statutory authority for the GA is found in Section 25.33 of the *Electricity Act of 1998*[154]. Part 5.5, Sections 1.6.7 and 1.6.11 of the IESO Market Manual provide detailed instructions on how the GA is to be determined and settled[155]. In particular, the GA is a monthly amount set to reflect the difference between MCP/HOEP and: (i) regulated prices paid to OPG's regulated assets; (ii) contracted prices paid to NUGs that have contracts with the OEFC; and (iii) contracted prices paid to generators that have contracts with the OPA[156].

7.55 Accordingly, the GA is inversely related to HOEP – i.e. an increase in the HOEP means a decrease in the GA, and vice versa[157]. Where the MCP/HOEP is below the fixed (i.e. regulated or contracted) prices, the GA will be a positive number representing the amount payable to generators (and the amount charged to consumers); conversely, where the MCP/HOEP exceeds the fixed prices, the GA will be a negative number representing a charge to generators[158] (and a credit to consumers). GA payments are affected whenever new electricity supply starts, with the GA increasing with each

[151] Hogan Report, Exhibit CDA-2, pp. 40-41.

[152] IESO, Market Rules for the Ontario Electricity Market, 12 October 2011, ("IESO: Market Rules"), Exhibit JPN-79, Chapters 7 and 9; General IESO Frequently Asked Questions, IESO website, ("General IESO FAQ"), Exhibit JPN-81 ("Dispatchable facilities will be settled at [the] five-minute [market clearing] price, non-dispatchable wholesale consumers will be settled using a weighted hourly average of these five-minute prices"); and IESO: Ontario's Physical Markets, Exhibit JPN-80, p. 23.

[153] IESO Market Manual Part 5.5: Physical Markets Settlement Statements, Issue 44.0, 12 October 2011, ("IESO Market Manual Part 5.5"), Exhibit JPN-82, Sections 1.6.7 and 1.6.11.

[154] *Electricity Act of 1998*, Exhibit JPN-5, Section 25.33(1). ("The IESO shall, through its billing and settlement systems, make adjustments in accordance with the regulations that ensure that, over time, payments by classes of market participants in Ontario that are prescribed by regulation reflect amounts paid, in accordance with the regulations, to generators, distributors, the OPA and the Financial Corporation, whether the amounts are determined under the market rules or under sections 78.1 to 78.5 of the *Ontario Energy Board Act of 1998*".)

[155] IESO Market Manual Part 5.5, Exhibit JPN-82, Sections 1.6.7 and 1.6.11.

[156] See IESO Guide to Electricity Charges, Exhibit JPN-1; and Global Adjustment, IESO website, ("IESO: Global Adjustment"), Exhibit JPN-75.

[157] OPA Cash Flows: November 2010, Exhibit JPN-23, p. 6.

[158] See IESO Guide to Electricity Charges, Exhibit JPN-1.

new contract for conservation and supply that establishes rates in excess of MCP/HOEP[159]. The GA has been consistently positive since at least 2009[160].

7.56 The total GA owed to generators is allocated to consumers pro-rata based on the amount of electricity (kWh) they consume, regardless of which generators are supplying electricity at the time of their consumption[161]. The total GA will largely be calculated by summing all adjustments to the prices owed to electricity generators, and then pro-rating this amount across consumers' purchases of electricity[162]. Since its introduction in 2005, the GA has been collected from all Ontario consumers on this basis. However, beginning in January 2011 the largest industrial consumers with average monthly demand of over 5 MW have paid the GA based on their share of consumption during the five highest demand hours of the year. Other consumers continue to be charged on the original basis[163]. The average GA for 2010 was CAD 2.718 cents/kWh[164].

- Retail prices

7.57 Prices paid by retail consumers are generally determined by adding to the total of MCP/HOEP, GA, and other fees and charges, an additional distribution charge to cover the cost of delivering electricity to the consumer. Retail consumers either purchase electricity based on use from their LDCs, or they enter into contracts for electricity with an LDC or licensed electricity retailer. The former retail consumers pay for the electricity commodity according to the OEB's RPP[165], and the latter retail consumers pay for the electricity commodity according to a retail contract. In 2010, there were 77 private-sector electricity retailers in Ontario that sold "contracts to businesses and consumers"[166]. There are currently 45 licensed electricity retailers that compete with LDCs in their respective service areas[167].

7.58 RPP prices are paid by residential and small business consumers that purchase electricity from their LDCs based on use[168]. Although these RPP prices are paid to LDCs, they are reviewed and set by the OEB every six months, specifically for the periods 1 May to 31 October and 1 November to

[159] OPA Cash Flows: November 2010, Exhibit JPN-23, p. 6.
[160] Global Adjustment Archive, IESO website, ("Global Adjustment Archive"), Exhibit JPN-11.
[161] IESO, HST Guide for IESO Transactions, Issue 26.0, 12 October 2011, ("IESO: HST Guide for IESO Transactions"), Exhibit JPN-84, Section 8.11, p. 35.
[162] IESO: HST Guide for IESO Transactions, Exhibit JPN-84, p. 35.
[163] See Ontario Regulation 398/10, made under the *Electricity Act, 1998* (Exhibit EU-16), ss. 6 and 7.
[164] Global Adjustment Archive, Exhibit JPN-11.
[165] A retail consumer seeking to purchase electricity through the RPP will establish an account with the local distributor to be connected to its distribution system, and by doing so, the consumer assumes responsibility for taking or using the electricity delivered by the LDC. RPP customers do not have a formal contract with the LDC; pursuant to Section 6.1.2 of the Distribution System Code, however, "[a] distributor has an implied contract with any customer that is connected to the distributor's distribution system and receives distribution services from the distributor. The terms of the implied contract are embedded in the distributor's Conditions of Service, the Rate Handbook, the distributor's rate schedules, the Distributor's licence and the Distribution System Code". Distribution System Code, Exhibit JPN-70, Section 6.1.2; and Conditions of Service, Hydro One website, ("Hydro One: Conditions of Service"), Exhibit JPN-87.
[166] Ontario's Long-Term Energy Plan, Exhibit CDA-6, p. 63.
[167] *Electricity Act of 1998*, Exhibit JPN-5, Section 29; Retail Settlement Code, Exhibit JPN-71, Sections 1.1, 2.7, 10.1, and 12; and OEB Licensed Electricity Retailers (http://www.ontarioenergyboard.ca/html/licences/all_issuedlicences_read.cfm?showtype=Electricity%20Retailer) referred to in Retail Contracts, IESO website, ("IESO: Retail Contracts"), Exhibit JPN-90.
[168] IESO: Global Adjustment, Exhibit JPN-75; and IESO, LDC Settlement of RPP and Global Adjustment, 28 September 2009, ("LDC Settlement"), Exhibit JPN-88, p. 9.

30 April each year, and are based upon forecasts of the HOEP and the GA[169]. The GA does not appear as a separate item on an RPP customer's electricity bill because it is directly included in the rates set by the OEB[170]. RPP prices vary according to the type of meter used by the customer[171]. Effective 1 November 2011, the prices for customers with conventional meters (tier pricing) were CAD 7.1 cents/kWh (low-tier) and CAD 8.3 cents/kWh (high-tier)[172]; and the prices for customers with smart meters (time-of-use pricing) were CAD 6.2 cents/kWh (off-peak), CAD 9.2 cents/kWh (mid-peak), and CAD 10.8 cents/kWh (on-peak)[173].

7.59 Retail consumers not under the RPP may enter into a retail contract with an LDC or licensed electricity retailer, paying a contracted price for electricity for a fixed period, plus the GA[174].

Settlement of payments to generators

7.60 The IESO is responsible for settling the "physical" electricity market in which participants buy and sell energy[175]. Settlement of the physical market involves a four-step process of gathering and processing data, reconciling the markets, invoicing participants, and transferring funds[176]. During this process, the IESO will collect electricity payments from consumers and distribute these funds to electricity generators.

7.61 In general, the MCP/HOEP portion of the payments it receives from consumers will be sent directly to generators, while the GA portion will be transferred to generators through the OPA or on behalf of the OPA. However, when the MCP/HOEP is negative, the IESO will receive a MCP/HOEP payment from generators. Accordingly, the IESO will determine the amount of money to be received or paid by a market participant based on the MCP/HOEP during its hours of participation in the IESO-administered markets[177].

7.62 The IESO will collect the GA from consumers and distribute it to generators through the OPA or on behalf of the OPA pursuant to Part 5.5, Sections 1.6.7 and 1.6.11 of the IESO Market Manual[178]. The settlement rules for the GA are complex and vary according to the different components of the GA and the class of market participant. However, typically, monthly invoices are issued by the IESO indicating the amounts to be paid or received by the market participant and the payment due date[179],

[169] Ontario Energy Board, Regulated Price Plan Price Report: November 1, 2011 to October 31, 2012, 17 October 2011, ("RPP Price Report: 1 November 2011 to 31 October 2012"), Exhibit JPN-89, p. 1.

[170] IESO: Global Adjustment, Exhibit JPN-75.

[171] RPP Price Report: 1 November 2011 to 31 October 2012, Exhibit JPN-89, pp. 3-5.

[172] OEB: Electricity Prices, Exhibit JPN-66. The conventional meter plan sets a lower fixed price for energy consumption up to a monthly threshold amount, with consumption above this level at a higher price. As of 1 November 2011, customers pay CAD 7.1 cents/kWh for a lower tier (which ranges from 600 kWh to 1,000 kWh per month depending on the season and the type of customer) and CAD 8.3 cents/kWh for an upper tier (all consumption per month above the lower tier). See also IESO Market Manual Part 5.5, Exhibit JPN-82, Section 1.6.7.7.

[173] See OEB: Electricity Prices, Exhibit JPN-66. The smart meter plan establishes prices for energy based on the time that energy is consumed. As of 1 November 2011, customers pay CAD 6.2 cents/kWh off-peak, CAD 9.2 cents/kWh mid-peak, and CAD 10.8 cents/kWh on-peak. See also IESO Market Manual Part 5.5, Exhibit JPN-82, Section 1.6.7.7.

[174] IESO: Global Adjustment, Exhibit JPN-75.

[175] IESO: Settlement Statements and Invoices, Exhibit JPN-62, p. 1.

[176] IESO: Settlement Statements and Invoices, Exhibit JPN-62, p. 1.

[177] IESO: Market Rules, Exhibit JPN-79, Chapter 7, Section 8.3; and Chapter 9, Sections 3.1.1, 3.1.3, 3.3, 6.10.2, and 6.11.1.

[178] IESO Market Manual Part 5.5, Exhibit JPN-82, Sections 1.6.7 and 1.6.11.

[179] See IESO: Market Rules, Exhibit JPN-79, Chapter 9, Section 6.10.2.

and market participants must pay these invoices by the specified due date[180]. These invoices will include a line item for the settlement difference between the MCP/HOEP and the regulated or contracted prices received by certain generators, i.e. the GA[181]. If the GA is positive, it is collected from the consumer; if negative, the IESO will pay the consumer the GA from its settlement clearing account[182]. The IESO then sends part of the total GA collected to the OPA to settle contract payments with transmission-connected generators, and uses the remainder to settle contract payments with distribution-connected generators on behalf of the OPA[183].

7.63 Although the settlement process for transmission-connected generators operating under the FIT Programme is the same as that described above, distribution-connected generators operating under the FIT Programme will receive their full contract payments (i.e. the HOEP plus GA) from the LDC to which they are connected. The relevant LDC will then seek reimbursement of the GA from the OPA via the IESO[184].

(iv) The FIT Programme and the FIT and microFIT Contracts[185]

7.64 The FIT Programme can be generally described as a scheme implemented by the Government of Ontario and its agencies through which generators of electricity, produced from certain forms of renewable energy, are paid a guaranteed price per kWh of electricity delivered into the Ontario electricity system under 20-year or 40-year contracts with the OPA. In the case of windpower projects having a capacity to produce electricity that is greater than 10 kW, and solar projects with a capacity of up to 10MW, a "Minimum Required Domestic Content Level" must be satisfied in the development and construction of the qualifying electricity generation facility.

7.65 The FIT Programme was formally launched by the OPA on 1 October 2009 pursuant to the Direction of the Ontario Minister of Energy and Infrastructure[186] acting under the authority of the *Electricity Act of 1998*[187], as amended by the *Green Energy and Green Economy Act of 2009*[188]. The FIT Programme is the third in a series of initiatives adopted by the Government of Ontario since 2004 to increase the supply of electricity produced from renewable sources of energy into the Ontario electricity system in order to diversify its supply-mix and help replace coal-fired facilities[189]. As

[180] See IESO: Market Rules, Exhibit JPN-79, Chapter 9, Section 6.11.1.

[181] OPA, 2006 Business Plan, 30 September 2005, ("OPA's 2006 Business Plan"), Exhibit JPN-92, p. 26.

[182] See IESO: Market Rules, Exhibit JPN-79, Chapter 9, Section 6.11.

[183] See IESO Market Manual Part 5.5, Exhibit JPN-82, Section 1.6.7.8. IESO Guide to Online Data Submission via the IESO Portal, March 2011, ("IESO Guide to Online Data Submission"), Exhibit JPN-93, pp. 20-21.

[184] The settlement process for payments made to generators operating under the FIT Programme is discussed further at paras. 7.204-7.207.

[185] A more detailed description and analysis of the FIT Programme and the FIT and microFIT Contracts are set out below at paras. 7.195-7.248, where we evaluate the merits of the parties' arguments concerning the proper factual and legal characterization of the challenged measures under Article 1.1(a) of the SCM Agreement.

[186] Minister's 2009 FIT Direction, Exhibit JPN-102.

[187] *Electricity Act of 1998*, Exhibit JPN-5, Sections 25.32 and 25.35, as amended by the *Green Energy and Green Economy Act of 2009*, S.O. 2009, c. 12, Schedule B, ("*Green Energy Act of 2009*"), Exhibit JPN-101.

[188] *Green Energy Act of 2009*, Exhibit JPN-101, Sections 5(2) and 7.

[189] See, for example, Ontario's Long-Term Energy Plan, Exhibit CDA-6, pp. 7, 9-10, 19, and 31. The two earlier initiatives were the *Request for Proposals for Renewable Energy Supply I* (2004), *II* (2005) and *III* (2008), and the *Renewable Energy Standard Offer Program* (2006). See Ontario Ministry of Energy, Request for Proposals for 300 MW of Renewable Energy Supply (RES I), issued 24 June 2004, ("RES I"), Exhibit CDA-52; Ontario Ministry of Energy, Request for Proposals for 1,000 MW of Renewable Energy Supply (RES II), issued 17 June 2005, ("RES II"), Exhibit CDA-53; Ontario Ministry of Energy, Request for Proposals for

described by the Ontario Minister of Energy and Infrastructure, its four objectives are to: (i) "increase capacity of renewable energy supply to ensure adequate generation and reduce emissions"; (ii) "introduce a simpler method to procure and develop generating capacity from renewable sources of energy"; (iii) "enable new green industries through new investment and job creation"; and (iv) "provide incentives for investment in renewable energy technologies"[190].

7.66 Participation in the FIT Programme is open to facilities located in Ontario that generate electricity exclusively from one or more of the following sources of renewable energy: wind, solar photovoltaic ("PV"), renewable biomass, biogas, landfill gas or waterpower[191]. The Programme is divided into two streams: (i) the FIT stream - for projects with a capacity to produce electricity that exceeds 10 kW, but is no more than 10 MW for solar PV projects or 50 MW in the case of waterpower projects; and (ii) the microFIT stream - for projects having a capacity to produce up to 10 kW of electricity (typically small household, farm or business generation projects)[192].

7.67 The FIT Programme is administered by the OPA and is implemented through the application of a standard set of rules, standard contracts and, for each class of generation technology, standard pricing. The standard rules are found in a number of instruments, with the most specific being the FIT Rules and the microFIT Rules developed by the OPA. Other relevant rules are found in the IESO Market Rules, the IESO Market Manual, the Transmission System Code, the Distribution System Code, and the Retail Settlement Code.

7.68 Only projects that satisfy all of the specific eligibility requirements set out in the FIT and microFIT Rules[193], and that can be connected to the Ontario electricity system[194], will be offered a Contract, and thereby permitted to participate in the Programme. By entering into a FIT or microFIT Contract, a qualifying entity will be required to *inter alia* build, operate and maintain the approved renewable energy electricity generation facility, in accordance with all relevant laws and regulations, and deliver the produced electricity into the Ontario electricity system. In return for performing these and other contractual obligations, the same entity will be remunerated, over the term of the particular

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approximately 500 MW of Renewable Energy Supply (RES III), issued 22 August 2008, ("RES III"), Exhibit CDA-54; and Ontario Power Authority, Joint Report to the Minister of Energy Recommendations on a Standard Offer Program for Small Generators connected to a Distribution System (RESOP), 17 March 2006, ("RESOP"), Exhibit CDA-55.

[190] Minister's 2009 FIT Direction, Exhibit JPN-102, p. 1. More specifically, the OPA explains that the Programme was developed:

> [T]o encourage and promote greater use of renewable energy sources including wind, waterpower, Renewable Biomass, Bio-gas, landfill gas and solar (PV) for electricity generating projects in Ontario. The fundamental objective of the FIT Program, in conjunction with the Green Energy and Green Economy Act, 2009 is to facilitate the increased development of Renewable Generating Facilities of varying sizes, technologies and configurations via a standardized, open and fair process.(Ontario Power Authority, Feed-in Tariff Programme Rules, Version 1.5.1, 15 July 2011, ("FIT Rules"), Exhibit JPN-119, Section 1.1).

[191] FIT Rules, Exhibit JPN-119, Section 2.1(a); and Ontario Power Authority, Feed-in Tariff Appendix 1, Standard Definitions, Version 1.5.1, 15 July 2011, ("FIT Standard Definitions"), Exhibit JPN-135, Definitions Nos. 215 and 216.

[192] FIT Rules, Exhibit JPN-119, Section 2.1(a)(iii); and Ontario Power Authority, microFIT Rules, Version 1.6.1, 10 August 2011, ("microFIT Rules"), Exhibit JPN-157, Section 2.1(a)(iv).

[193] FIT Rules, Exhibit JPN-119, Sections 2-3; and microFIT Rules, Exhibit JPN-157, Sections 2-3.

[194] In particular, for FIT projects, the OPA must first confirm that there are resources available to connect the proposed renewable energy electricity facility to the relevant transmission or distribution network. FIT Rules, Exhibit JPN-119, Sections 5.2 ("Transmission Availability Test") and 5.3 ("Distribution Availability Test"). Similarly, for microFIT projects, a Connection Agreement between a Local Distribution Company and the microFIT facility must exist and be operational. microFIT Rules, Exhibit JPN-157, Section 4.1.

Contract, in accordance with a formula that is based on a standard Contract Price established by the OPA[195]. This is done through the application of similar mechanisms to those used to settle the payments to generators supplying electricity into the Ontario electricity system under non-FIT contracts[196]. Thus, while the OPA has ultimate contractual liability for all FIT and microFIT Contract Payments[197], in practice, the actual payments are made by a combination of the OPA, the IESO and relevant LDCs.

5. Order of analysis

7.69 The complainants claim that Canada acts inconsistently with its obligations under the SCM Agreement, the TRIMs Agreement and the GATT 1994 by reason of the "Minimum Required Domestic Content Level" adopted by the Province of Ontario under the FIT Programme, and implemented through the FIT and microFIT Contracts. According to the complainants, the Panel should evaluate the merits of these claims by first focusing on those made under the SCM Agreement. The complainants justify this submission by arguing that of the three covered agreements that are relied upon in these disputes, the SCM Agreement deals most specifically and in detail with the measures at issue, including with respect to the nature of the remedy that is available in the event of a finding of violation. Canada, on the other hand, considers that the Panel should first address the complainants' claims under Article III:4 of the GATT 1994 because, in its view, this provision deals most specifically and in detail with the focus of the complainants' challenge, namely, the "Minimum Required Domestic Content Level".

7.70 We note that the complainants assert, and Canada does not contest, that the measures at issue are trade-related investment measures affecting imports of renewable energy generation equipment and components. This suggests that, compared with the SCM Agreement and Article III:4 of the GATT 1994, it is the TRIMs Agreement that deals most directly, specifically and in detail[198], with the aspects of the FIT Programme, and the FIT and microFIT Contracts, that are at the centre of the complainants' concerns. In this light, we will commence our evaluation of the complainants' claims by focusing on those made under the TRIMs Agreement. However, it is apparent from the terms of Article 2.1 of the TRIMs Agreement that, in undertaking this evaluation[199], we will also necessarily have to come to a view about the merits of the complainants' allegations concerning the consistency of the challenged measures with Article III:4 of the GATT 1994. Thus, in the section that follows we will simultaneously evaluate the merits of both of the complainants' claims under Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994.

[195] FIT Rules, Exhibit JPN-119, Sections 7.1(a), 7.1(b), and 10.1(a); FIT Price Schedule, 3 June 2011, ("2011 FIT Price Schedule"), Exhibit JPN-30; FIT Contract, Exhibit JPN-127, Article 3.1 and Exhibit B; and microFIT Price Schedule, 13 August 2010, ("2010 microFIT Price Schedule"), Exhibit JPN-31.

[196] FIT Rules, Exhibit JPN-119, Sections 8.1 and 8.2; and FIT Contract, Exhibit JPN-127, Articles 4.2-4.4 and Exhibit B.

[197] FIT Rules, Exhibit JPN-119, Section 6.3(a).

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

[199] The text of Article 2.1 of the TRIMs Agreement is set out and discussed below, at paras. 7.114-7.121.

B. WHETHER CANADA ACTS INCONSISTENTLY WITH ARTICLE 2.1 OF THE TRIMS AGREEMENT AND ARTICLE III:4 OF THE GATT 1994

1. Arguments of the parties

(a) Japan

7.71 Japan claims that the FIT Programme, and the FIT and microFIT Contracts are (i) trade-related investment measures inconsistent with Canada's obligation under Article 2.1 of the TRIMs Agreement; and (ii) measures inconsistent with Canada's national treatment obligation under Article III:4 of the GATT 1994.

7.72 Japan argues that the FIT Programme, and the FIT and microFIT Contracts, are TRIMs falling within the scope of the TRIMs Agreement because, through the operation of the prescribed domestic content requirements, they (i) "encourage investment in the production of renewable energy and associated equipment in Ontario"[200]; and (ii) by definition, favour the use of domestic over imported products (i.e. wind and solar energy generation equipment) and are thereby "trade-related"[201]. Japan recalls that a TRIM will be in violation of Article 2.1 of the TRIMs Agreement when it is inconsistent with Article III or Article XI of the GATT 1994[202]. Thus, to the extent they are inconsistent with Article III:4 of the GATT 1994, Japan submits that the FIT Programme, and the FIT and microFIT Contracts, must also be inconsistent with Article 2.1 of the TRIMs Agreement[203]. In any case, Japan submits that the challenged measures' inconsistency with Article 2.1 is also apparent from the terms of Paragraph 1(a) in the Annex to the TRIMs Agreement, which describe one category of TRIMs that is deemed to be inconsistent with the obligation of national treatment found in Article III:4 of the GATT 1994[204].

7.73 Japan also argues that the FIT Programme, and FIT and microFIT Contracts, are inconsistent with 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[205]. First, renewable energy generation equipment manufactured domestically in Ontario and imported from Japan are "like products" because they are in a directly competitive situation in the market and there is no substantial difference between domestic and imported equipment in terms of their physical properties, end-uses, consumer perceptions, and tariff classifications. Second, the domestic content rules of the FIT Programme and Contracts are "requirements" in that they are conditions with which FIT generators voluntarily comply in order to obtain an advantage. Third, the domestic content rules of the FIT Programme and Contracts "affect" the "internal" "sale", "purchase" or "use" of renewable energy equipment in that they provide an incentive to wind and solar PV energy generators in Ontario to choose renewable energy equipment manufactured in Ontario. Finally, the domestic content rules of the FIT Programme and Contracts accord less favourable treatment to imported renewable energy generation equipment than that accorded to like products of Ontario origin because they modify the conditions of competition to the detriment of imported products[206].

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[200] Japan's first written submission, para. 298, citing the Minister's FIT Directive of 24 September 2009, which refers to new investment in renewable energy technologies. See Minister's 2009 FIT Direction, Exhibit JPN-102, p. 1.

[201] Japan's first written submission, para. 299, citing the Panel Report, *Indonesia – Autos*, para. 14.82.

[202] Japan's first written submission, para. 296.

[203] Japan's first written submission, paras. 295 and 300.

[204] Japan's first written submission, paras. 295 and 301-302.

[205] Japan's first written submission, para. 262.

[206] Japan's first written submission, paras. 262-283.

7.74 In this connection, Japan submits that Article III:8(a) of the GATT 1994 does not apply to the measures at issue base on the following three main arguments.

7.75 First, Japan argues that FIT Contracts are not "procurement by governmental agencies of products purchased". In Japan's view, the OPA does not "purchase" electricity "for governmental purposes". Moreover, according to Japan, even if it were possible to conclude that products were "purchased" under the FIT Contracts, such purchases could not amount to "procurement" by governmental agencies, under Article III:8(a) of the GATT 1994, in the light of the proper interpretation of the term "procurement" under customary international law rules of treaty interpretation[207].

7.76 Second, Japan argues that the FIT Contracts are not entered into "for governmental purposes". Properly interpreted in accordance with customary rules of treaty interpretation, Japan is of the view that the expression "for governmental purposes" means for governmental use, consumption or benefit. Japan contends that the Government of Ontario does not use, consume or benefit from the electricity delivered pursuant to FIT Contracts[208].

7.77 Finally, Japan submits that the FIT Contracts are entered into "with a view to commercial resale". Properly interpreted, Japan argues that the expression "with a view to commercial resale" means with a view to being sold into the stream of commerce or trade, as opposed to being used or consumed by the government. Because the electricity delivered pursuant to the FIT Contracts is injected into the transmission grid and delivered almost instantaneously to consumers in Ontario for their use, Japan maintains that to the extent that electricity may be considered to have been purchased by the Government of Ontario under FIT Contracts, that electricity is purchased with a view to commercial resale[209].

(b) European Union

7.78 The European Union argues that the FIT Programme, and the FIT and microFIT Contracts are (i) trade-related investment measures that are inconsistent with Article 2.1 of the TRIMs Agreement, in conjunction with paragraph 1(a) of its Annex; and (ii) measures inconsistent with Article III:4 of the GATT 1994[210].

7.79 According to the European Union, the challenged measures are TRIMs because: (i) they aim at encouraging the development of a local manufacturing capability for equipment and components for renewable energy generation facilities in Ontario[211]; and (ii) the "Minimum Required Domestic Content Level" affects trade in wind and solar energy generation equipment and components, as it

[207] Japan's opening statement at the first meeting of the Panel, paras. 49-58; second written submission, paras. 54 and 60; and opening statement at the second meeting of the Panel, paras. 27-28 and 32.

[208] Japan's first written submission, fn. 457; opening statement at the first meeting of the Panel, paras. 53 and 69-75; second written submission, para. 61; opening statement at the second meeting of the Panel, para. 33; and response to Panel question No. 47 (second set).

[209] Japan's opening statement at the first meeting of the Panel, paras. 78-85; second written submission, paras. 64-71; opening statement at the second meeting of the Panel, paras. 36-39; and response to Panel question No. 48 (second set).

[210] European Union's first written submission, paras. 98-106.

[211] European Union's first written submission, para. 100, referring to the evidence submitted by Japan in its first written submission, paras. 121-128, and the objectives mentioned by the Minister's Directive to the OPA. (Minister's 2009 FIT Direction, Exhibit JPN-102, pp. 1-2).

creates an incentive to purchase or use Ontario's products to the detriment of imported like products[212].

7.80 The European Union submits that it is possible to establish that a TRIM is inconsistent with Article 2.1 of the TRIMs Agreement by either: (i) adducing evidence to demonstrate the existence of any of the situations described in the Illustrative List of TRIMs; or (ii) otherwise demonstrating a violation of Article III:4 of the GATT 1994 on the basis of the terms of that provision[213]. The European Union makes both these arguments in the present disputes. Thus, the European Union argues that the challenged measures are inconsistent with Article 2.1 of the TRIMs Agreement when read in the light of Article 2.2 of the TRIMs Agreement and Paragraph 1(a) of its Annex, because in its view they are TRIMs requiring the purchase or use by entities of equipment and components for renewable generation facilities of Ontario origin or from a source in Ontario[214]. In addition, the European Union argues that the FIT Programme and its related contracts are inconsistent with the terms of Article III:4 of the GATT 1994 because, through the operation of the "Minimum Required Domestic Content Level", they accord less favourable treatment to imported equipment and components for renewable energy generation facilities than that accorded to like products originating in Ontario[215]. In this regard, the European Union agrees with, and adopts as its own, the arguments advanced by Japan as to why the measures at issue are inconsistent with Article III:4 of the GATT 1994[216].

7.81 The European Union submits that Article III:8 of the GATT 1994 does not apply to the measures at issue on the basis of four main arguments.

7.82 First, the European Union argues that Article III:8(a) of the GATT 1994 is not applicable because Article III:8(a) only covers requirements directly relating to the product purchased by the government. In the case under consideration, the European Union submits that the product allegedly procured by the Government of Ontario is electricity produced by FIT generators. However, the "Minimum Required Domestic Content Level" at issue relates to different products, i.e. renewable energy 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, electricity. Thus, the European Union argues that the "Minimum Required Domestic Content Level" does not "govern" the alleged procurement of electricity because it is not related to the subject matter of the alleged procurement[217].

7.83 Second, the European Union argues that Article III:8(a) of the GATT 1994 is not applicable because the FIT Programme does not involve a "purchase" or "procurement". According to the European Union, the term "procurement" in Article III:8(a) means "acquisition". In its view, the OPA does not acquire electricity from the FIT generators under the FIT Programme. Rather, the European Union asserts that the OPA facilitates the production of electricity from renewable sources of energy and directs the FIT generators to supply their electricity into the grid[218].

7.84 Third, the European Union argues that Article III:8(a) of the GATT 1994 is not applicable because even assuming that the measures involve a "purchase" or "procurement" of electricity, such

[212] European Union's first written submission, paras. 101-102.
[213] European Union's first written submission, paras. 151 and 156-157.
[214] European Union's first written submission, paras. 141 and 153.
[215] European Unions' first written submission, paras. 156 and 158-162.
[216] European Union's first written submission, paras. 106 and 158.
[217] European Union's response to Panel question No. 22 (first set); and opening statement at the first meeting of the Panel, para. 41.
[218] European Union's first written submission, paras. 57 and 115; response to Panel question No. 49 (first set); and opening statement at the second meeting of the Panel, para. 12.

conduct is not undertaken "for governmental purposes". For the European Union, the key question in this respect is whether the electricity purchased by the OPA is acquired with a view to covering the needs of the Government of Ontario. According to the European Union, the fact that the OPA purchases electricity from 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 is neither used by nor covers the needs of the OPA or the Government of Ontario to perform any of its public service functions[219].

7.85 Finally, the European Union argues that Article III:8(a) of the GATT 1994 is not applicable because any purchase of electricity through the FIT Programme is "with a view to commercial resale and/or with a view to be used in the production of goods for commercial sale"[220]. In this respect, the European Union submits that a "commercial resale" in the sense of Article III:8(a) does not necessarily require that the product in question be resold for a *profit*. Rather, the European Union submits that Article III:8(a) merely requires that the purchased product is sold, traded or introduced into the market for that particular product. The European Union asserts that the electricity produced by the FIT generators is introduced into the market and sold to all consumers at commercial prices. Moreover, the European Union also argues that since the electricity produced by the FIT generators is fed into the grid, the purchased product is used in the production of goods for commercial sale[221].

(c) Canada

7.86 Canada argues that the FIT Programme is not subject to the obligations of Article III of the GATT 1994 because the laws and requirements that create and implement the FIT Programme are laws and requirements that govern the procurement of renewable electricity for the governmental purpose of securing electricity supply for Ontario consumers from clean sources, and not with a view to commercial resale or with a view to use in the production of goods for commercial sale[222]. Thus, Canada states, considering that the FIT Programme is not subject to Article III of the GATT 1994, it cannot be inconsistent with Article 2.1 of the TRIMs Agreement[223].

7.87 In support of its view that Article III:8(a) of the GATT 1994 applies to the measures at issue, Canada submits four main arguments.

7.88 First, Canada contends the challenged measures are law, regulations or requirements governing the procurement of electricity. Canada considers that Section 25.35 of the *Electricity Act of 1998*; the Ministerial Direction; and the FIT and microFIT Rules and Contracts are laws or requirements for the purposes of Article III:8(a). In addition, Canada argues that the scope of Article III:8(a) is not confined to the purchase of products that are the focus of a claim under Article III of the GATT 1994[224]. Canada contends that its understanding is supported by the

[219] European Union's first written submission, paras. 116-132; opening statement at the first meeting of the Panel, paras. 36-37; second written submission, paras. 125-133; opening statement at the second meeting of the Panel, paras. 41-49; and responses to Panel questions Nos. 46 and 47 (second set).

[220] European Unions' first written submission, para. 133.

[221] European Union's first written submission, paras. 128-132; opening statement at the first meeting of the Panel, paras. 38-40; second written submission, paras. 134-149; opening statement at the second meeting of the Panel, paras. 50-59; and response to Panel question No. 48 (second set).

[222] Canada's first written submission (DS412), para. 67.

[223] Canada's first written submission (DS412), para. 101.

[224] Canada's first written submission (DS412), para. 68; first written submission (DS426), para. 13; opening statement at the first meeting of the Panel, paras. 10 and 46-48; response to Panel question No. 22 (first set); and opening statement at the second meeting of the Panel, paras. 62 and 69.

Government Procurement Agreement ("GPA") and academic literature on the GPA[225]. Finally, Canada states that nothing in the wording of Article III:8(a) prescribes that the "domestic content requirement" must "govern" the procurement. Alternatively, Canada argues that the domestic content requirement does "govern" the OPA's procurement of wind and solar electricity[226].

7.89 Second, Canada asserts the OPA is procuring electricity. Canada points out that there is no dispute between the parties that the OPA is a governmental agency[227]. Canada also explains that several sections of the challenged measures expressly state that the OPA is procuring renewable electricity[228]. In any case, Canada argues that the ordinary meaning of "procurement" is "[t]he action of obtaining something; acquisition […]"[229]. Canada contends that this meaning is confirmed by its context in Article III:8(a), since it refers to the procurement of products "purchased", and the ordinary meaning of "purchase" is "[t]o acquire in exchange for payment in money or an equivalent; to buy"[230]. Thus, according to Canada, "Article III:8(a) applies to the governmental acquisition of products by payment"[231]. Canada contends that the OPA purchases renewable electricity for the following reasons: (i) the challenged measures state that the OPA is purchasing renewable electricity; (ii) the OPA only pays money in exchange for renewable electricity that is produced and delivered into the grid[232]; (iii) the OPA also purchases the by-products from the production of renewable electricity, including carbon credits and "future contract related products"[233]; and (iv) the OPA pays sales tax under the FIT Contracts, which in Ontario is paid by the acquirer of goods and services[234].

7.90 Third, Canada argues that the ordinary meaning of a "purchase for governmental purposes" is a purchase for an aim of the government. The OPA's purchase of renewable electricity furthers the aim of the Government of Ontario to secure the supply of adequate and reliable electricity from clean sources[235].

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[225] Canada's opening statement at the first meeting of the Panel, paras. 49-51; and response to Panel question No. 22 (first set).

[226] Canada's opening statement at the second meeting of the Panel, paras. 64-65.

[227] Canada's first written submission (DS412), para. 70.

[228] Canada's first written submission (DS412), paras. 71-75. See also Canada's first written submission (DS426), para. 16; opening statement at the first meeting of the Panel, para. 29; closing oral statement at the first meeting of the Panel, para. 3; second written submission, para. 19; and opening statement at the second meeting of the Panel, para. 20.

[229] Canada's first written submission (DS412), para. 76, quoting the OED Online Dictionary, definition of "procurement" (OED Online Dictionary, definition of "procurement", ("OED Online Dictionary: procurement"), Exhibit CDA-39). See also Canada's second written submission, para. 24.

[230] Canada's first written submission (DS412), para. 76, quoting the OED Online Dictionary, definition of "purchase" (OED Online Dictionary, definition of "purchase", ("OED Online Dictionary: purchase"), Exhibit CDA-40).

[231] Canada's first written submission (DS412), para. 77. See also, Canada's response to Panel question No. 56 (first set).

[232] Canada's first written submission (DS412), paras. 77-80. See also Canada's first written submission (DS426), para. 16; second written submission, paras. 16 and 43; opening statement at the second meeting of the Panel, para. 20; and closing statement at the second meeting of the Panel, para. 2.

[233] Canada's first written submission (DS426), para. 16; opening statement at the first meeting of the Panel, paras. 17-20, referring to FIT Contract, Exhibit JPN-127, Article 2.10(a); and second written submission, para. 15.

[234] Canada's first written submission (DS426), para. 17, referring to Canada Revenue Agency, How GST/HST works, ("How GST/HST Works"), Exhibit CDA-56; FIT Contract, Exhibit JPN-127, Article 3.5; and FIT Rules, Exhibit JPN-119, Section 7.3(d). See also Canada's opening statement at the first meeting of the Panel, para. 21.

[235] Canada's first written submission (DS412), paras. 86-88; first written submission (DS426), paras. 23-34; closing statement at the first meeting of the Panel, para. 9; response to Panel question No. 28 (first

7.91 Finally, Canada submits that OPA's purchase of renewable electricity is not with a view to commercial resale as it is not a purchase with an aim to resell for profit. Similarly, the OPA is not purchasing renewable electricity with a view to using the 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 produce goods[236].

2. Arguments of the third parties

(a) Australia

7.92 Referring to the term "governmental purposes" in Article III:8(a) of the GATT 1994, Australia notes that the ordinary meaning of the term "purpose" may be "practical advantage or use"[237]. Although this ordinary meaning may not be as common as the one suggested by Canada, Australia submits that it appears to be more appropriate when one considers the reference to "*les besoins*" in the French version of Article III:8(a) of the GATT 1994. With respect to the term "with a view to commercial resale", Australia notes that the ordinary meaning of "commercial" is "concerned with or engaged in 'commerce'; commerce is defined as the activity of buying and selling"[238]. In Australia's view, the concept of profit in both definitions is a secondary consideration. Australia considers that to interpret "with a view to commercial resale" as meaning a purchase with an aim to resell for profit would be an overly narrow definition – one that would expand the possible exemptions to the national treatment obligations in Article III. Australia submits that Article III:8(a) 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[239].

(b) Brazil

7.93 Brazil considers that the complainants unduly limit the scope of the expression "for governmental purposes" in Article III:8(a) of the GATT 1994, by maintaining that it only covers purchases for the government's own use or benefit. In Brazil's view, the complainants' interpretation seems to indicate that the sole purpose of the government is to provide for the maintenance and the regular functioning of its bureaucracy, disregarding the fact that state bureaucracy is only a means to achieve a myriad of ends, as defined by each society. Brazil contends that the purpose of a government cannot be conceptually construed, and can only be understood on a case-by-case basis and informed by the specific function performed by a given government in each sector of the economy. However, Brazil considers that the definition of "governmental purposes" cannot be as broad as suggested by Canada, as it would significantly undermine the scope of the national treatment obligation set out in Article III of the GATT 1994[240].

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set); second written submission, paras. 50-67; opening statement at the second meeting of the Panel, paras. 33-46; closing statement at the second meeting of the Panel, paras. 5-12; and response to Panel question No. 47 (second set).

[236] Canada's first written submission (DS412), paras. 90-97; first written submission (DS426), paras. 35-47; opening statement at the first meeting of the Panel, paras. 54-72; response to Panel question No. 25(a) (first set); second written submission, paras. 68-83; opening statement at the second meeting of the Panel, paras. 47-59; closing statement at the second meeting of the Panel, paras. 13-16; and response to Panel question No. 48 (second set).

[237] Australia's third-party submission (DS412), para. 20; and third-party submission (DS426), para. 20.

[238] Australia's third-party submission (DS412), para. 30; and third-party submission (DS426), para. 30.

[239] Australia's third-party submission (DS412), paras. 16-35; third-party submission (DS426), paras. 16-35; and third-party statement (DS412 and DS426), paras. 21-24.

[240] Brazil's third-party statement (DS412 and DS426), paras. 2-8.

(c) China

7.94 China considers that the terms "purchased for governmental purposes" in Article III:8(a) of the GATT 1994 mean that (i) the government is the reason for the purchase; (ii) the government shall benefit from the result or effect of the purchase; or (iii) the government is the aim or the end of the purchase. In these disputes, China considers that the electricity purchased by the OPA is not for governmental purposes because it is injected into the grid for sale to end consumers. Moreover, China notes that the electricity sold to business operators will be used in the production of goods for commercial sale[241].

(d) European Union (in WT/DS412)

7.95 As a third party in WT/DS412, the European Union considers that the renewable energy generation equipment manufactured in Ontario and the one imported from Japan and from other countries are "like products" in the sense of Article III:4 of the GATT 1994. The European Union contends that the contested measures are "requirements" in the sense of Article III:4, and that it may be reasonably expected that the challenged measures will adversely modify the conditions of competition between the domestic and imported like products. The European Union recalls that the FIT Programme creates incentives among Ontario-based wind and solar PV energy generators to use renewable energy generation equipment produced within Ontario. With regards to Article III:8(a), the European Union considers that there is no "procurement" in the sense of this provision; and even if the Government of Ontario did procure electricity, it would be with a view to commercial resale or use in the production of goods for commercial sale[242].

7.96 Turning to the claims under the TRIMs Agreement, the European Union underlines that the TRIMs Agreement is a fully fledged agreement, which applies independently to Article III of the GATT 1994. The European Union also notes that the measures at issue would be covered by Paragraph 1(a) of the Annex to the TRIMs Agreement. A finding that a measure falls under Paragraph 1(a) 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 need not 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[243].

(e) Japan (in WT/DS426)

7.97 As a third party in WT/DS426, Japan contends that the characterization and treatment provided under domestic law cannot have any bearing on the application or interpretation of provisions of the covered agreements, or more generally on the determination of whether any WTO obligation has been violated. For similar reasons, Japan considers that the manner in which a Member chooses to administer its tax system has little relevance for whether a particular transaction is a "procurement" or "purchase" for purposes of Article III:8(a) of the GATT 1994[244].

[241] China's third-party submission (DS412), paras. 8-22; and third-party statement (DS412 and DS426), paras. 2-3.
[242] European Union's third-party submission (DS412), paras. 27-42.
[243] European Union's third-party submission (DS412), paras. 43-47.
[244] Japan's third-party submission (DS412), paras. 13-15.

(f) Korea

7.98 Korea considers that the text of Article III:8(a) of the GATT 1994, when read as a whole, suggest that the meaning of "procurement" is not completely identical to the meaning of "purchase", since this provision 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" would appear to encompass any form of governmental acquisition, including but not limited to "purchase"[245].

7.99 Moreover, Korea considers that electric power is not a material object, but a form of energy typically generated when coils of wire are 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). Korea contends that it remains open whether, in the circumstances of these disputes, (i) electricity should be considered a "product", and (ii) a definition of "product" (referring to renewable energy from wind, solar PV, or other "clean" alternatives) that considers the methods used to produce the electric power would be appropriate where the definition is intended to achieve important environmental objectives[246].

7.100 Turning to the expression "governmental purposes", Korea contends that Canada's interpretation of "governmental purposes" would result in all procurements made by a government being considered "for governmental purposes", which would render this expression inutile. In addition, Korea notes that Canada appears to suggest that "governmental purposes" can be discerned from the societal interest in the alleged aim of the governmental action. Korea considers that Canada is correct in stressing the importance of adequate and reliable electrical energy supplies to the public welfare. However, Korea notes that the same description could be applied to almost any other field of economic activity. Thus, Korea contends that a test under Article III:8(a) that requires only some connection of the purchase to some matter relevant to public welfare would appear to be inadequate[247].

(g) Mexico

7.101 Mexico considers that when a subsidy contingent upon the use of domestic over imported goods is found to be prohibited under the SCM Agreement, a violation of the national treatment obligation under Article III of the GATT 1994 will necessarily exist. In addition, measures conditioned upon the use of domestic goods constitute investment measures, and being inconsistent with Article III of the GATT 1994, will also automatically result in a violation of Article 2.1 of the TRIMs Agreement. However, Mexico considers that in the case of governmental purchases measures will be excluded from the scope of Article III of the GATT 1994 and Article 2.1 of the TRIMs Agreement[248].

(h) Norway

7.102 Norway agrees with the complainants that the crucial issue in these disputes is whether the OPA is actually "purchasing" electricity, or whether it functions solely as a "clearing house". In this respect, Norway argues that it is not sufficient to consider whether the OPA's activities are referred to as "procurement". With regards to Canada's interpretation of "governmental purposes", Norway considers that it would in practice include every single purchase made by a government. This would

[245] Korea's third-party submission (DS412), paras. 16-18.
[246] Korea's third-party submission (DS412), paras. 22-26.
[247] Korea's third-party submission (DS412), paras. 31-34.
[248] Mexico's third-party submission (DS412), paras. 16-19; and third-party submission (DS426), paras. 16-19.

result in the terms "governmental purposes" being made inutile, and also allow Members to circumvent the obligation included in Article III:4 of the GATT 1994[249].

(i) United States

7.103 With respect to the "likeness" analysis under Article III:4 of the GATT 1994, the United States recalls that several panels have found significant the fact that a measure distinguishes between a domestic and an imported product solely on the basis of origin[250]. Turning to Article III:8(a), the United States addresses the following three issues.

7.104 First, the United States contends that Canada has improperly assigned an "object and purpose" to Article III:8(a) of the GATT 1994. The United States recalls that Article 31 of the Vienna Convention provides that the interpretation of treaty provisions shall be informed by the object and purpose *of the treaty*. Thus, according to the United States, the proper identification of the object and purpose of an agreement is not derived by reviewing an isolated subsection of that agreement[251].

7.105 Second, the United States argues that Canada has employed an overly broad interpretation of "governmental purposes" in Article III:8(a). The United States argues that Canada's interpretation renders meaningless the phrase "purchase for governmental purposes" because of two reasons: (i) nearly every government procurement is "directed by" a government document of some sort; and (ii) Canada's interpretation is circular, as it is difficult to conceive of a situation in which a government would say it is not acting with a governmental aim in mind[252].

7.106 Finally, the United States considers that Canada has incorrectly identified the relevant product for purposes of Article III:8(a). The particular purchases to which the FIT local content requirement apply – sales of equipment by manufacturers to private power generators – appear to differ in nature and by contract from the purported government procurement of electricity that is at the core of Canada's Article III:8(a) defence. In other words, 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*. According to the United States, it does not follow that a purported government 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. The United States considers that 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[253].

3. Evaluation by the Panel

(a) Introduction

7.107 In the sections that follow, we begin our evaluation of the merits of the parties' arguments by first determining whether the complainants have established that the challenged measures amount to TRIMs within the meaning of Article 1 of the TRIMs Agreement. We subsequently examine whether the complainants have also demonstrated that the FIT Programme, and the FIT and microFIT Contracts, are inconsistent with Article 2.1 of the TRIMs Agreement by virtue of being inconsistent with the national treatment obligation provided for in Article III:4 of the GATT 1994. In this

[249] Norway's third-party statement (DS412 and DS426), paras. 2-6.
[250] United States' third-party submission (DS412 and DS426), paras. 3-5.
[251] United States' third-party submission (DS412 and DS426), paras. 6-12.
[252] United States' third-party submission (DS412 and DS426), paras. 13-15.
[253] United States' third-party submission (DS412 and DS426), paras. 16-20.

connection, the key question that we will have to resolve, given Canada's line of defence[254], is whether Article III:8(a) of the GATT 1994 may apply to remove the challenged measures from the scope of Article III:4 of the GATT 1994, and thereby also the disciplines found in Article 2.1 of the TRIMs Agreement.

(b) Whether the measures at issue are trade-related investment measures

7.108 Article 1 of the TRIMs Agreement stipulates that it "applies to investment measures related to trade in goods only". However, the TRIMs Agreement does not define trade-related investment measures ("TRIMs"). The complainants argue that the measures at issue are TRIMs because they (i) encourage investment in the local production of renewable energy generation equipment and components in Ontario; and (ii) affect trade in wind and solar energy generation equipment by favouring Ontario products over imported products[255]. Canada does not advance any arguments on whether the challenged measures constitute TRIMs.

7.109 With respect to whether the challenged measures constitute "investment" measures, the evidence before us reveals that, as argued by the complainants, one of the aims of the FIT Programme, and the FIT and microFIT Contracts, is to encourage investment in the local production of equipment associated with renewable energy generation in the Province of Ontario. Thus, for example, the objectives of the FIT Programme include enabling "new green industries through new investment and job creation" and the provision of "incentives for investment in renewable energy technologies"[256].

7.110 The evidence before us also discloses that the FIT Programme has been a key factor motivating a number of manufacturers to establish facilities for the production of renewable energy equipment in Ontario. For instance, Siemens has reported that by becoming a local manufacturer of inverters for solar PV technology, "Siemens will allow its customers investing in commercial and solar farm applications to meet the 'minimum required domestic level' requirement by the Ontario government's feed-in tariff (FIT) program"[257]. In addition, another company, Automation Tooling Systems, "announced plans in October 2009 to manufacture solar modules in Ontario to take advantage of the province's Green Energy Act, which guarantees a higher price for solar energy through its feed-in tariff program"[258]. Similarly, two other firms, ENERCON and Niagara Region Wind Corporation, have signed a contract pursuant to which ENERCON will supply and maintain wind turbines for the Niagara Region Wind Power Project. It has been reported that "[a] key component of this agreement is ENERCON's commitment to build a manufacturing facility in the Niagara Region … [which] will allow NRWC to fulfill its domestic content requirements, as required by the Ontario Power Authority"[259]. The new facility "would be the first of its kind in the North American market and for ENERCON outside of its home market of Germany"[260].

[254] We note that apart from Canada's reliance on Article III:8(a) of the GATT 1994, Canada has not advanced any specific arguments to reject the complainants' claims under Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994.

[255] Japan's first written submission, paras. 298-299; and European Union's first written submission, paras. 100-102; and 151-152.

[256] Minister's 2009 FIT Direction, Exhibit JPN-102, p. 1.

[257] Siemens invests in Solar Inverter Manufacturing in Canada, Siemens Canada, Press Release, 3 June 2010, ("Siemens invests in Canada"), Exhibit JPN-112.

[258] Chuck Howitt, "ATS lifts curtain on green wing", *Waterloo Region Record*, 26 November 2010, ("ATS lifts curtain on green wing"), Exhibit JPN-113.

[259] "Niagara Region Wind Corporation selects turbine manufacturer", Canada NewsWire, 27 September 2011, ("Niagara Region Wind Corporation selects turbine manufacturer"), Exhibit JPN-117.

[260] Niagara Region Wind Corporation selects turbine manufacturer, Exhibit JPN-117.

7.111 As to whether the measures are "trade-related", we note that the FIT Programme imposes a "Minimum Required Domestic Content Level" on electricity generators utilising solar PV and windpower technologies that, for the reasons we explain elsewhere in this section[261], compels them to purchase and use certain types of renewable energy generation equipment sourced in Ontario in the design and construction of their facilities. To this extent, we see the "Minimum Required Domestic Content Level" that is at issue in these disputes to be not unlike the domestic content requirements challenged in *Indonesia – Autos*, where the panel opined that "by definition, [domestic content requirements] always favour the use of domestic products over imported products, and therefore affect trade"[262].

7.112 Thus, based on the foregoing analysis, we find that the FIT Programme, and the FIT and microFIT Contracts, to the extent they envisage and impose a "Minimum Required Domestic Content Level", constitute TRIMs within the meaning of Article 1 of the TRIMs Agreement. Having established that the challenged measures amount to TRIMs, we now turn to examine whether they are inconsistent with Article 2.1 of the TRIMs Agreement.

(c) Whether the measures at issue are inconsistent with Article 2.1 of the TRIMs Agreement because they are allegedly inconsistent with Article III:4 of the GATT 1994

7.113 As already noted, we see the core issue that is contested in these disputes in relation to the complainants' claims under the TRIMs Agreement and the GATT 1994 to be whether the challenged measures are outside the scope of application of Article III:4 of the GATT 1994 by virtue of the operation of Article III:8(a) of the GATT 1994[263]. In this regard, the key questions that we must resolve are: (i) whether Paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement precludes the application of Article III:8(a) to the challenged measures; and (ii) to the extent that Paragraph 1(a) of the Illustrative List does not remove the possibility of applying Article III:8(a) to the challenged measures, whether those measures are of the kind described in Article III:8(a). We now address each of these questions in turn.

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[261] The "Minimum Required Domestic Content Level" is described and examined in more detail below at paras. 7.158-7.165.

[262] Panel Report, *Indonesia – Autos*, para. 14.82.

[263] We agree with the European Union's characterization of Article III:8(a) of the GATT 1994 as a "scope" provision rather than an exception. (European Union's response to Panel Question No. 14 (first set); and opening statement at the second meeting of the Panel, para. 29). We recall that the Appellate Body in *China – Raw Materials* considered the different nature of Articles XI:2 and XX of the GATT 1994, and stated that:

> Members can resort to Article XX of the GATT 1994 as an exception to justify measures that would otherwise be inconsistent with their GATT obligations. By contrast, Article XI:2 provides that the general elimination of quantitative restrictions *shall not extend to* the items listed under subparagraphs (a) and (c) of that provision. This language seems to indicate that the scope of the obligation not to impose quantitative restrictions itself is limited by Article XI:2(a). Accordingly, where the requirements of Article XI:2(a) are met, there would be no scope for the application of Article XX, because no obligations exists. (Appellate Body Report, *China – Raw Materials*, para. 334).

We note that, pursuant to Article III:8(a), the provisions of Article III *shall not apply to* laws, regulations or requirements governing certain type of procurement. Thus, consistent with the Appellate Body's view relating to the relationship between Articles XI:2 and XX of the GATT 1994, the language in Article III:8(a) seems to indicate that the scope of the national treatment obligation under Article III is limited by Article III:8(a). In other words, if a measure is covered by Article III:8(a), it will not fall within the scope of Article III of the GATT 1994.

(i) Whether the challenged measures are outside the scope of Article III:4 of the GATT 1994 by virtue of the operation of Article III:8(a) of the GATT 1994

Whether Paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement precludes the application of Article III:8(a) of the GATT 1994 to the challenged measures

7.114 We begin by setting out and reviewing the relevant legal provisions, which stipulate as follows:

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

7.115 Paragraph 1(a) of Illustrative List in the Annex to the TRIMs Agreement provides:

> 1. TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require:
>
> (a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production; or …

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

7.117 The text of Article 2.1 of the TRIMs Agreement imposes an obligation on Members not to apply any TRIM that is inconsistent with the "provisions of Article III or Article XI of GATT 1994". The "provisions of Article III" include the national treatment obligation found in Article III:4. It follows that any measure found to be inconsistent with Article III:4 of the GATT 1994 that is also a TRIM will be incompatible with Article 2.1 of the TRIMs Agreement.

7.118 It is important to note that the "provisions of Article III" that are referred to in Article 2.1 of the TRIMs Agreement include Article III:8(a). This provision precludes the application of the obligations set out in Article III to "laws, regulations or requirements governing" certain types of

government procurement[264]. Consequently, any government procurement transactions covered by the terms of Article III:8(a) of the GATT 1994 will be removed from the scope of the obligations set out in Article III, including Article III:4. Thus, where a particular TRIM involves the same kind of government procurement transactions described in Article III:8(a), it cannot be found to be inconsistent with the obligation in Article 2.1 of the TRIMs Agreement.

7.119 Article 2.2 of the TRIMs Agreement does not impose any obligations on Members, but rather informs the interpretation of the prohibition set out in Article 2.1. In particular, Article 2.2 explains that the TRIMs described in the Illustrative List of the Annex to the TRIMs Agreement are to be considered inconsistent with Members' specific obligations under Articles III:4 and XI:1 of the GATT 1994. It does not follow, however, that TRIMs having the same characteristics as those described in Paragraph 1(a) of the Illustrative List must be automatically found to be inconsistent with Article III:4 of the GATT 1994 *when they would otherwise be covered by the terms of Article III:8(a) of the GATT 1994*. Such a reading of Article 2.2 would be inconsistent with the clear terms of Article 2.1, which explicitly state that there will be a violation of Article 2.1 of the TRIMs Agreement whenever a measure is inconsistent with Article III of the GATT 1994. This refers to *the whole of Article III, including Article III:8(a).*

7.120 In our view, the European Union's argument that Paragraph 1(a) of the Illustrative List, read in conjunction with Article 2.2 of the TRIMs Agreement, may be determinative of whether a measure violates Article III:4 of the GATT 1994, and thereby also Article 2.1 of the TRIMs Agreement, does not reflect the proper sequence of the legal analysis that is envisaged under Articles 2.1 and 2.2 of the TRIMs Agreement. We consider this sequence to be the following. Where in a particular case it is found that the national treatment obligation in Article III:4 applies to a challenged measure, the Illustrative List may be used to determine whether the challenged measure is inconsistent with that obligation through the operation of Article 2.1 of the TRIMs Agreement. Where such a measure has the characteristics that are described in Paragraph 1(a) of the Illustrative List, it follows from the clear language of this provision that it will be in violation of Article III:4 of the GATT 1994, and thereby also Article 2.1 of the TRIMs Agreement. Given the language of Article 2.1, it would, in our view, be inappropriate to infer from Paragraph 1(a) of the Illustrative List that TRIMs having the characteristics described in that paragraph will *always* be inconsistent with Article III:4 of the GATT 1994, irrespective of whether they may be covered by the terms of Article III:8(a) of the GATT 1994.

7.121 In the light of the foregoing considerations, we conclude that Paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement does not obviate the need for us to undertake an analysis of whether the challenged measures are outside of the scope of application of Article III:4 of the GATT 1994 by virtue of the operation of Article III:8(a) of the GATT 1994.

Whether the challenged measures are of the kind described in Article III:8(a) of the GATT 1994

7.122 These proceedings are the first where a panel has been asked to interpret and apply Article III:8(a) of the GATT 1994. A plain reading of this provision, which we have already set out above, suggests that it can be broken up into a number of cumulative elements. The parties' arguments appear to raise issues with respect to the following three questions:

(i) whether the challenged measures can be characterized as "laws, regulations or requirements *governing* procurement";

[264] The obligation in Article 2.1 of the TRIMs Agreement is further qualified by the statement that it is "without prejudice to other rights and obligations under the GATT 1994".

(ii) whether the challenged measures involve "*procurement* by governmental agencies"; and

(iii) whether any "procurement" that exists is undertaken "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".

"Laws, regulations or requirements *governing* procurement" of electricity

7.123 The complainants' claims under Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994 are focused on the "Minimum Required Domestic Content Level" imposed under the FIT Programme, and the FIT and microFIT Contracts, which they allege results in less favourable treatment of imported renewable energy generation equipment compared with the treatment accorded to domestic like products[265]. Canada argues that it has no national treatment obligations with respect to the "Minimum Required Domestic Content Level" because it is part of the "laws, regulations or requirements *governing* the procurement" of electricity under the FIT Programme. In other words, Canada submits that the "Minimum Required Domestic Content Level" is removed from the scope of Article III by operation of Article III:8(a) of the GATT 1994[266].

7.124 As we explain in more detail elsewhere in these Reports[267], the evidence before us reveals that the "Minimum Required Domestic Content Level" is a condition that *must* be satisfied by electricity generators utilizing solar PV or windpower technologies wanting to participate in the FIT Programme. In other words, the "Minimum Required Domestic Content Level" compels the purchase and use of certain renewable energy generation equipment that is sourced in Ontario as a necessary prerequisite for the alleged procurement by the Government of Ontario to take place. We agree with Canada that a measure "governing" procurement is one that controls, regulates or determines that procurement[268]. It follows that the "Minimum Required Domestic Content Level" is a "requirement[] governing" the alleged procurement of electricity by the Government of Ontario under the FIT Programme, and the FIT and microFIT Contracts, for purposes of Article III:8(a).

7.125 The European Union does not contest that compliance with the "Minimum Required Domestic Content Level" is a necessary condition for the alleged procurement of electricity to take place. Nevertheless, according to the European Union, "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*"[269]. The European Union submits that "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 [must] 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"[270]. In other words, the European Union argues that the "laws, regulations or requirements" referred to in Article III:8(a) of the GATT 1994 can only be understood to refer to "laws, regulations

[265] Japan's first written submission, paras. 272-283 and 295-297; and European Union's first written submission, paras. 106, 152-153, 156, and 158-162.

[266] Canada's first written submission (DS412), paras. 62, 67, and 101; first written submission (DS426), paras. 3 and 11; opening statement at the first meeting of the Panel, paras. 5 and 9; second written submission, paras. 2 and 13; and opening statement at the second meeting of the Panel, paras. 5 and 12.

[267] See below at paras. 7.164-7.166.

[268] See Canada's first written submission (DS412), para. 83 referring to the ordinary meaning of "govern" endorsed in the Panel Report, *EC – Selected Customs Matters*, para. 7.529.

[269] European Union's response to Panel question No. 22 (first set), para. 88. (emphasis added)

[270] European Union's second written submission, para. 113. See also European Union's response to Panel question No. 56 (first set).

or requirements" that *directly relate to the product* procured by the government. Thus, because the "Minimum Required Domestic Content Level" is imposed with respect to products (certain renewable energy generation equipment) that are different to the product allegedly procured (electricity), the European Union argues that the "Minimum Required Domestic Content Level" cannot be said to actually "govern" the alleged procurement. For this reason, the European Union asserts that the challenged measures cannot be covered by the terms of Article III:8(a)[271].

7.126 We have difficulty accepting the European Union's interpretation. The words "laws, regulations or requirements governing" in Article III:8(a) are not linked directly to the "products purchased" but to the "procurement" of such products. In this light, we cannot accept that the reference to "laws, regulations or requirements governing the procurement" can *only* be read to mean "laws, regulations or requirements" that *directly* affect a product that is identical to the product that is the subject of the alleged procurement. In our view, it is apparent from the text of Article III:8(a) that the focus of the analysis must be the "laws, regulations or requirements governing" the alleged *procurement* of electricity.

7.127 As already mentioned, the "Minimum Required Domestic Content Level" is a necessary prerequisite for the alleged procurement by the Government of Ontario to take place, and to this extent, we are of the view that such requirements "govern" the alleged procurement. Furthermore, we observe that the electricity allegedly procured by the Government of Ontario under the FIT Programme is produced using the renewable energy generation equipment that is the subject of the "Minimum Required Domestic Content Level". Thus, to the extent that the "Minimum Required Domestic Content Level" relates to the very same equipment that is needed and used to produce the electricity that is allegedly procured, there is very clearly a close relationship between the products that are affected by the relevant "laws, regulations or requirements" (renewable energy generation equipment) and the product that is allegedly procured (electricity).

7.128 Thus, for the above reasons, we find that the "Minimum Required Domestic Content Level" should be properly characterized as one of the "requirements governing" the alleged procurement of electricity for the purpose of Article III:8(a).

"*Procurement* by governmental agencies"

7.129 We now proceed to examine whether the measures at issue involve "*procurement* by governmental agencies of products *purchased*" within the meaning of Article III:8(a) of the GATT 1994.

7.130 The European Union and Canada consider that the ordinary meanings of the words "procurement" and "purchased" should be understood, in the context of Article III:8(a) of the GATT 1994, to imply the same governmental action of *acquiring* a product[272]. Although agreeing with the view that a "procurement" can be defined as "[t]he action of obtaining something; acquisition"[273], Japan submits that the notion of "procurement" referred to in Article III.8(a) is not entirely captured by the meaning of "purchased" that is advanced by the European Union and Canada. In Japan's view, a number of contextual elements suggest that the proper interpretation of the term "procurement", and thus a finding that "procurement by governmental agencies" exists, involves

[271] In its third-party submission, the United States also raised the issue of the legal implications of the difference between the product subject to the "Minimum Required Domestic Content Level" and the product that is the subject of the alleged procurement. See United States' third-party submission, paras. 18-19.

[272] European Union's first written submission, para. 114; response to Panel question No. 56 (first set); Canada's first written submission (DS412), para. 76; and response to Panel question No. 56 (first set).

[273] Japan's first written submission, para. 51.

consideration of the following four factors, "none of which alone may be decisive": (i) governmental payment for the procurement; (ii) governmental use, consumption or benefit; (iii) governmental obtainment, acquisition, or possession; and (iv) governmental control over the obtaining of the product[274].

7.131 We have some difficulty accepting Japan's interpretation of the term "procurement". In our view, Japan's argument that "procurement" implies "governmental use, benefit, or consumption" does not sit well with the immediate context within which the term "procurement" is used in Article III:8(a) of the GATT 1994. As the parties have explained, the ordinary meaning of the word "procurement" includes "[t]he action of obtaining something; an acquisition"[275]. Article III:8(a) refers to "procurement by governmental agencies of products *purchased*". The ordinary meanings of the word "purchase" advanced by the parties include "to obtain; to gain possession of" and "to acquire in exchange for payment in money or an equivalent; to buy"[276]. The notion of governmental *use, benefit or consumption* is not immediately apparent from the ordinary meanings of these terms. Rather, in our view, to the extent that the ordinary meanings of both words refer to the action of "obtaining" or "acquiring" something, they support a conclusion that "procurement" and "purchase" should be given the same meaning. Indeed, the fact that Article III:8(a) describes the "*procurement* … of products" as "products *purchased*" would seem to confirm the view that the term "procurement" in Article III:8(a) should be given the same essential meaning as the word "purchased" and *vice versa*.

7.132 Moreover, if the notion of "procurement" that is referred to in Article III:8(a) were interpreted to necessarily include "governmental use, consumption, or benefit" of the product at issue, there would have been no need to exclude government procurement of products "with a view to commercial resale or with a view to use in the production of goods for commercial sale" from the types of government procurement covered under Article III:8(a). This is because government procurement of a product for its own use, consumption or benefit cannot, by definition, amount to procurement "with a view to commercial resale or with a view to use in the production of goods for commercial sale". Had negotiators intended for the notion of "procurement" to be understood to include purchases of products for a government's own use, consumption or benefit, it would have been sufficient to end Article III:8(a) with the words "procurement by governmental agencies of product purchased for governmental purposes".

7.133 We also are not persuaded that the references made by Japan to the GATT Panel in *US – Sonar Mapping* and to Canada's Appendix I to the GPA support Japan's interpretation of the term "procurement" in Article III:8(a) of the GATT 1994. Starting with the latter, we agree with Canada that Appendix I to the GPA is not intended to provide a general definition of the term procurement, nor an interpretation of the term "procurement" within the meaning of Article III:8(a) of the GATT 1994. It is evident that the definition Canada has agreed to be bound by for the purpose of the GPA is not intended to define the scope of its rights and obligations under Article III:8(a) of the GATT 1994.

7.134 As to the GATT panel in *US – Sonar Mapping*, we believe there are a number of features of the facts and law at issue in that dispute which significantly diminish the relevance, for these disputes,

[274] Japan's opening statement at the first meeting of the Panel, paras. 49-58; second written submission, para. 54; and opening statement at the second meeting of the Panel, para. 28.

[275] The French and Spanish texts of Article III:8(a) of the GATT 1994 confirm this understanding of the meaning of "procurement", respectively providing in the relevant part: "*produits achetés pour les besoins des pouvoirs publics*" and "*productos comprados para cubrir las necesidades de los poderes públicos*".

[276] Japan's second written submission, para. 38; Canada's second written submission, para. 93; opening statement at the second meeting of the Panel, paras. 22-23; European Union's first written submission, para. 114; and opening statement at the second meeting of the Panel, para. 38.

of the panel's findings Japan relies upon. First, we note that the GATT panel in *US - Sonar Mapping* examined whether a contract between two private companies regarding the acquisition of a sonar mapping system constituted "government procurement" under Article I:1(a) of the Tokyo Round Agreement on Government Procurement. Thus, it was within the very specific context of an alleged government procurement effected through purchases made by two private companies that the GATT panel identified the four elements that Japan refers to in these proceedings[277]. Second, we note that the wording and structure of Article I:1(a) of the Tokyo Round Agreement on Government Procurement is fundamentally different from Article III:8(a). In particular, Article I:1(a) refers to several methods of procurement, including lease, rental or hire-purchase, with or without an option to buy, which are not found in Article III:8(a). Indeed, it was because these methods of procurement referred to in Article I:1(a) "were all means of obtaining the use or benefit of a product", that the GATT panel concluded that "the word 'procurement' could be understood to refer to the obtaining of such use or benefit"[278].

7.135 Thus, in our view, the term "procurement", when interpreted in its immediate context, should be understood to have the same meaning as the term "purchase". We can find no support in the text of Article III:8(a) and the context of the term "procurement" to accept Japan's argument that this term must necessarily involve governmental use, consumption or benefit of the procured product[279].

7.136 As already noted, the ordinary meanings of the word "purchase" advanced by the parties include "to obtain; to gain possession of" and "to acquire in exchange for payment in money or an equivalent; to buy"[280]. For the reasons explained in Section VII.C.2(c)(iii) of these Reports, where we evaluate the parties' arguments concerning the proper legal characterization of the measures at issue under Article 1 of the SCM Agreement, we interpret government "purchases" of goods to mean the action by which a government obtains possession (including via obtaining an entitlement) over goods through some kind of payment (monetary or otherwise). In our view, this interpretation of the notion of a government "purchase" of goods is equally applicable to guide our analysis of the parties' claims under Article III:8(a) of the GATT 1994. Thus, we find that for the purpose of Article III:8(a) of the GATT 1994, a "procurement by governmental agencies of products purchased" should be understood to refer to the action of a government of obtaining possession (including via obtaining an entitlement) over products through some kind of payment (monetary or otherwise). Moreover, in the light of this interpretation and our finding, set out in Section VII.C.2(c)(iii) of these Reports, that the challenged measures may be properly characterized as "government purchases [of] goods" within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement, we conclude that the measures at issue also involve "*procurement* by governmental agencies of products purchased" for the purpose of Article III:8(a) of the GATT 1994.

[277] GATT Panel Report, *US – Sonar Mapping*, para. 4.7, as cited by Japan in its opening statement at the first meeting of the Panel, para. 50.

[278] GATT Panel Report, *US – Sonar Mapping*, para. 4.5.

[279] With respect to the other elements considered by the GATT panel in *US – Sonar Mapping* – payment by government; governmental possession; and governmental control over the obtaining of the product – we consider them to be met when a governmental agency "purchases" a product. Thus, they do not support Japan's understanding that there is a difference in meaning between "procurement" and "purchased" in Article III:8(a) of the GATT 1994.

[280] Japan's second written submission, para. 38; Canada's second written submission, para. 93; opening statement at the second meeting of the Panel, paras. 22-23; European Union's first written submission, para. 114; and opening statement at the second meeting of the Panel, para. 38.

Procurement "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"

7.137 We now proceed to examine whether the procurement by the Government of Ontario is "for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale". The main issues raised in the parties' arguments relate to the meanings of the expression "governmental purposes" and the term "commercial resale" in Article III:8(a) of the GATT 1994.

- "Governmental purposes"

7.138 With respect to the ordinary meaning of the expression "governmental purposes", we first note that the parties have advanced a range of different meanings. At one end of the spectrum, Canada proposes the broadest meaning of the parties, suggesting that a purchase for "governmental purposes" may exist whenever a government purchases a product for a stated aim of the government[281]. At the other extreme, Japan advances the narrowest meaning, submitting that a purchase for "governmental purposes" must be limited to purchases of products for governmental use, consumption or benefit[282]. The European Union takes an intermediate position, proposing a meaning of "governmental purposes" that refers to government purchases for governmental needs, which include both the purchase of goods consumed by the government itself and those necessary for a government's provision of public services[283].

7.139 As we understand it, the ordinary meaning of "governmental purposes" ("*les besoins des pouvoirs publics*" and "*las necesidades de los poderes públicos*", respectively in the French and Spanish versions) is relatively broad, and may encompass all three of the meanings advanced by the parties. We must, however, interpret this expression within its context. In this regard, we find it particularly instructive to observe that the expression "governmental purposes" is immediately followed by the words "and not with a view to commercial resale or with a view to use in the production of goods for commercial sale." Canada argues that the "requirement that the purchase is not with a view to commercial resale is a requirement *in addition* to the requirement that the purchase is for governmental purposes"[284]. Thus, Canada is of the view that the "governmental purposes" and "not with a view to commercial resale" language establishes *two* separate requirements that must *both* be satisfied for a law, regulation or requirement to fall within the scope of Article III:8(a). Canada concludes from this observation that "the meaning of a purchase for 'governmental purposes' cannot be confined to a purchase for governmental consumption, and the meaning of a purchase 'with a view

[281] Canada's first written submission (DS412), para. 86; first written submission (DS426), para. 23; closing statement at the first meeting of the Panel, para. 9; response to Panel question No. 28 (first set); second written submission, para. 50; opening statement at the second meeting of the Panel, para. 33; closing statement at the second meeting of the Panel, para. 5; and response to Panel question No. 47 (second set).

[282] Japan's first written submission, paras. 284 and 287; opening statement at the first meeting of the Panel, paras. 53, 69; 71, 74-75; second written submission, para. 61; opening statement at the second meeting of the Panel, para. 33; and response to Panel question No. 47 (second set).

[283] European Union's first written submission, paras. 116 and 118; second written submission, paras. 128 and 130; opening statement at the second meeting of the Panel, para. 48; response to Panel question No. 47 (second set); and comments on Canada's response to Panel question No. 45 (second set). Japan considers that this may also be a plausible reading of "governmental purposes" (Japan's opening statement at the second meeting of the Panel, para. 33). The European Union finds support for its interpretation in the French and Spanish versions of Article III:8(a) of the GATT 1994, which respectively provide in the relevant part: "*produits achetés pour les besoins des pouvoirs publics*" and "*productos comprados para cubrir las necesidades de los poderes públicos*".

[284] Canada's second written submission, para. 75.

to commercial resale' cannot be confined to a purchase with the aim to resell"[285]. The complainants, however, submit that the expression "not with a view to commercial resale" should be contrasted with the expression "for governmental purposes"[286].

7.140 In our view, the plain language of Article III:8(a) suggests that a "procurement … of products purchased for governmental purposes" *cannot* also be a "procurement … of products purchased … with a view to commercial resale or with a view to use in the production of goods for commercial sale". In this regard, we see the expression "and not with a view to commercial resale …" as serving to specifically inform and limit the otherwise relatively broad ordinary meaning of the term "governmental purposes". We are not convinced by Canada's arguments that the "governmental purposes" and "not with a view to commercial resale" language establishes *two* separate and cumulative requirements. In our view, the fact that Article III:8(a) includes the words "*and not*" after "governmental purposes" qualifies this expression by indicating that the "procurement … of products purchased … with a view to commercial resale" are excluded from the operation of Article III:8(a).

7.141 The parties have argued that Article XVII:2 of the GATT 1994 also serves as relevant context for the interpretation of Article III:8(a), with Japan and the European Union, in addition, submitting that the negotiating history of the two provisions supports their own interpretations of Article III:8(a). According to Canada, Article XVII:2 helps to demonstrate not only that "governmental purposes" in Article III:8(a) is not confined to "governmental consumption or use", but also that the "governmental purposes" and "not with a view to commercial resale" language establishes two cumulative conditions[287]. Japan, on the other hand, submits that Article XVII:2, together with its negotiating history, reveals that the two provisions exclude the same type of "procurement", namely procurement that is for "governmental consumption or use", from the scope of their other operative subparagraphs[288]. Likewise, the European Union considers that the negotiating history of Articles III:8(a) and XVII:2 shows that, despite differences in language, both provisions were meant to address the same matter, concluding that the words "'for governmental purposes' or 'government needs' are conterminous with 'products for immediate or ultimate consumption in governmental use'"[289].

7.142 Article XVII:2 reads as follows:

> The 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 or use in the production of goods* for sale. With respect to such imports, each contracting party shall accord to the trade of the other contracting parties fair and equitable treatment.

7.143 As the European Union observes[290], both Article III:8(a) and Article XVII:2 describe the circumstances when purchases of products undertaken by governmental agencies under Article III:8(a), or imports of products by State Trading Enterprises for purposes of Article XVII:2, shall be removed from their main respective disciplines. Thus, measures covered by Article III:8(a)

[285] Canada's second written submission, para. 76. See also Canada's closing statement at the second meeting of the Panel, para. 14; and comments on Japan's and the European Union's responses to Panel questions Nos. 45 and 48 (second set).

[286] Japan's opening statement at the first meeting of the Panel, para. 82; and European Union's opening statement at the first meeting of the Panel, para. 39.

[287] Canada's response to Panel question No. 45 (second set).

[288] Japan's first written submission, fn. 457; opening statement at the first meeting of the Panel, paras. 56 and 74; and response to Panel question No. 45 (second set).

[289] European Union's response to Panel question No. 45 (second set), para. 75.

[290] European Union's response to Panel question No. 45 (second set).

will be automatically removed from the scope of the national treatment obligations set out elsewhere in Article III. Similarly, the kind of purchases identified in Article XVII:2 will be removed from the scope of Article XVII:1, which imposes an obligation on State Trading Enterprises to conduct its purchasing activities involving either imports or exports in a manner consistent with the principles of non-discrimination found in the GATT 1994. The latter includes the national treatment obligations found in Article III of the GATT 1994[291]. To this extent, it can be concluded from the text of Articles III:8(a) and XVII:2 that both provisions are intended to define the scope of the national treatment obligations in the context of two particular types of purchases: (i) purchases of products by governmental agencies (Article III:8(a)); and (ii) purchases of products through State Trading Enterprises (Article XVII:2).

7.144 The kind of government purchases covered under the terms of Article III:8(a) are those that are "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". On the other hand, Article XVII:2 applies to purchases of products "for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods for sale". At first sight, the distinct language used to describe the types of relevant purchases that are covered by the two provisions could be interpreted to signify that Articles III:8(a) and XVII:2 were intended to cover a different range of transactions (not only because of the differences in the entities covered by the provisions). However, in our view, such a conclusion would not be completely accurate as it is evident from the language used in both provisions that there is, at the very least, significant overlap with respect to the types of purchases that are *excluded* from their terms of operation, namely, purchases "not with a view to commercial resale …" (under Article III:8(a)) and purchases "not otherwise for resale …" (under Article XVII:2). Thus, to the extent that the language of Article XVII:2 may serve as context for the interpretation of Article III:8(a), we find that it helps to confirm that a "procurement … of products purchased for governmental purposes" under Article III:8(a) cannot also be a "procurement … of products purchased … with a view to commercial resale or with a view to use in the production of goods for commercial sale".

7.145 In the light of the foregoing analysis, we find that the term "governmental purposes" should be interpreted in juxtaposition to the expression "not with a view to commercial resale or with a view to use in the production of goods for commercial sale" that appears in Article III:8(a). In other words, we conclude that a purchase of goods for "governmental purposes" cannot at the same time amount to a government purchase of goods "with a view to commercial resale" under the terms of Article III:8(a). Thus, if we find that the procurement of electricity by the Government of Ontario under the FIT Programme is undertaken "with a view to commercial resale or with a view to use in the production of goods for commercial sale", such procurement will not be covered by Article III:8(a)[292]. With this finding in mind, we now turn to examine whether the measures at issue involve a government purchase "with a view to commercial resale".

- "Commercial resale"

7.146 The parties have advanced different meanings of the expression "with a view to commercial resale" that appears in Article III:8(a) of the GATT 1994. On the one hand, Canada argues that it

[291] Panel Report, *Korea – Various Measures on Beef*, para. 753.

[292] We note that even pursuant to Canada's own interpretation of "governmental purposes" and "commercial resale" as cumulative and separate requirements, a government procurement will not be covered by Article III:8(a) of the GATT 1994, if it is undertaken "with a view to commercial resale", regardless of whether such procurement can be said to be for "governmental purposes".

means a purchase with the aim to resell for profit[293]. The complainants, on the other hand, submit that "with a view to commercial resale" means with a view to being sold or introduced into the stream of commerce, trade or market, regardless of any profit[294].

7.147 We recall that the Government of Ontario purchases electricity under the FIT Programme, through the FIT and microFIT Contracts. The purchased electricity is injected by generators into Ontario's electricity grid via transmission and distribution networks, and is eventually sold to consumers by Hydro One, LDCs and private-sector licensed electricity retailers. Hydro One is a holding company wholly-owned by the Government of Ontario and an "agent" of the Government of Ontario. As explained in more detail below[295], Hydro One is also a "public body" for the purpose of Article 1 of the SCM Agreement. Of the 80 LDCs that currently operate in Ontario, 77 are owned by municipal governments. The private-sector licensed retailers "sell contracts to businesses and consumers"[296]. We understand there are currently 45 licensed electricity retailers operating in Ontario that compete with LDCs in their respective service areas[297]. Thus, it is evident that the electricity purchased by the Government of Ontario under the FIT Programme is resold to retail consumers through Hydro One and the LDCs in competition with private-sector retailers. We are not convinced by Canada's argument that electricity purchased under the FIT Programme is not *resold* because of the fact that it is injected into Ontario's electricity grid, where it is pooled with electricity from other sources[298]. As we see it, the fact that electricity purchased under the FIT Programme is consumed through precisely the same channels as electricity supplied from all other generating sources supports the view that it is resold by the Government of Ontario and the municipal governments through Hydro One and the LDCs in competition with private-sector electricity retailers.

7.148 Thus, to the extent that the notion of commerce should, as the complainants argue, be understood to simply encompass the buying and selling or trading of products into a market, the Government of Ontario's purchases of electricity, through the FIT Programme, may be considered to be a first step in the resale of electricity to retail consumers, and thereby the introduction of electricity into commerce. Canada, however, argues that even under the complainants' interpretation of the term "commercial resale", the purchases of electricity by the Government of Ontario under the FIT Programme cannot be qualified as being made "with a view to commercial resale". In particular, Canada argues that the OPA cannot be said to sell or introduce products into the "*market*", because a "*market*" "where supply and demand freely meet" does not exist in the Ontario electricity system[299]. We are not persuaded by Canada's argument. In our view, the consideration of whether Ontario's

[293] Canada's first written submission (DS412), para. 90; first written submission (DS426), paras. 35-39; opening statement at the first meeting of the Panel, paras. 55 and 57; response to Panel question No. 25(a) (first set); second written submission, para. 69; and opening statement at the second meeting of the Panel, para. 48.

[294] Japan's opening statement at the first meeting of the Panel, paras. 78 and 85; second written submission, para. 66; opening statement at the second meeting of the Panel, para. 36; and European Union's first written submission, para. 139; opening statement at the first meeting of the Panel, para. 39; second written submission, para. 135; opening statement at the second meeting of the Panel, para. 54; and response to Panel question No. 48 (second set).

[295] See below at paras. 7.234-7.239.

[296] Ontario's Long-Term Energy Plan, Exhibit CDA-6, Appendix One.

[297] *Electricity Act of 1998*, Exhibit JPN-5, Section 29; Retail Settlement Code, Exhibit JPN-71, Sections 1.1, 2.7, 10.1, and 12; and OEB Licensed Electricity Retailers (http://www.ontarioenergyboard.ca/html/licences/all_issuedlicences_read.cfm?showtype=Electricity%20Retailer) referred to in IESO: Retail Contracts, Exhibit JPN-90.

[298] Canada's opening statement at the first meeting of the Panel, para. 56; response to Panel question No. 25(a) (first set); second written submission, para. 68; and opening statement at the second meeting of the Panel, para. 47.

[299] Canada's first written submission (DS426), para. 43, referring to European Union's first written submission, paras. 129-130.

electricity system is, as a whole, highly regulated or made up entirely of competitive markets at the different levels of trade does not change the basic fact that electricity purchased by the Government of Ontario under the FIT Programme is bought from generators and sold to retail consumers through the same channels as all other electricity by Hydro One and LDCs *in competition with private sector electricity retailers*. Therefore, consistently with the complainants' interpretation of "commercial resale", the purchased electricity is introduced into commerce.

7.149 Canada submits that the Government of Ontario's purchases of electricity under the FIT Programme are not "with a view to commercial resale" because the OPA does not profit from the resale of electricity but simply recovers the cost of purchasing renewable electricity[300]. However, whether the *OPA* profits from the Government of Ontario's purchases of electricity under the FIT Programme is not conclusive of whether any profit is made by the *Government of Ontario* on the resale of electricity to consumers. In this regard, we note that Hydro One distributes electricity to almost one third of electricity consumers in Ontario. The Memorandum of Agreement between the Government of Ontario and Hydro One provides that Hydro One "will operate as a commercial enterprise with an independent Board of Directors that will, at all times, exercise its fiduciary responsibility and a duty of care to act in the best interests of [Hydro One]"[301]. Canada has acknowledged that both Hydro One and the 77 LDCs owned by the municipal governments are intended to make returns from their electricity transmission and distribution activities and/or assets on the basis of OEB-approved prices that are "just and reasonable"[302]. In this connection, in 2010, Hydro One paid CAD 28 million in dividends to its shareholder, the Province of Ontario[303].

7.150 Therefore, although the OPA does not profit from the resale of electricity through Hydro One and the LDCs, it is evident that the Government of Ontario and Ontario's municipal governments will profit from these operations. We are not convinced by Canada's argument that the Government of Ontario does not profit from the resale of electricity because "[d]istributors profit from their service of distributing electricity to the end-user, rather than any on-sale of the renewable electricity, itself"[304]. To the extent that the service of electricity distribution is necessarily tied to and inseparable from the sale of electricity as a "commodity", there is no basis to conclude that the resale activities of Hydro One and almost all of the LDCs do not result in making profits.

7.151 Having found that Hydro One and the LDCs sell electricity in competition with private-sector licensed retailers and that the Government of Ontario and the municipal governments profit from the resale of electricity purchased under the FIT Programme to consumers, it is clear to us, for purposes of these disputes, that the nature of the resale of electricity purchased under the FIT Programme is "commercial". In coming to this conclusion, we emphasize that this does not mean we agree with Canada's understanding that a "commercial resale" will always necessarily involve profit, as there

[300] Canada's first written submission (DS412), para. 92; and response to Panel question No. 25(a) (first set).

[301] Memorandum of Agreement between Her Majesty the Queen in Right of the Province of Ontario as Represented by the Minister of Energy and Hydro One Inc., 27 March 2008 ("Memorandum of Agreement between the Government of Ontario and Hydro One"), Exhibit CDA-107, p. 1.

[302] Canada's response to Panel question No. 13(b) (second set); citing OEB, "Report of the Board on the Cost of Capital for Ontario's Regulated Utilities, EB-2009-0084, 11 December 2009, ("OEB Report on the cost of capital for Ontario's regulated utilities"), Exhibit CDA-64, p. 8. Canada also states that the rates received by LDCs allow for cost recovery and a rate of return that is "just and reasonable". (Canada's response to Panel question No. 13(a) (second set)).

[303] Hydro One Releases 2010 Year-End Financial Results, Exhibit JPN-41, p. 2. Hydro One operates through its subsidiaries in electricity transmission and distribution, and telecom businesses. Total revenues for 2010 were CAD 5,124 million, from which CAD 5,061 million represented transmission and distribution revenues. Hydro One Releases 2010 Year-End Financial Results, Exhibit JPN-41, pp. 2-3.

[304] Canada's opening statement at the second meeting of the Panel, para. 55.

may well be situations where a resale of a product purchased by a governmental agency may not involve a profit but still may be "commercial" for the purpose of Article III:8(a) of the GATT 1994. Indeed, it is a fact that loss-making sales can be, and often are, a part of ordinary commercial activity. However, in the present factual situation, we have concluded that it is sufficient, for the purpose of finding that the Government of Ontario purchases electricity under the FIT Programme "with a view to commercial resale", that the Government of Ontario and the municipal governments not only profit from the resale of electricity that is purchased under the FIT Programme, but also that electricity resales are made in competition with licensed electricity retailers. In the light of the foregoing considerations, we find that the Government of Ontario's procurement of electricity under the FIT Programme is undertaken "with a view to commercial resale".

Conclusion with respect to whether the challenged measures fall outside the scope of Article III:4 of the GATT 1994 by virtue of the operation of Article III:8(a) of the GATT 1994

7.152 We have concluded above that: (i) the Government of Ontario's purchases of electricity under the FIT Programme constitute "procurement", within the meaning of that term in Article III:8(a); (ii) the "Minimum Required Domestic Content Level" prescribed under the FIT Programme, and effected through the FIT and microFIT Contracts, is one of the "requirements governing" the Government of Ontario's "procurement" of electricity; and (iii) the Government of Ontario's "procurement" of electricity under the FIT Programme is undertaken "with a view to commercial resale". In the light of this latter conclusion, we find that the measures at issue are not covered by the terms of Article III:8(a), and that consequently, Canada cannot rely on Article III:8(a) of the GATT 1994 to exclude the application of Article III:4 of the GATT 1994 to the "Minimum Required Domestic Content Level" that the complainants challenge.

7.153 In coming to this conclusion, we express no opinion about the legitimacy of the Government of Ontario's objective of promoting the use of renewable energy in the production of electricity through the FIT Programme. Our conclusion that the Government of Ontario purchases electricity under the FIT Programme "with a view to commercial resale", within the meaning of Article III:8(a), must be understood only as a judgement about the extent to which Canada is entitled to rely upon Article III:8(a) of the GATT 1994 to maintain a measure that is alleged to discriminate against imported products under the terms of Article III:4.

7.154 Having found that the challenged measures are not removed from the obligations prescribed under Article III:4 by virtue of the operation of Article III:8(a), it follows that they must also be subject to the obligations in Article 2.1 of the TRIMs Agreement, as elaborated and informed by Article 2.2 and the Illustrative List contained in the Annex to the TRIMs Agreement. In this connection, we recall that one of the arguments that has been advanced by both Japan and the European Union is that the challenged measures may be found to be inconsistent with Article 2.1 of the TRIMs Agreement by virtue of the operation of Paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement, which describes one category of TRIMs that is deemed to be inconsistent with the obligation of national treatment found in Article III:4 of the GATT 1994. We now turn to evaluate the merits this argument.

(ii) Whether the measures at issue are inconsistent with Article III:4 of the GATT 1994, and thereby also Article 2.1 of the TRIMs Agreement, by virtue of the operation of Article 2.2 of the TRIMs Agreement and Paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement

7.155 As we have previously explained[305], Article 2.2 of the TRIMs Agreement prescribes that the TRIMs identified in Paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement are inconsistent with Article III:4 of the GATT 1994. Thus, where it is established that a measure falls within the scope of the obligations in Article III:4 of the GATT 1994, that measure may be found to be inconsistent with those obligations, and thereby also Article 2.1 of the TRIMs Agreement, if it shares the characteristics of the TRIMs described in Paragraph 1(a) of the Illustrative List.

7.156 The European Union argues that the measures at issue are covered by Paragraph 1(a) of the Illustrative List because: (i) compliance with the "Minimum Required Domestic Content Level" is necessary for generators to participate in the FIT Programme; and (ii) the "Minimum Required Domestic Content Level" requires generators to purchase or use domestic renewable energy equipment and components[306]. Similarly, Japan argues that the measures at issue are of the type explicitly listed in Paragraph 1(a) of the Illustrative List because the "Minimum Required Domestic Content Level" requires wind and solar PV generators to use generation equipment produced in Ontario in order to take advantage of the rates offered by the FIT Programme[307]. Canada has not advanced any arguments to reject the complainants' allegations that the challenged measures are of the kind described in Paragraph 1(a) of the Illustrative List.

7.157 Given the parties' arguments and the language of Paragraph 1(a) of the Illustrative List[308], we are of the view that in order to determine whether the complainants have established that the challenged measures share the characteristics of the TRIMs described in Paragraph 1(a) of the Illustrative List, we must ascertain: (i) whether the "Minimum Required Domestic Content Level" that is applied under the FIT Programme requires electricity generators using solar PV and windpower technology to purchase or use renewable energy generation equipment and components that are of Canadian origin or from a Canadian source; and (ii) whether compliance with the "Minimum Required Domestic Content Level" is necessary in order to obtain an "advantage". Below we examine each of these elements in turn.

Whether the "Minimum Required Domestic Content Level" requires the purchase or use of products of Canadian origin or from a Canadian source

7.158 The FIT Rules define the "Minimum Required Domestic Content Level" as the minimum percentage of domestic content level set out on the FIT Contract cover page that should be achieved by contract facilities utilizing windpower with a contract capacity greater than 10 kW, or contract facilities utilizing solar PV[309]. Japan has presented the following table to summarize the Minimum Required Domestic Content Levels that are prescribed under the FIT Programme.

[305] See above at para. 7.119.

[306] European Union's first written submission, paras. 141, 143, 152, and 156-157. See also European Union's opening statement at the first meeting of the Panel, para. 43; response to Panel question No. 14(a) (first set); second written submission, para. 152; and opening statement at the second meeting of the Panel, para. 61.

[307] Japan's first written submission, paras. 295 and 301-302.

[308] The relevant text of Paragraph 1(a) of the Illustrative List is set out above at para. 7.115.

[309] Ontario Power Authority, Feed-in Tariff Programme Rules, Version 1.5.1, 31 October 2011, ("FIT Rules"), Exhibit EU-4, Section 6.4(a).

	Wind (FIT)		Solar PV (FIT)		Solar PV (microFIT)	
Milestone Date for Commercial Operation	2009-2011	2012-	2009-2010	2011-	2009-2010[310]	2011-
Minimum Required Domestic Content Level	25%	50%	50%	60%	40%	60%

Table 1: Minimum Required Domestic Content Levels prescribed under the FIT Programme

7.159 The domestic content level of a contract facility is calculated pursuant to the methodology set out in Exhibit D of the FIT Contract[311]. This Exhibit contains four different "Domestic Content Grids", each of which identifies a range of different "Designated Activities" and an associated "Qualifying Percentage", with respect to each of the categories of renewable energy generation falling within the scope of the FIT Programme[312]. These categories are (i) windpower projects greater than 10 kW; (ii) solar PV projects greater than 10 kW utilizing crystalline silicon PV technology; (iii) solar PV projects greater than 10 kW utilizing thin-film PV technology; and (iv) solar PV projects less than or equal to than 10 kW. The Domestic Content Grids identified for the latter two categories of solar PV projects apply equally to microFIT projects under the microFIT Rules[313].

7.160 For each "Designated Activity" that is performed in relation to the Contract Facility, an associated "Qualifying Percentage" will be achieved. For example, where the wind turbine blades of a windpower project have been "cast in a mould in Ontario" and the "instrumentation that is within the blades has been assembled in Ontario", the Contract Facility will achieve a Qualifying Percentage of 16%. The FIT Contract explains that a project's Domestic Content Level will be determined by adding up the Qualifying Percentages associated with all of the Designated Activities performed in relation to that particular project.

7.161 Japan, argues that "for *all* projects", the effect of the Domestic Content Grids is to require that "*at least some* goods manufactured, formed, or assembled in Ontario *must* be utilized in order to satisfy the Minimum Required Domestic Content Levels"[314]. Japan contends that purely service activities contained in each Domestic Content Grids are not sufficient to meet the "Minimum Required Domestic Content Levels". In particular, Japan submits that the Minimum Required Domestic Content Levels cannot be achieved, in the light of the relevant Domestic Content Grids, without the use of domestic over imported goods for the following reasons[315]:

> In the FIT Contract, Exhibit D, Table 1 for Wind Power Projects Greater than 10 kW, the only designated activities that are purely service activities are line item 17 relating to construction costs (with a qualifying percentage of 15%) and line item 18 relating to consulting services (with a qualifying percentage of 5%). Thus, services may contribute at most 20% to the Domestic Content Level. In other words, where the Minimum Required Domestic Content Level is greater than 20% (as it has always been for these Wind Power Projects …), at least some Ontario-sourced goods must be used to satisfy the Minimum Required Domestic Content Level.

[310] Solar PV microFIT applications received by the OPA on or before 8 October 2010 may satisfy the 40% domestic content requirement.
[311] FIT Rules, Exhibit EU-4, Section 6.4(b).
[312] Ontario Power Authority, Feed-in Tariff Contract, Version 1.5.1, 31 October 2011, ("FIT Contract"), Exhibit EU-5, Exhibit D.
[313] microFIT Rules, Exhibit JPN-157, Definitions, pp. 14-16.
[314] Japan's first written submission, para. 173.
[315] Japan's first written submission, para. 173.

> In the FIT Contract, Exhibit D, Table 2 for Solar (PV) Power Projects Greater than 10 kW Utilizing Crystalline Silicon PV Technology, the only designated activities that are purely service activities are line item 8 relating to construction costs (with a qualifying percentage of 18%) and line item 9 relating to consulting services (with a qualifying percentage of 4%). Thus, services may contribute at most 22% to the Domestic Content Level. In other words, where the Minimum Required Domestic Content Level is greater than 22% (as it has always been for these Solar (PV) Power Projects, …), at least some Ontario-sourced goods must be used to satisfy the Minimum Required Domestic Content Level.
>
> In the FIT Contract, Exhibit D, Table 3 for Solar (PV) Power Projects Greater than 10 kW Utilizing Thin-Film PV Technology, the only designated activities that are purely service activities are line item 15 relating to construction costs (with a qualifying percentage of 24%) and line item 16 relating to consulting services (with a qualifying percentage of 4%). Thus, services may contribute at most 28% to the Domestic Content Level. In other words, where the Minimum Required Domestic Content Level is greater than 28% (as it has always been for these Solar (PV) Power Projects, …), at least some Ontario-sourced goods must be used to satisfy the Minimum Required Domestic Content Level.
>
> In the FIT Contract, Exhibit D, Table 4 for Solar (PV) Power Projects Less than or Equal to 10 kW, the only designated activity that is purely a service activity is line item 24 relating to labour and services (with a qualifying percentage of 27%). Thus, services may contribute at most 27% to the Domestic Content Level. In other words, where the Minimum Required Domestic Content Level is greater than 27% (as it has always been for these Solar (PV) Power Projects, …), at least some Ontario-sourced goods must be used to satisfy the Minimum Required Domestic Content Level.
>
> In the microFIT Contract, Appendix C, Table 1 for Micro-Scale (≤10kW) Solar Photovoltaic Power Projects, the only designated activity that is purely a service activity is line item 8 relating to labour and services (with a qualifying percentage of 27%). Thus, services may contribute at most 27% to the Domestic Content Level. In other words, where the Minimum Required Domestic Content Level is greater than 27% (as it has always been for these Solar Photovoltaic Power Projects, …), at least some Ontario-sourced goods must be used to satisfy the Minimum Required Domestic Content Level.
>
> In the microFIT Contract, Appendix C, Table 2 for Micro-Scale (≤10kW) Solar Photovoltaic Power Projects Utilizing Thin-Film PV Technology, the only designated activity that is purely a service activity is line item 6 relating to labour and services (with a qualifying percentage of 28%). Thus, services may contribute at most 28% to the Domestic Content Level. In other words, where the Minimum Required Domestic Content Level is greater than 28% (as it has always been for these Solar Photovoltaic Power Projects …), at least some Ontario-sourced goods must be used to satisfy the Minimum Required Domestic Content Level[316].

7.162 The European Union agrees with Japan's description of how this aspect of the challenged measures operates, and has adopted all of Japan's arguments in this context as its own[317].

[316] Japan's first written submission, para. 173.
[317] European Union's first written submission, para. 16.

7.163 We have carefully reviewed the operation of the "Minimum Required Domestic Content Level" and agree with the complainants that in all of the situations described above by Japan, at least some Ontario-sourced (and therefore Canadian-sourced) goods must be used to satisfy them. Thus, we find that the "Minimum Required Domestic Content Level" that is applied under the FIT Programme requires FIT and microFIT electricity generators using solar PV technology and FIT generators using windpower technology to purchase or use a certain percentage of renewable energy generation equipment and components that are sourced in Ontario, and therefore "from a domestic source" within the meaning of Paragraph 1(a) of the Illustrative List.

Whether compliance with the "Minimum Required Domestic Content Level" is necessary in order to obtain an advantage

7.164 The 2009 Ministerial Direction that called upon the OPA to establish the FIT Programme, also directed the OPA to include minimum domestic content requirements and ensure that any failure to comply with such requirements "should be subject to significant commercial consequences under the FIT contract"[318]. To this end, Section 6.4(b) of the FIT Rules stipulates that "[i]f a Contract Facility does not meet the Minimum Required Domestic Content Level, the Supplier will be in default under the FIT Contract." Sections 9.1(b) and (d) of the FIT Contract define a Supplier's failure to perform "any material covenant or obligation" set forth in the Contract, as well as a Supplier's representation that is "not true or correct in any material respect" as events that would place the Supplier in default. Other provisions of the FIT Contract suggest that such events may relate to a Supplier's obligations with respect to the "Minimum Required Domestic Content Level". For instance, Article 2.4(b)(iii) of the FIT Contract requires that a Supplier's "Notice to Proceed Request" include a "Domestic Content Plan" as defined therein. Article 2.2(f) of the FIT Contract stipulates that "[w]here the FIT Contract Cover Page identifies the Renewable Fuel of the Contract Facility as windpower or solar (PV), the Supplier shall develop and construct the Contract Facility such that the Domestic Content Level is equal to or greater than the Minimum Required Domestic Content Level." Furthermore, Article 2.11(c) of the FIT Contract requires that a Supplier must provide the OPA with a "Domestic Content Report" detailing how the Contract Facility has satisfied the Domestic Required Content Level within 60 days of its Commercial Operation Date.

7.165 It is evident from the above that compliance with the "Minimum Required Domestic Content Level" is a necessary condition and prerequisite for electricity generators to participate in the FIT Programme. As we have explained elsewhere in these Reports, the FIT Programme guarantees a fixed price for every kWh of electricity delivered into the Ontario electricity system over a period of 20 years by qualifying generators of electricity using solar PV and windpower technology[319]. The prices paid under the FIT Programme were established by the OPA with a view to ensuring that participants are able to cover "typical" development costs and obtain a reasonable rate of return. Thus, generators participating in the FIT Programme will be remunerated for each kWh of electricity delivered into Ontario's electricity system at a price calculated to ensure economically viable operations for "typical" facilities for a 20-year period. We agree with the complainants that, on the basis of these conditions, *mere participation* in FIT Programme may be viewed as obtaining an "advantage" within the meaning of the chapeau of Paragraph 1(a) of the Illustrative List. Moreover, because a failure to comply with the "Minimum Required Domestic Content Level" will place FIT and microFIT generators in default of their contractual obligations, it may also be concluded that the "Minimum Required Domestic Content Level" renders the FIT and microFIT Contracts TRIMs that are "enforceable under domestic law", and they must also for this reason fall within the scope of the chapeau to Paragraph 1(a) of the Illustrative List.

[318] Minister's 2009 FIT Direction, Exhibit JPN-102, pp. 1-2.
[319] See paras. 7.64, 7.203, 7.213, 7.217, and 7.219.

7.166 Thus, on the basis of the foregoing analysis, we find that compliance with the "Minimum Required Domestic Content Level" not only involves the "purchase or use" of products from a domestic source, within the meaning of Paragraph 1(a) of the Illustrative List, but also that such compliance "is necessary" for electricity generators using solar PV and windpower technologies to participate in the FIT Programme, and thereby "obtain an advantage", within the meaning of Paragraph 1 of the Illustrative List. We are therefore satisfied that the challenged measures are TRIMs falling within the scope of Paragraph 1(a) of the Illustrative List, and that in the light of Article 2.2 and the chapeau to Paragraph 1(a) of the Illustrative List, they are inconsistent with Article III:4 of the GATT 1994, and thereby also inconsistent with Article 2.1 of the TRIMs Agreement.

(d) Conclusion with respect to the claims under Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994

7.167 In the light of the findings we have made in this Section of these Reports, we conclude that the FIT Programme, and the FIT and microFIT Contracts, are inconsistent with Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994.

C. WHETHER THE CHALLENGED MEASURES CONSTITUTE SUBSIDIES WITHIN THE MEANING OF ARTICLE 1.1 OF THE SCM AGREEMENT

1. Introduction

7.168 In the following sections we evaluate the merits of the complainants' arguments that the FIT Programme, and the FIT and microFIT Contracts, constitute subsidies within the meaning of Article 1.1 of the SCM Agreement. We start by examining whether the complainants have established that the challenged measures each constitute a "financial contribution" and/or "income or price support" within the meaning of Article 1.1(a) of the SCM Agreement. We then turn to assess the parties' arguments concerning the existence of "benefit" within the meaning of Article 1.1(b) of the SCM Agreement.

2. Whether the challenged measures constitute a "financial contribution" and/or "income or price support" within the meaning of Article 1.1(a) of the SCM Agreement

(a) Arguments of the parties

(i) Japan

7.169 Japan argues that the challenged measures each amount to a "financial contribution" in the form of a "direct transfer of funds" or a "potential direct transfer of funds" under Article 1.1(a)(1)(i) of the SCM Agreement, or *alternatively*, a form of "income or price support" within the meaning of Article 1.1(a)(2) of the SCM Agreement[320].

7.170 Recalling that the Appellate Body has observed that a "direct transfer of funds" may take the form of a transaction prescribing "reciprocal rights and obligations" or a "conditional grant", and that "what is captured in [Article 1.1(a)(1)(i)] is a government's provision … of funds, irrespective of

[320] Japan's first written submission, paras. 185-214; response to Panel question No. 5 (first set); opening statement at the first meeting of the Panel, para. 24; second written submission, paras. 26-51; and responses to Panel questions Nos. 21 and 25 (second set). Japan submits, *in the alternative*, that the measures at issue could also be characterized as governmental action involving entrustment or direction, within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement. Japan's first written submission, fn. 367.

whether this is done gratuitously or in exchange for consideration"[321], Japan submits that the challenged measures may be best characterized as "direct transfers of funds" because they involve payments on the part of the OPA that are analogous to a "conditional grant". In this regard, Japan identifies the following features of the FIT and microFIT Contracts, which Japan submits demonstrate that the FIT payments are nothing other than government financing provided to FIT generators on the condition of (i) the construction of a renewable energy generating facility that satisfies a specified Minimum Domestic Content Level; and (ii) the delivery of electricity generated from this facility to the grid for use by all Ontarians[322]:

(a) under the FIT and microFIT Contracts, FIT generators must build a generation facility while satisfying a requirement to use Ontario-made wind and solar PV generation equipment in constructing the facility;

(b) in return, the OPA promises to pay a price which is alleged to be above a market price that guarantees the recovery of costs plus a reasonable return on investment over a 20-year period;

(c) the OPA pays that price 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

(d) the electricity injected into the grid goes straight to consumers, without the OPA or any other governmental 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[323].

7.171 According to Japan, the same features also demonstrate that, independent of any actual payments made under the challenged FIT and microFIT Contracts, the challenged measures may be characterized as "potential direct transfer[s] of funds" because they guarantee payments for all electricity generated (or foregone as per IESO instruction) for the entirety of the contract period, which for solar PV and windpower projects is 20 years. Thus, Japan argues that the OPA's commitment to making the envisaged disbursements under the challenged measures constitutes a governmental practice involving a "potential direct transfer of funds"[324].

7.172 *Alternatively*, Japan argues that the measures at issue constitute "any form of income or price support in the sense of Article XVI of GATT 1994", within the meaning of Article 1.1(a)(2) of the SCM Agreement. According to Japan, the challenged measures may be properly characterized as such because they "contribute" to the income and prices received by FIT generators while at the same time operate to reduce imports of renewable energy generation equipment into Ontario, distorting international trade[325]. Japan submits that two particular aspects of the FIT and microFIT Contracts are consistent with this characterization: (i) the allegedly above-market prices paid by the Government of Ontario for electricity; and (ii) the long-term contract period (20 years). Japan argues that the combined effect of these two contractual terms is to enable "FIT generators to construct and operate their generating facilities in the first place, assured of achieving a return that they would not otherwise

[321] Japan's second written submission, para. 43, referring to Appellate Body Report, *US – Large Civil Aircraft (Second Complaint)*, paras. 617-618 and fn. 1292.
[322] Japan's second written submission, para. 45; and responses to Panel questions Nos. 5 (first set) and 25 (second set).
[323] Japan's second written submission, para. 36; and response to Panel question No. 25 (second set).
[324] Japan's first written submission, paras. 192-194.
[325] Japan's first written submission, paras. 205-214.

achieve in the market". Thus, Japan argues that the Government of Ontario "quite literally 'supports' the 'income' received by generators and the 'price' paid to them for their electricity output"[326].

7.173 Japan rejects Canada's argument that the challenged measures can *only* be legally characterized as financial contributions in the form of government purchases of goods. Recalling 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*", Japan argues that the fact that the FIT and microFIT Contracts appear to be described as government "purchases" under Canadian law is not dispositive of the legal characterization of the challenged measures for the purposes of WTO law[327]. In addition, Japan asserts that the OPA never takes possession of, or exercises control over, or takes title to the electricity supplied under the FIT and microFIT Contracts, and as such, it does not "purchase" electricity[328]. In this regard, Japan maintains that the FIT Programme 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, or to allow the Government of Ontario to sell electricity to local distributors and/or consumers. Rather, Japan argues that the purpose of the FIT Programme is to provide electricity to all consumers in Ontario.

7.174 In any case, Japan argues that even if the Panel were to conclude that the FIT and microFIT 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"[329]. According to Japan, this would be possible because, in Japan's view, the Appellate Body made clear in *US – Large Civil Aircraft (Second Complaint)* that a transaction may be covered by multiple subparagraphs of Article 1.1(a)(1), and that the presence of the word "or" that exists between Article 1.1(a)(1) and Article 1.1(a)(2) of the SCM Agreement need not necessarily imply that the two provisions are mutually exclusive.

7.175 Finally, were the Panel to find that the challenged measures could *only* be properly characterized as government purchases of goods, as Canada contends, Japan submits that it would still have met its burden of showing that they satisfy the first element of the subsidy definition, recalling that a government purchase of goods constitutes a "financial contribution" under Article 1.1(a)(1) of the SCM Agreement[330].

(ii) European Union

7.176 Not unlike Japan, the European Union submits that the challenged measures may each be legally characterized as a "financial contribution" in the form of a "direct transfer of funds" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement, or as a form of "income or price support" under the terms of Article 1.1(a)(2) of the SCM Agreement. However, for the European Union, the most appropriate legal characterization, and the European Union's "primary" submission in these proceedings, is that the FIT Programme and related contracts constitute a form of "income or price support". As an *alternative* to these two lines of argument, the European Union maintains that the challenged measures might also be characterized as "potential direct transfer[s] of funds" under

[326] Japan's first written submission, para. 212.

[327] Japan's opening statement at the first meeting of the Panel, para. 25, referring to Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 586 (quoting Appellate Body Report, *US – Softwood Lumber IV*, para. 56); and second written submission, paras. 29-34.

[328] Japan's opening statement at the first meeting of the Panel, para. 23; second written submission, para. 39; and comments on Canada's response to Panel question No. 47 (second set).

[329] Japan's opening statement at the first meeting of the Panel, para. 28; opening statement at the second meeting of the Panel, para. 7, referring to Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 613 and fn. 1287; and comments on Canada's response to Panel question No. 24 (second set).

[330] Japan's response to Panel question No. 22 (second set).

Article 1.1(a)(1)(i) of the SCM Agreement, or as governmental action that involves entrustment and direction in the sense of Article 1.1(a)(1)(iv) insofar as private LDCs make settlement payments on behalf of the OPA under the terms of the FIT and microFIT Contracts[331].

7.177 The European Union asserts that the FIT Programme operates as a price support system whereby the Government of Ontario, through its agency, the OPA, contractually agrees with the FIT generators a price for the electricity they will produce (or will be directed not to produce) and then pays that price directly (through another agency, the IESO) or indirectly (through LDCs) to the FIT generators. Moreover, the European Union submits that the nature of the FIT Programme's local content requirements reduces or even eliminates imports of equipment and components for renewable energy generation facilities into Ontario. As such, the European Union argues that the long-term, guaranteed and allegedly above-market prices paid to the FIT generators under the challenged FIT and microFIT Contracts provide a "form of income or price support in the sense of Article XVI of GATT 1994", within the meaning of Article 1.1(a)(2) of the SCM Agreement[332].

7.178 According to the European Union, the challenged measures may be characterized as "direct transfer[s] of funds" because, apart from the expected delivery of electricity into the Ontario electricity grid, they involve the OPA making payments to the FIT generators on an unconditional basis. The European Union submits that for the purpose of the financial contribution analysis, the payments committed under the legally binding FIT and microFIT Contracts should be seen as "granted" or "transferred" payments, even though physically those payments have not yet taken place[333]. Recalling that the Appellate Body has observed that a "direct transfer of funds" may exist in the form of a "conditional grant" and 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", the European Union submits that the essence of the FIT Programme and its related contracts is that the FIT generators assume a set of obligations (including the construction of a generation facility and the delivery of electricity into the grid) in return for which they will receive payment from the OPA. The European Union maintains that this renders the challenged measures "direct transfer of funds"[334].

7.179 The European Union advances two additional *alternative* arguments to support its view that the measures amount to "financial contributions". First, relying upon the same arguments advanced in Japan's first written submission, the European Union submits that the challenged measures may also be characterized as "potential direct transfer[s] of funds"[335]. Secondly, the European Union argues that the disbursements made by the LDCs pursuant to the FIT and microFIT Contracts on behalf of the OPA result in a "financial contribution", 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[336]. However, in this regard, the European Union maintains that because the OPA is ultimately liable for making these

[331] European Union's first written submission, paras. 43-44; and opening statement at the first meeting of the Panel, paras. 18-19.

[332] European Union's first written submission, paras. 32-42; opening statement at the first meeting of the Panel, para. 14-17; response to Panel question No. 20 (first set); and second written submission, paras. 5-18 and 33-38.

[333] European Union's first written submission, para. 48. The European Union's arguments in relation to the existence of a financial contribution in the form of a "direct transfer of funds" explicitly incorporated all of the arguments made by Japan in its first written submission. European Union's first written submission, fn. 51.

[334] European Union's first written submission, paras. 49-50; opening statement at the first meeting of the Panel, para. 18; second written submission, paras. 42-43; and opening statement at the second meeting of the Panel, para. 11, referring to Appellate Body Report, *US – Large Civil Aircraft (Second Complaint)*, para. 617.

[335] The European Union explicitly incorporated all of the arguments made by Japan in its first written submission on this point. European Union's first written submission, para. 53 and fn. 65.

[336] European Union's first written submission, para. 44.

payments, the challenged measures would probably be better characterized as a "direct transfer of funds"[337].

7.180 Finally, although the European Union considers that the most appropriate characterization of the challenged measures would not be as a government "purchase [of] goods" within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement[338], it argues that such a conclusion would not be an obstacle to finding that the challenged measures could also be characterized as "any form of income or price support". In this regard, 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. According to the European Union, the word "or" merely provides for a choice or alternative characterisations to meet the first element of the definition of "subsidy". The European Union also notes that the terms of Article 1.1(a)(2) of the SCM Agreement are broad enough to capture domestic programmes involving *a combination of* various forms of financial contribution, bundled together with other features[339]. Similarly, the European Union argues that the challenged measures may be characterized as several types of financial contributions within the sub-headings of Article 1.1(a)(1), recalling certain observations of the Appellate Body in *US – Large Civil Aircraft (Second Complaint)*[340]. In any event, were the Panel to 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[341].

(iii) Canada

7.181 Canada submits that the complainants have mischaracterized the challenged measures as financial contributions in the form of "direct transfer[s] of funds" or "potential direct transfer[s] of funds", or as a form of "income or price support". Canada argues that the FIT Programme and its related contracts can only be properly legally characterized as financial contributions in the form of "government purchases [of] goods" within the meaning of Article 1.1(a)(iii) of the SCM Agreement[342].

7.182 Canada asserts that the FIT programme, and the FIT and microFIT Contracts, involve the payment of money by the OPA, which it describes as the "agent" of the Government of Ontario[343], to renewable electricity generators for the supply of electricity into the Ontario transmission grid[344].

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[337] European Union's first written submission, paras. 59-61.

[338] European Union's second written submission, paras. 41-51. The European Union maintains that the OPA acts more like an intermediary (an agent or a clearing house) than an actual purchaser of electricity. According to the European Union, other market operators purchase electricity either at market rates or above (i.e. at "regulated" rates), while the OPA pays the allegedly above-market rates agreed contractually with the FIT generators. European Union's opening statement at the first meeting of the Panel, para. 20; and opening statement at the second meeting of the Panel, para. 12.

[339] European Union's opening statement at the first meeting of the Panel, paras. 10-13; second written submission, paras. 5-18; and opening statement at the second meeting of the Panel, paras. 5-10.

[340] European Union's opening statement at the first meeting of the Panel, para. 19, citing Appellate Body Report, *US – Large Civil Aircraft (Second Complaint)*, fn. 1287.

[341] European Union's opening statement at the first meeting of the Panel, paras. 20 and 21; and second written submission, para. 53.

[342] Canada's first written submission (DS412), paras. 116-122; and first written submission (DS426), paras. 54-63.

[343] Canada's first written submission (DS412), paras. 1 and 70; and first written submission (DS426), para. 2.

[344] Canada's first written submission (DS412), paras. 70-81; first written submission (DS426), paras. 16-22; and responses to Panel questions Nos. 1 and 2 (first set).

Thus, according to Canada, the measures at issue operate to enable the OPA to *purchase* electricity from generators using solar PV and wind technology. Canada submits that its legal characterization of the measures as a government purchase of goods is substantiated by certain sections of the *Electricity Act, 1998*, the Ministerial Direction, various aspects of the FIT and microFIT Rules, the terms and conditions of the FIT and microFIT Contracts, and a number of other documents and sources[345].

7.183 Canada argues that a transaction properly characterized as a purchase of goods must be treated as only a purchase of goods for the purpose of Article 1.1(a)(1)(iii) of the SCM Agreement, even though it will invariably involve a "direct transfer of funds" or a "potential direct transfer of funds"[346]. Relying upon a line of reasoning developed by the panel in *US – Large Civil Aircraft (Second Complaint)*, Canada argues that to maintain that a transaction properly characterized as a government purchase of goods could also be characterized as a direct transfer of funds would be inconsistent with the principle of effective treaty interpretation[347].

7.184 Canada rejects the view advanced by the complainants that a product can only be "purchased" if the purchaser takes physical possession, control or title over the product, referring to two examples of product purchasers that do not possess these characteristics in support of its position[348]. In addition, Canada submits that the examples of electricity "aggregators" and "marketers", which Japan presents as entities that actually purchase electricity in contrast to the OPA, merely highlight that it is possible to purchase and take title to electricity without physically possessing it[349]. In any case, Canada asserts that to the extent that the electricity produced by FIT generators is delivered into Ontario's transmission and distribution networks, the Government of Ontario does take physical possession over it by virtue of Hydro One owning 97% of the transmission lines and the fact that all but three of 80 LDCs are owned by municipal governments[350]. Canada also notes that FIT generators have never been directed by the IESO to refrain from delivering electricity into the system, explaining that the particular clauses in the FIT Contracts that the complainants focus upon are standard and that, in any case, the IESO cannot make such requests for smaller FIT generators or for any microFIT generators[351].

7.185 Finally, Canada maintains that the complainants' legal characterization of the challenged measures as "income or price support" is misplaced for two main reasons. First, relying on the same reasoning mentioned above from the panel in *US – Large Civil Aircraft (Second Complaint)*, Canada argues that Article 1.1(a)(2) cannot be interpreted as applying to transactions that are properly characterized as government purchases of goods because this would render Article 1.1(a)(1)(iii) meaningless, and thereby infringe the principle of effective treaty interpretation. Thus, in the same way that Canada dismisses the complainants' assertions that the measures at issue involve "direct transfers of funds", Canada argues that the FIT programme and individual contracts cannot amount to

[345] Canada's first written submission (DS412), fns. 135 and 141, and para. 73; first written submission (DS426), paras. 16-22; opening statement at the first meeting of the Panel, paras. 11-44; second written submission, paras. 15-22; opening statement at the second meeting of the Panel, para. 20; and response to Panel question No. 25 (second set).

[346] Canada's first written submission (DS412), para. 120.

[347] Canada's first written submission (DS412), paras. 117-119; and first written submission (DS426), para. 55.

[348] Canada's opening statement at the first meeting of the Panel, para. 41.

[349] Canada's opening statement at the second meeting of the Panel, para. 26.

[350] Canada's response to Panel question No. 21 (first set); and opening statement at the second meeting of the Panel, paras. 30-32.

[351] Canada's response to Panel question No. 21 (first set); and opening statement at the second meeting of the Panel, paras. 30-32.

a form of "income or price support" because this would render Article 1.1(a)(1)(iii) redundant[352]. Secondly, Canada submits that the reference to "any product" in Article XVI of the GATT is not a reference to unsubsidized input goods, but rather a reference to an increase in exports of "any product" that is the subject of the alleged subsidy being notified under this provision or a decrease in imports of foreign products impacted by the notified subsidy. Thus, in order for the FIT Programme to be properly characterized as a form of "income or price support", Canada argues that complainants would need to show that trade in electricity (the allegedly subsidized good) is affected by the alleged subsidy, not trade in renewable electricity generation equipment[353].

(b) Arguments of the third parties

(i) Australia

7.186 Australia agrees with the arguments of the complainants 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. Alternatively, Australia submits that the Panel may characterize the FIT Contracts as "purchases of goods" under Article 1.1(a)(1)(iii). Australia argues 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, a purchase of goods within the meaning of Article 1.1(a)(1(iii) occurs where a government pays a person or entity for the provision of goods. Thus, according to Australia, in these disputes the contract rate received by FIT generators could be characterized as consideration for the electricity supplied to the Ontario electricity market[354].

(ii) China

7.187 China disagrees with the European Union's use of export restrictions as examples of "income or price support", within the meaning of Article 1.1(a)(2) of the SCM Agreement, for the following reasons. First, this phrase "does not exhaust all government interventions that may have an effect on income or price, such as tariffs and quantitative restrictions." Second, the application of the "effect" test to the existence of an "income or price support" would exaggerate the reasonable scope of this phrase. Third, as Article XI of the GATT 1994 provides for the "general elimination of quantitative restrictions", it is questionable whether the concept of "income or price support" seeks to place such governmental actions within the scope of the SCM Agreement. Fourth, the concept of "market price support" included in Annex 3 of the Agreement on Agriculture indicates that direct control by the government over the domestic price is required to demonstrate the existence of "price support". Thus, in China's view, the analysis should focus on the nature of the direct governmental action, rather than on the movement in prices. Finally, the European Union's reliance on Paragraph 7.430 of the Panel Report in *China – Raw Materials* fails to observe the footnote stating that the term "subsidy" included in that paragraph does not implicate a legal conclusion under the SCM Agreement[355].

(iii) El Salvador

7.188 El Salvador emphasizes the role played by LDCs within the FIT Programme, and the importance of deciding whether they are owned by the government. El Salvador considers that the Appellate Body Report in *US – Anti-Dumping and Countervailing Duties (China)* may contribute to

[352] Canada's first written submission (DS412), paras. 121-122; and first written submission (DS426), paras. 59-60.

[353] Canada's first written submission (DS426), para. 62.

[354] Australia's third-party submission (DS412), paras. 4-10; third-party submission (DS426), paras. 4-10; and third-party statement (DS412 and DS426), paras. 3-10.

[355] China's third-party submission (DS426), paras. 3-10; and third-party statement (DS412 and DS426), paras. 5-8.

the Panel's examination of this matter. Turning to the notion of "income or price support", El Salvador considers that the Panel should be provided with objective parameters to determine whether a reduction of imports of renewable energy generation equipment has occurred. El Salvador suggests that methodologies used for purposes of other WTO rules may be employed by the Panel to determine "income or price support", citing as an example the methodology used in the field of safeguards to examine the correlation between increased injury and industry[356].

(iv) European Union (in WT/DS412)

7.189 As a third party in WT/DS412, the European Union considers that the FIT Programme amounts to a subsidy as defined in Article 1.1 of the SCM Agreement. In the European Union's view, the FIT Programme implies a financial contribution by the Government of Ontario either as a direct transfer of funds or a potential direct transfer of funds. The European Union contends that the commitment by the Canadian Province of Ontario to pay the agreed price for the electricity generated by FIT generators would 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. Alternatively, the European Union considers that the FIT Programme provides a form of income or price support to FIT generators through guaranteed prices in the sense of Article 1.1(a)(2)[357].

(v) Japan (in WT/DS426)

7.190 As a third party in WT/DS426, Japan argues that, to the extent Article XVI:1 of the GATT 1994 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 that the "income or price support" must be provided to the goods, the trade of which is actually impacted by the support. Japan claims that Canada offers no basis 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". Japan notes that Article XVI:1 uses the term "*any* product", and not a term such as "*like* product" (emphasis added). Japan considers that the term "any product" in Article XVI:1 refers to every product, including unsubsidized input goods, the exports or imports of which may increase or decrease as a result of the income or price support provided. Thus, Japan contends that "income or price support" provided to a product will fall within the definition of a "subsidy" if it increases exports or decreases imports of *any product*[358].

(vi) Mexico

7.191 Mexico notes that the SCM Agreement does not contain a provision similar to Article III:8(a) of the GATT 1994 to exclude governmental purchases from its scope. However, Mexico contends that it is questionable whether a governmental purchase, in which the government receives something in return for a payment, will amount to a financial contribution within the meaning of the SCM Agreement[359].

[356] El Salvador's third-party submission (DS426), paras. 5-16; and third-party statement (DS412 and DS426), paras. 3-11.
[357] European Union's third-party submission (DS412), paras. 19-20.
[358] Japan's third-party submission (DS426), paras. 16-18.
[359] Mexico's third-party submission (DS412), para. 20; and third-party submission (DS426), para. 20.

(vii) Norway

7.192 Norway expresses support for the position advanced by the Kingdom of Saudi Arabia urging the Panel to respect the principles defined by the Appellate Body with regards to the terms "public body" and "governmental control"[360].

(viii) The Kingdom of Saudi Arabia

7.193 Saudi Arabia refers to the Appellate Body Report in *US – Anti-Dumping and Countervailing Duties (China)*, setting out that a "public body", within the meaning of Article 1.1(a)(1) of the SCM Agreement, is an entity that possesses, exercises or is vested with governmental authority. Saudi Arabia contends that the unique defining element of "governmental authority" is the power to command or compel private bodies. Saudi Arabia considers that 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. Saudi Arabia contends that the government's exercise of "meaningful control" over an entity alone is not sufficient to determine that the entity is a public body, as governmental control is merely one element of evidence that may be consider when determining "governmental authority"[361].

(c) Evaluation by the Panel

(i) Introduction

7.194 The complainants' assertions about the proper legal characterization of the challenged measures under Articles 1.1(a)(1) and 1.1(a)(2) of the SCM Agreement are largely in contrast to those advanced by Canada. Recent WTO jurisprudence suggests that when faced with such a situation, a panel should first determine the proper factual characterization of the measures at issue, before turning to examine whether those measures, in the light of their proper factual characterization, fall within the scope of Article 1.1(a) of the SCM Agreement[362]. In undertaking the task of properly characterizing a challenged measure, a panel "must thoroughly scrutinize the measure before it, both in its design and in its operation, and identify its principal characteristics"[363]. Moreover, "[i]n making its objective assessment of the applicability of specific provisions of the covered agreements to a measure properly before it, a panel must identify *all* relevant characteristics of the measure, and recognize which features are the most central to that measure itself, and which are to be accorded the most significance for purposes of characterizing the relevant [measure] and, thereby, properly determining the discipline(s) to which it is subject under the covered agreements"[364]. While the classification of a transaction under municipal law may inform a panel's assessment, it is not "determinative"[365] of a challenged measure's proper legal characterization under WTO law. With these considerations in mind, we proceed to evaluate the merits of the parties' arguments.

[360] Norway's third-party statement (DS412 and DS426), para. 7.
[361] Saudi Arabia's third-party submission (DS412), paras. 2-17; third-party submission (DS426), paras. 2-17; and third-party statement (DS412 and DS426), paras. 2-7.
[362] Appellate Body Report, *US – Large Civil Aircraft (Second Complaint)*, paras. 585 and 589.
[363] Appellate Body Reports, *China – Auto Parts*, para. 171.
[364] Appellate Body Reports, *China – Auto Parts*, para. 171 (emphasis original).
[365] Appellate Body Report, *US – Softwood Lumber IV*, para. 56.

(ii) Factual characterization of the measures

The legal bases of the FIT Programme[366] and the mandate and powers of the OPA

7.195 We recall that the FIT Programme was formally launched by the OPA on 24 September 2009 pursuant to the Direction of the Ontario Minister of Energy and Infrastucture[367] acting under the authority of the *Electricity Act of 1998*[368], as amended by the *Green Energy and Green Economy Act of 2009*[369]. Section 25.35(1) of the amended *Electricity Act of 1998* provides that the "Minister may direct the OPA to develop a feed-in tariff program that is designed to procure energy from renewable energy sources". The same section defines a "feed-in tariff program" as a "program for procurement, providing standard program rules, standard contracts and standard pricing …"[370]. Pursuant to this statutory authority, the Minister of Energy and Infrastructure called upon the OPA to establish a "feed-in tariff ("FIT") program that is designed to procure energy" through "a 20-year power purchase agreement in respect of all renewable fuels other than waterpower …"[371]. This direction specified that the FIT Contract "should require the developer to design, build and operate a renewable generating facility and in exchange should provide for guaranteed, long-term pricing for the output of the renewable generating facility"[372].

7.196 The OPA's power to enter into such "contracts" is set out in section 25.35(4) of the amended *Electricity Act of 1998*, which grants the OPA authority to enter into "contracts relating to the procurement of electricity supply and capacity using alternative energy sources or renewable energy sources to assist the Government of Ontario in achieving goals in the development and use of alternative or renewable energy technology and resources". This authority is repeated in Section 25.35(1)(a); and, confirming the OPA's power to enter into "contracts relating to the procurement of electricity", Section 25.20(3) of the amended *Electricity Act of 1998* grants the OPA the right to "recover from consumers its costs and payments under procurement contracts"[373]. These powers are intended to enable the OPA to pursue its mandated activities, which include "to engage in activities to facilitate the diversification of sources of electricity supply by promoting the use of cleaner energy sources and technologies, including alternative sources and renewable sources" and "to establish system-wide goals for the amount of electricity to be produced from alternative energy sources and renewable energy sources"[374].

[366] A more general description of the FIT Programme, including its objectives and how it is intended to operate, is set out in the introduction to our findings at paras. 7.64-7.68.

[367] Minister's 2009 FIT Direction, Exhibit JPN-102.

[368] *Electricity Act of 1998*, Exhibit JPN-101, Sections 25.32 and 25.35.

[369] *Green Energy Act of 2009*, Exhibit JPN-101, Sections 5(2) and 7.

[370] *Electricity Act of 1998*, Exhibit JPN-101, Section 25.35(4). More generally, Section 25.32(4.1) of the *Electricity Act of 1998* provides that the "Minister may direct the OPA to undertake … any other initiative or activity that relates to, (a) the procurement of electricity supply or capacity from renewable energy sources…"

[371] Minister's 2009 FIT Direction, Exhibit JPN-102, pp. 1-2.

[372] Minister's 2009 FIT Direction, Exhibit JPN-102, p. 2.

[373] The OPA's powers to enter into "procurement" contracts for electricity under the amended *Electricity Act of 1998* are also referred to in Sections 78.3 and 78.4 of the *Ontario Energy Board Act of 1998* and *Ontario Regulation 578/05*. *Ontario Regulation 578/05*, as amended, ("*Ontario Regulation 578/05*"), Exhibit JPN-154.

[374] *Electricity Act of 1998*, Exhibit JPN-101, Section 25.2(1).

7.197 That the OPA has the mandate and power to enter into "procurement" contracts for the supply of electricity is also evident from various documents prepared by the OPA and other Ontario governmental agencies[375].

The FIT Contract

7.198 The FIT Contract describes the contractual relationship between the OPA and the legal entity or entities responsible for the approved renewable energy electricity project (the "Supplier"). It is comprised of a project-specific cover page (which provides a summary of a number of key project facts and characteristics including, where applicable, the relevant "domestic content level"), a set of general terms and conditions[376], a series of exhibits addressing a range of formal and substantive matters relating to each project, and an appendix of standard definitions. By entering into the FIT Contract, the OPA and the Supplier "mutually agree to be bound" by its terms and conditions "[f]or valuable consideration"[377]. The Standard Definitions Appendix suggests that the FIT Contract is a "power purchase agreement"[378].

7.199 In order to fully understand the contractual parties' rights and obligations, the FIT Contract must be read together with the FIT Rules. These set out, in varying degrees of detail over 42 pages comprising thirteen sections and four exhibits, the rules and procedures that govern the operation of the FIT Programme. In particular, the FIT Rules describe the project eligibility and application requirements, the application review and acceptance procedures, and the tests for determining what kind of connection, if any, can be established between the relevant generation facility and the Ontario electricity system[379]. They also provide an overview of the form of the FIT Contract and how it should be executed, including an explanation of some of its key provisions such as, for example, those relating to the "Minimum Required Domestic Content Level" that must be achieved by qualifying solar PV and windpower projects[380]. In addition, the FIT Rules identify the relevant prices and describe the processes to be used for settling the Contract Payments[381].

7.200 Apart from the delivery of electricity into the Ontario power grid, one of the fundamental obligations undertaken by the Supplier under a FIT Contract is to design, build and own or lease a

[375] For example, see OPA Generation Procurement Update, Exhibit JPN-21; A Progress Report on Electricity Supply, Fourth Quarter 2010, Ontario Power Authority, ("OPA Progress Report: Fourth Quarter 2010"), Exhibit JPN-26, p. 1 (disclosing that "4,709 MW were procured from existing generating facilities"); OPA Progress Report: Second Quarter 2011, Exhibit JPN-28, p. 1 (disclosing that "4,716 MW were procured from existing generating facilities"); OPA's Generation Procurement Cost Disclosure, Exhibit JPN-29 (stating that "[t]he OPA has procured a generation portfolio consisting of various generation technologies and capacities for the province of Ontario"); Highlights of the *Electricity Restructuring Act of 2004*, Exhibit JPN-9, p. 2 (stating that "[t]he OPA is responsible for developing an integrated power system plan and procurement process for electricity supply"); and OEFC: Management of Power Supply Contracts, Exhibit JPN-22, p. 2 (referring to "Ontario Power Authority supply procurements"). See also from the private sector, Overview of Electricity Regulation in Canada, Exhibit JPN-7, p. 18 (stating that "[t]he OPA … is … primarily responsible for … procuring new generation through various forms of procurement processes").

[376] The FIT Contract also envisages the possibility that, where necessary, a "Special Terms and Conditions" schedule could be added to the Contract. FIT Contract, Exhibit JPN-127, Schedule 2.

[377] FIT Contract, Exhibit JPN-127, Cover Page.

[378] The Standard Definitions Appendix defines "Pre-COD Facilities" as "the Facility, or the Facility and other generation facilities that are the subject of a FIT Contract or other power purchase agreement with the OPA similar in nature to the FIT Contract …" (emphasis added). FIT Standard Definitions, Exhibit JPN-135, Definition No. 192.

[379] FIT Rules, Exhibit JPN-119, Sections 2-5.

[380] FIT Rules, Exhibit JPN-119, Section 6.

[381] FIT Rules, Exhibit JPN-119, Sections 7-8. In addition, the FIT Rules set out requirements in respect of "program review and amendments", "confidentiality", and "program launch".

qualifying renewable energy electricity generation facility ("Contract Facility") and to operate and maintain it in accordance with all relevant IESO Market Rules, laws and regulations[382]. These requirements not only serve to ensure that the Supplier delivers electricity into the grid but they also assure the OPA that the conditions for its delivery are satisfied according to the relevant standards. When building a Contract Facility that utilizes solar PV or windpower technology that has a capacity to produce more than 10 kW of electricity, the Supplier must additionally ensure that it is developed and constructed in such a way that satisfies the "Minimum Required Domestic Content Level"[383].

7.201 Other notable obligations on the Supplier include assigning all Environmental Attributes associated with the Contract Facility to the OPA[384], transferring half of all payments received from the Canadian Government under the "ecoENERGY for Renewable Power Program" to the OPA[385], paying all taxes on the electricity delivered up to the relevant Connection Point[386], and ensuring that the Contract Facility is appropriately connected to the Ontario electricity system. With particular respect to the latter, Articles 2.3(a) and 2.7(b) of the FIT Contract direct the Supplier to arrange, at its own cost, for the Contract Facility to be connected to the relevant connection point in order to permit the successful delivery of the electricity it produces into the IESO-controlled transmission grid or the distribution system[387]. In order to do this, the Supplier must first identify a proposed connection point, from the available options identified by the OPA on a semi-annual basis[388], that matches the particular characteristics of the Contract Facility. However, it is the OPA that decides, together with the IESO as well as the relevant licensed transmitters or distributors, whether any particular Contract Facility can be connected to the proposed connection point. FIT projects may be connected to the IESO-controlled

[382] FIT Contract, Exhibit JPN-127, Articles 2.1(a) and 2.7(a); and FIT Rules, Exhibit JPN-119, Section 6.3(a). The relevant laws and regulations include those found in the Distribution System Code, the Transmission System Code and the Connection Agreement.

[383] FIT Contract, Exhibit JPN-127, Article 2.2(f).

[384] FIT Rules, Exhibit JPN-119, Section 7.3(c); and FIT Contract, Exhibit JPN-127, Article 2.10. "Environmental Attributes" are defined as *inter alia* "the interests and rights arising out of attributes or characteristics relating to the environmental impacts associated with a Renewable Generating Facility or the output of a Renewable Generating Facility, now or in the future, and the right to quantify and register these with competent authorities, including: (a) all right, title, interest and benefit in and to any renewable energy certificate, credit, reduction right, offset, allocated pollution right, emission reduction allowance or other proprietary or contractual right, whether or not tradable, resulting from the actual or assumed displacement of emissions by the production of Electricity from the Contract Facility as a result of the utilization of renewable energy technology; (b) rights to any fungible or non-fungible attributes or entitlements relating to environmental impacts, whether arising from the Contract Facility itself, from the interaction of the Contract Facility with the IESO-Controlled Grid, a Distribution System or the Host Facility …; (c) any and all rights, title and interest relating to the nature of an energy source (including a Renewable Fuel) as may be defined and awarded through Laws and Regulations or voluntary programs, including all Emission Reduction Credits; and (d) all revenues, entitlements, benefits and other proceeds arising from or related to the foregoing…" FIT Standard Definitions, Exhibit JPN-135, Definition No. 85.

[385] FIT Rules, Exhibit JPN-119, Section 7.3(b); and FIT Contract, Exhibit JPN-127, Article 3.2 ("If the Supplier receives any payments under the ecoENERGY for Renewable Power Program attributable to the Contract Facility, the Supplier, within 30 days of receipt of such payment, shall pay to the OPA 50% of the amount of such payment, failing which, the OPA may set off any such payments due to the OPA against any amounts payable by the OPA to the Supplier").

[386] FIT Contract, Exhibit JPN-127, Article 3.4. In essence, the "Connection Point" is defined as the point where electricity from the Contract Facility directly or indirectly enters the Distribution System or the IESO-Controlled Grid. FIT Standard Definitions, Exhibit JPN-135, Definition No. 54. All taxes payable on the Delivered Electricity from the Connection Point onwards are to be paid by the OPA. In addition, the OPA is liable for any Sales Taxes payable in connection with the Delivered Electricity. FIT Contract, Exhibit JPN-127, Article 3.5.

[387] FIT Contract, Exhibit JPN-127, Articles 2.3(a) and 2.7(b).

[388] FIT Rules, Exhibit JPN-119, Section 5.1(a).

transmission grid or the distribution system[389]. However, typically, FIT Projects with a capacity greater than 10 MW will be connected to the IESO-controlled transmission grid[390].

7.202 The FIT Contract Price is established by the OPA and, in principle, revised once every two years for unexecuted projects[391]. Such prices are intended to cover the development costs plus a reasonable rate of return over the term of the FIT Contract for projects meeting specific assumptions relating to cost and efficiency[392]. The Contract Prices applicable to the measures at issue were determined using a discounted cash flow model taking into account "reasonable" capital costs (i.e. "project development, construction and equipment costs"), "reasonable" operating and maintenance costs (i.e. "project staffing and maintenance costs, including on-going capital expenditures and property taxes") and "reasonable" connection costs (i.e. "project connection costs, no significant upgrade costs assumed")[393]. In 2009, the rate of return used to establish the FIT Price Schedule was "approximately 11%"[394]. For certain technologies, a specified percentage of the Contract Price will escalate annually based on increases in the consumer price index[395]. In addition, qualifying Aboriginal[396] and Community[397] Participation Projects will receive a "Price Adder" depending upon their respective Aboriginal and Community Participation Levels[398]. All relevant prices are published by the OPA on its website in the FIT Price Schedules[399], and these define the Contract Prices under the FIT Contract.

7.203 For each kWh of electricity that is delivered into the Ontario electricity system (or not delivered under the instruction of the IESO), a Supplier will receive the Contract Payment (or the Additional Contract Payment) defined in Exhibit B of the FIT Contract as a function of the FIT Contract Price[400]. Put simply, where a Contract Facility is an "IESO market participant", because, for

[389] FIT Rules, Exhibit JPN-119, Section 2.1(a)(vii).
[390] FIT Programme Overview, Exhibit JPN-37, p. 18.
[391] FIT Rules, Exhibit JPN-119, Sections 7.1(a), 7.1(b), and 10.1(a).
[392] FIT Rules, Exhibit JPN-119, Section 7.1(a). The Contract Price does not include any Sales Taxes payable by the OPA in connection with the Delivered Electricity. As already noted, where Sales Tax is payable, it shall be paid by the OPA. FIT Contract, Exhibit JPN-127, Article 3.5.
[393] Proposed Feed-In Tariff Price Schedule, Stakeholder Engagement - Session 4, OPA, ("Proposed FIT Price Schedule Presentation"), Exhibit CDA-46, Slides 22-28.
[394] Canada's responses to Panel questions Nos. 26 (first set) and 12 (second set); Proposed FIT Price Schedule Presentation, Exhibit CDA-46, Slide 30.
[395] FIT Rules, Exhibit JPN-119, Section 7.2.
[396] Section 9.1(a) of the FIT Rules, Exhibit JPN-119, defines an "Aboriginal Community" as *inter alia* "(i) a First Nation that is a 'Band' as defined in the Indian Act (Canada); (ii) the Métis Nation of Ontario or any of its active Chartered Community Councils; …"
[397] Section 9.1(e) of the FIT Rules, Exhibit JPN-119, defines an "Community Investment Member" as *inter alia* "(i) one or more individuals Resident in Ontario; (ii) a Registered Charity with its head office in Ontario; (iii) a Not-For-Profit Organization with its head office in Ontario; …"
[398] Section 9.1(b) of the FIT Rules, Exhibit JPN-119, defines the "Aboriginal Participation Level" as "the percentage of the Economic Interest in the Applicant or the Supplier that is held by an Aboriginal Community." Similarly, Section 9.1(f) of the FIT Rules, Exhibit JPN-119, defines the "Community Participation Level" as *inter alia* "the percentage of the Economic Interest in the Applicant or the Supplier that is held by Community Investment Members …"
[399] 2011 FIT Price Schedule, Exhibit JPN-30; and 2010 microFIT Price Schedule, Exhibit JPN-31.
[400] All transmission-connected Suppliers and distribution-connected Suppliers with a capacity of more than 5 MW will receive the Additional Contract Payment for electricity they are directed by the IESO *not* to deliver into the Ontario electricity grid for system safety and reliability reasons. FIT Contract, Exhibit JPN-127, Exhibit B, Types 1, 2, and 3A, Article 1.5. ("Insofar as the IESO issues instructions to reduce all or part of the output of the Contract Facility on an economic basis in order to mitigate over generation on the entire IESO-Controlled Grid …" an Additional Contract Payment shall be made to the Supplier).

example, it is connected to the IESO-controlled grid (i.e. connected to the transmission network[401]), the Contract Payment is defined as the relevant Contract Price multiplied by the Hourly Delivered Electricity[402], minus the HOEP, minus 80% of the total net revenues that a Supplier may receive from the sale of Future Contract Related Products[403]. Where, on the other hand, the Contract Facility is not an "IESO market participant", and is directly or indirectly connected to the distribution network, the Contract Payment is defined as the relevant Contract Price multiplied by the Hourly Delivered Electricity, minus 80% of the total net revenues that a Supplier may receive from the sale of Future Contract Related Products[404]. However, for Contract Facilities connected to the distribution network that have a capacity greater than 5 MW, the Contract Payment, in situations when the HOEP is negative, is defined as the relevant Contract Price multiplied by the Hourly Delivered Electricity, minus the absolute value of the HOEP, minus 80% of the total net revenues that a Supplier may receive from the sale of Future Contract Related Products[405].

7.204 The FIT Rules provide that the OPA is responsible for making all Contract Payments to the Supplier[406]. However, the typical settlement processes through which a Supplier will be paid (either explicitly or implicitly referred to in the FIT Contract and FIT Rules) envisage that in addition to the OPA, the IESO and relevant LDCs acting on behalf of the OPA will also play a role. In particular, for transmission-connected Contract Facilities, the FIT Rules specify that payments under the FIT Contract "will be adjusted by subtracting the greater of the [HOEP] and zero in respect of all Hourly Delivered Electricity to account for either payments made in accordance with the IESO Market Rules or benefits conferred on the Host Facility, as applicable"[407]. The IESO Market Rules govern the IESO-controlled grid, including the terms and conditions pursuant to which payments due to electricity generators participating in the "IESO-administered markets" will be settled. For a Contract Facility that is connected to the IESO-controlled transmission grid this means that whenever the HOEP is positive, the relevant Supplier will receive the (HOEP) portion of the Contract Price *from the IESO*. When the HOEP is less than the Contract Price, the outstanding portion of the Contract Price minus 80% of any Future Contract Related Product sales (i.e. the GA) will be paid *by the OPA*. On the other hand, it will be for the Supplier to pay the GA to the OPA when the HOEP is greater than the Contract Price[408].

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[401] Approximately 97% of transmission lines are owned and maintained by Hydro One, an agent of the Government of Ontario. Canada's opening statement at the second meeting of the Panel, para. 27; and response to Panel question No. 13 (second set).

[402] In essence, "Hourly Delivered Electricity" is the electricity generated by the Contract Facility that is successfully injected into the transmission or distribution system during any hour. FIT Standard Definitions, Exhibit JPN-135, Definition No. 118.

[403] FIT Contract, Exhibit JPN-127, Exhibit B, Types 1 and 2, Article 1.4. "Future Contract Related Products" are defined as "all Related Products that relate to the Contract Facility and that were not capable of being traded or sold by the Supplier in the IESO-Administered Markets or other markets on or before the Contract Date". FIT Standard Definitions, Exhibit JPN-135, Definition No. 106. "Related Products" are defined as products and services, including transmission rights, "that may be provided by the Contract Facility from time to time, … that may be traded or sold in the IESO-Administered Markets or other markets, or otherwise sold, and which shall be deemed to include products and services for which no market may exist, such as capacity reserves." Article 3.3 of the FIT Contract, Exhibit JPN-127, provides that the Supplier "shall sell, supply or deliver all Future Contract Related Products as requested, directed or approved by the OPA".

[404] FIT Contract, Exhibit JPN-127, Exhibit B, Type 3A, Article 1.4(a)(i) and (b); and Type 3B, Article 1.4.

[405] FIT Contract, Exhibit JPN-127, Exhibit B, Type 3A, Article 1.4(a)(ii) and (b).

[406] FIT Rules, Exhibit JPN-119, Section 6.3(a) and 8.4; and FIT Contract, Exhibit JPN-127, Article 3.1.

[407] FIT Rules, Exhibit JPN-119, Section 8.1(a). This is reflected in FIT Contract, Exhibit JPN-127, Exhibit B, Types 1 and 2, Article 1.4(a).

[408] FIT Rules, Exhibit JPN-119, Section 8.1(b), reflected in FIT Contract, Exhibit JPN-127, Exhibit B, Types 1 and 2, Article 1.4(c).

7.205 For distribution-connected Contract Facilities, the FIT Rules stipulate that the OPA "will pay the Supplier any amounts owing under the FIT Contract through settlement between the Supplier and the applicable LDC on a periodic basis in accordance with the applicable LDCs monthly, quarterly or other periodic billing cycle"[409]. In other words, distribution-connected projects will be paid directly by the LDC to which they are connected. However, after making this payment, the relevant LDC will, in accordance with the Retail Settlement Code and the IESO Market Manual[410], seek to recover any amounts paid in excess of the wholesale price[411] of electricity for the electricity delivered by the Supplier in question, from the OPA, through the IESO[412].

7.206 The FIT Contract envisages that for Contract Facilities connected to the IESO-controlled transmission grid, the HOEP portion of the Contract Price will be paid by the IESO through the operation of the settlement process regulated by the IESO Market Rules. The same generators will receive the outstanding portion of the Contract Price minus 80% of net revenues from the sale of Future Contract Related Products (i.e. the Contract Payment) from the OPA , which will form part of the global adjustment. In other words, the Contract Payment for transmission-connected projects will be included in the global adjustment; and the difference between the Contract Payment and the Contract Price will, in the absence of any net revenues from Future Contract Related Products, be the HOEP, which will be paid to a FIT Supplier by the IESO as a result of its status as an "IESO market participant". On the other hand, for Contract Facilities that are directly or indirectly connected to the distribution system, the Contract Payment (i.e. the Contract Price multiplied by the Hourly Delivered Electricity, minus 80% of net revenues from the sale of Future Contract Related Products) will be made by the associated LDC, on behalf of the OPA, and will also be included in the global adjustment.

7.207 Notwithstanding these settlement arrangements, the OPA may decide "at its sole discretion" to change them "at any time and from time to time" for the Programme as a whole or in respect of one or more projects or LDCs[413]. Moreover, whatever settlement arrangements may operate, the OPA will remain liable to make the Contract Payments[414].

7.208 Thus, although there is no specific provision in the FIT Contract that explicitly defines its object, it is evident when it is read as a whole, in the light of the FIT Rules, that its fundamental purpose is the *delivery of electricity* produced from a Contract Facility that satisfies the "Minimum Required Domestic Content Level" into the Ontario electricity system, in return for which, the OPA undertakes to pay the Supplier the remuneration defined under the Contract through the operation of

[409] FIT Rules, Exhibit JPN-119, Section 8.2(a). See also FIT Contract, Exhibit JPN-127, Exhibit B, Type 4, Article 1.4.

[410] IESO Market Manual Part 5.5, Exhibit JPN-82, Section 1.6.11.2.

[411] The wholesale price is the price that the relevant LDC should pay on the "wholesale market" for the electricity in question.

[412] This settlement process is more fully described by Japan in its first written submission. See Japan's first written submission, paras. 145-147.

[413] FIT Rules, Exhibit JPN-119, Section 8.4.

[414] FIT Rules, Exhibit JPN-119, Sections 6.3(a) and 8.4.

one or more different settlement mechanisms for a period of 20 years[415]. Article 3.5 of the FIT Contract appears to describe this transaction as a "purchase" of electricity[416].

The microFIT Contract

7.209 The microFIT Contract "governs [the] OPA's procurement of electricity"[417] from the entity or entities responsible for an approved project (the "Supplier"). It defines the contractual relationship between the OPA and the Supplier on the basis of a set of standard terms and conditions that are much simpler and less detailed when compared with those used in the FIT Contract. This reflects the OPA's stated intention of providing, through the operation of the microFIT stream of the FIT Programme, "a simplified approach for enabling the development of renewable micro-generation projects in Ontario", with a view to attracting participants such as homeowners, farmers and small businesses[418].

7.210 As with the FIT Contract, the microFIT Contract must be read together with the microFIT Rules in order to be fully understood. The microFIT Rules set out the basic rules and procedures that must be followed by microFIT Project applicants and participants. They describe the relevant eligibility requirements and the application and project connection processes, and outline some of the key provisions of the microFIT Contract with respect to duration, price and the settlement of payments[419].

7.211 A Supplier operating a microFIT Project must own or lease a "micro-generation project" (the "Facility") for the term of the microFIT Contract, and ensure that it delivers electricity into the Ontario electricity system in accordance with all relevant laws and regulations[420]. In addition, when the Facility is based on solar PV technology, the Supplier must ensure that it is developed and constructed in such a way that satisfies the "Minimum Required Domestic Content Level"[421].

7.212 A microFIT Supplier must assign all Environmental Attributes associated with the Facility to the OPA[422]. It must also, at its own cost, enter into a Connection Agreement with a relevant LDC[423],

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[415] This understanding is also consistent with how the FIT Contract and Settlement process is described in the FIT Programme Overview: "The [FIT] contract requires the OPA to pay the contract holder for the electricity produced by the project"; for distribution-connected projects, "the local distribution company will make payments to the proponents on a regular basis according to the normal billing cycle of the local distribution company"; and for transmission-connected projects, payments will be "settled directly by the OPA and the Independent Electricity System Operator". FIT Programme Overview, Exhibit JPN-37, Section 6.4.

[416] In particular, Article 3.5 of the FIT Contract, Exhibit JPN-127, reads in relevant part: "If any Sales Tax is payable in connection with the Delivered Electricity … purchased hereunder, such Sales tax shall be paid by the OPA" (emphasis added). Article 3.4 of the FIT Contract, Exhibit JPN-127, indicates that the Supplier "sells" electricity under the transaction: "The Supplier is liable for … all Taxes applicable to the Delivered Electricity … sold hereunder …" (emphasis added). The "Delivered" electricity is defined as the "Electricity … delivered to the Connection Point". FIT Standard Definitions, Exhibit JPN-135, Definition No. 65.

[417] Ontario Power Authority, microFIT Contract, Version 1.6.1, 10 August 2011, ("microFIT Contract"), Exhibit JPN-164, Article 2.1.

[418] microFIT Programme Overview, Exhibit JPN-38, p. 1 and Section 1.2(a); and microFIT Rules, Exhibit JPN-157, Section 1.1.

[419] microFIT Rules, Exhibit JPN-157, Sections 1-5.

[420] microFIT Contract, Exhibit JPN-164, Articles 6.2 and 6.4; and microFIT Rules, Exhibit JPN-157, Sections 2.1(a) and 6.1(a).

[421] microFIT Contract, Exhibit JPN-164, Article 6.4.4.

[422] microFIT Contract, Exhibit JPN-164, Article 5. "Environmental Attributes" are defined as "the interests and rights arising out of attributes or characteristics relating to the environmental impacts associated with the Facility, now or in the future, and the right to quantify and register these with competent authorities, including: (a) all right, title, interest and benefit in and to any renewable energy certificate, credit, reduction right, offset, allocated pollution right, allowance, emission reduction allowance or allowance set aside or other

in the absence of which, it will not be offered a microFIT Contract[424]. A microFIT Facility cannot be directly connected to the IESO-controlled transmission grid – it must be connected to the Ontario electricity system via a distribution system[425].

7.213 The microFIT Contract Price is established by the OPA in the same way as the FIT Contract Price[426] and is listed in the FIT and microFIT Price Schedules[427]. The microFIT Contract Price is guaranteed for 20 years. For each kWh of electricity that a Supplier successfully delivers into the Ontario electricity system, it will receive the Contract Price (the "Generation Payment") from the relevant LDC in accordance with the Retail Settlement Code and the Connection Agreement[428]. In other words, the LDC connected to the microFIT Facility, acting on behalf of the OPA, will make the Generation Payment in accordance with a similar settlement process used to pay distribution-connected FIT Suppliers[429]. As with the FIT Contract, ultimate liability for Generation Payments under the microFIT Contract lies with the OPA[430].

7.214 Thus, not unlike the FIT Contract, when the microFIT Contract is read as a whole and in the light of the microFIT Rules, it is apparent that its fundamental purpose is the *delivery of electricity* produced from a Facility that satisfies the "Minimum Required Domestic Content Level" into the Ontario electricity system, in return for which the OPA undertakes to pay the Supplier the remuneration defined under the Contract through the operation of a similar mechanism used to settle payments owed to distribution-connected FIT Projects. Section 2.1 of the microFIT Contract characterizes this transaction as the "OPA's procurement of electricity"[431]. Similarly, Appendix A to the microFIT Contract describes it as a "sale" of electricity[432].

Conclusion

7.215 Having carefully scrutinized the challenged measures, and recalling the descriptions of the challenged measures set out elsewhere in these Reports[433], we conclude that the principle characteristics of the FIT Programme, and of the FIT and microFIT Contracts, can be described in the following terms:

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proprietary or contractual right, whether or not tradable; (b) rights to any fungible or non-fungible attributes or entitlements relating to environmental impacts, however arising; (c) any and all rights, title and interest relating to the nature of an energy source as may be defined and awarded through applicable laws and regulations or voluntary programs; and (d) all revenues, entitlements, benefits and other proceeds arising from or related to the foregoing. …". microFIT Contract, Exhibit JPN-164, Appendix A, Definitions.

[423] microFIT Rules, Exhibit JPN-157, Sections 1.2(4), 3.1(xi), and 6.1(c). A "Connection Agreement" is defined as "a 'Micro-Embedded Generation Facility Connection Agreement' as prescribed by the Distribution System Code entered into between an LDC and a Supplier." microFIT Rules, Exhibit JPN-157, Definition No. 6. It is the standard agreement used by all LDCs and is prescribed by the OEB. microFIT Programme Overview, Exhibit JPN-38, Section 1.2(d).

[424] microFIT Rules, Exhibit JPN-157, Sections 1.2(10) and 4.1(b).

[425] microFIT Rules, Exhibit JPN-157, Section 2.1(a)(v).

[426] microFIT Rules, Exhibit JPN-157, Section 5.2 and Definitions. The FIT Contract Price is discussed above at para. 7.202.

[427] 2011 FIT Price Schedule, Exhibit JPN-30; and 2010 microFIT Price Schedule, Exhibit JPN-31. See also microFIT Programme Overview, Exhibit JPN-38, Section 1.2(e).

[428] microFIT Contract, Exhibit JPN-164, Sections 4.4 and 4.4.2; and microFIT Rules, Exhibit JPN-157, Section 5.2.

[429] See above discussion at para. 7.205.

[430] microFIT Contract, Exhibit JPN-164, Section 4.4.1.

[431] microFIT Contract, Exhibit JPN-164, Section 2.1.

[432] microFIT Contract, Exhibit JPN-164, Appendix A, Definitions: "'Settlement Price' means the price at which electricity sales pursuant to this agreement will be settled." (emphasis added)

[433] See above paras. 7.64-7.68 and 7.158-7.165

The FIT Programme

7.216 The FIT Programme has very clearly two fundamental objectives: First, to encourage the participation of new generation facilities using renewable sources of energy into Ontario's electricity system in order to diversify Ontario's supply-mix and help replace the generation capacity that has been (and will be) lost as a result of the closure of Ontario's coal-fired facilities by 2014, and thereby also reduce greenhouse gas emissions; and secondly, to stimulate local investment in the production of renewable energy generation equipment needed to design and construct qualifying generation facilities using solar PV and windpower technologies. These objectives are pursued through the execution of the FIT and microFIT Contracts, which involve an exchange of performance obligations on the part of the OPA and qualifying Suppliers. There is no inherent grant element to the FIT and microFIT transactions.

The FIT and microFIT Contracts

7.217 In essence, the FIT and microFIT Contracts envisage an exchange of the following core performance obligations between Suppliers and the OPA:

7.218 A Supplier must:

(i) design, construct, own (or lease) and operate a qualifying facility in accordance with all relevant IESO Market Rules, laws and regulations;

(ii) comply with the "Minimum Required Domestic Content Level" when designing and constructing a solar PV or a microFIT windpower facility;

(iii) deliver the electricity that is produced into the Ontario electricity system in accordance with all relevant IESO Market Rules, laws and regulations;

(iv) participate in a defined electricity payment processes to settle Contract Payments that is not unlike that used generally in Ontario's electricity system; and

(v) assign all Environmental Attributes associated with the Contract Facility to the OPA, pay the OPA 50% of all payments received by the Supplier under the "ecoENERGY for Renewable Power Program"[434], and effectively transfer to the OPA 80% of total net revenues from the sale of Future Contract Related Products[435].

7.219 In return, the OPA agrees to make the Contract Payments, which are defined in such a way that ensures each Supplier will be remunerated via defined settlement processes at the guaranteed FIT Contract Price for each kWh of Delivered Electricity for 20 years.

(iii) Legal characterization of the measures

7.220 We recall that the complainants have argued that the challenged measures may be properly characterized as one or multiple types of the "financial contribution[s]" defined in Article 1.1(a)(1) of the SCM Agreement and/or a form of "income or price support" within the meaning of

[434] Although explicitly excluded from the definition of Environmental Attributes found in the microFIT Rules, ecoENERGY payments are neither excluded from, nor included in, the definition of Environmental Attributes that is contained in the microFIT Contract. Thus, it is unclear whether any ecoENERGY payments made to microFIT Suppliers would not have to be transferred to the OPA by virtue of being Environmental Attributes. See above para. 7.212 and fn. 422.

[435] This obligation is only explicitly found in the FIT Contract, Exhibit JPN-127.

Article 1.1(a)(2) of the SCM Agreement. On the other hand, Canada has argued that the only appropriate characterization of the measures at issue is as "financial contribution[s]" in the form of "government purchases [of] goods" under the terms of Article 1.1(a)(1(iii) of the SCM Agreement. Because there is no dispute between the parties about whether each of the challenged measures amount to a "financial contribution", we begin by assessing the merits of the parties' arguments concerning the specific *types* of "financial contribution" they each consider match the salient characteristics of the challenged measures.

The challenged measures as financial contributions

7.221 Article 1.1(a)(1) of the SCM Agreement defines a "financial contribution" in the following terms:

> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
>
> (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
>
> (iii) a government provides goods or services other than general infrastructure, or purchases goods;
>
> (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments[.]

7.222 Having carefully considered the parties' arguments, we agree with Canada that the appropriate legal characterization of the FIT Programme and the FIT and microFIT Contracts is as "financial contribution[s]" in the form of "government purchases [of] goods" within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement. We come to this conclusion on the basis of the following considerations.

The OPA pays for "delivered electricity"

7.223 First, in evaluating how the challenged measures should be legally characterized it is, in our view, important to recall that one of the fundamental objectives of the FIT Programme is to secure investment in new generation facilities *for the purposes* of diversifying Ontario's supply-mix and helping to fill the supply gap that is expected from the closure of Ontario's coal-fired facilities by 2014. It is by offering a Contract Price and making Contract Payments *for Delivered Electricity* that the Government of Ontario endeavours to achieve this objective. In other words, although the construction of a certain type of renewable energy generation facility is one of the objectives (and indeed, one of the conditions) of the challenged measures, the provisions of the FIT and microFIT Contracts expressly confirm that the funds transferred to qualifying Suppliers are intended to pay *for the electricity that is delivered* into Ontario's electricity grid. That the Contract Price is set at a level that is intended to provide a reasonable return on investment for the overall project does not alter the

fact that under the express terms of the FIT and microFIT Contracts, Contract Payments will be made to solar PV and windpower generators *only* if electricity is delivered[436]. Thus, there is no grant element inherent in the design and operation of the FIT Programme. The OPA does not pay for renewable energy equipment or facilities. It does not make any upfront lump-sum advances to the FIT generators: the OPA's payment liability will arise only as and when electricity is produced and delivered into the system pursuant to the terms of the FIT and microFIT Contracts.

7.224 Likewise, while a FIT and microFIT Contract will facilitate a Supplier's search for appropriate project financing, it would be wrong to characterize the Contract Payments themselves as finance payments for the construction of the Contract Facility. Indeed, whereas an entity that provides project financing accepts the risk of losing money if it obtains insufficient security, the OPA accepts no comparable risk because it is only by way of the provision of electricity – the goods in this case – that any money is paid to a FIT Supplier.

The Government of Ontario takes possession over electricity and therefore "purchases" electricity

7.225 Secondly, we are not convinced by the European Union's argument that the notion of government "purchases [of] goods" that is referred to in Article 1.1(a)(1)(iii) of the SCM Agreement, must be interpreted to mean that the "term 'purchase' implies that the government is the entity being supplied with something for its use"[437]. In our view, the correct interpretation of these terms is closer to that advanced by Japan, which is derived from the following two ordinary meanings of the verb to "purchase" obtained from The Oxford English Dictionary (OED Online): (i) "to obtain; to gain possession of"; and (ii) "to acquire in exchange for payment in money or an equivalent; to buy"[438].

7.226 On the basis of the above two definitions, the act of purchasing a good might be described in terms of gaining possession of, acquiring, buying or obtaining a good. Among the definitions of the verbs to "acquire", to "buy" and to "obtain", found in the same dictionary used by Japan and Canada are, respectively: (i) to "gain possession of through skill or effort; to obtain, develop, or secure in a careful, concerted, often gradual manner"[439]; (ii) to "get possession of by giving an equivalent, usually in money; to obtain by paying a price; to purchase"[440]; and (iii) to "come into the possession of; to procure; to get, acquire, or secure"[441].

7.227 The fact that the notion of "possession" is central to all three of the above definitions suggests that irrespective of the particular term used to explain what is meant by a "purchase", it should necessarily be understood as an act that, in the context of Article 1.1(a)(1)(iii) of the SCM Agreement, will result in the government "possessing" the good that is purchased. Furthermore, it follows from most of the above formulations, that the notion of a "purchase" for the purpose of Article 1.1(a)(1)(iii) should involve some kind of payment (usually monetary) in exchange for a good. This latter proposition finds support in *US – Large Civil Aircraft (Second Complaint)*, where the Appellate Body

[436] The relevance to our legal characterization of the challenged measures of the fact that Exhibit B of the FIT Contract, Exhibit JPN-127, provides that a FIT generator will be given an "Additional Contract Payment" when it is directed by the IESO *not* to deliver electricity is discussed below at paras. 7.240 and 7.241.

[437] European Union's second written submission, para. 13. (emphasis added)

[438] Japan's second written submission, para. 38. Similar ordinary meanings can be found in the dictionary definitions of the terms used to describe a government "purchase" of goods in the French and Spanish language versions of Article 1.1(a)(1)(iii) of the SCM Agreement (respectively, "*achètent*" and "*compre*"). In particular, "*acheter*" is defined as "*obtenir contre paiement la propriété et l'usage*" (Le Trésor de la Langue Française Informatisé, online version at http://atilf.atilf.fr/); while "*comprar*" is defined as "*obtener algo con dinero*" (Real Academia Española, online version at http://www.rae.es/rae.html).

[439] Shorter Oxford English Dictionary, online version at http://www.oed.com/view/Entry/1731.

[440] Shorter Oxford English Dictionary, online version at http://www.oed.com/view/Entry/25484.

[441] Shorter Oxford English Dictionary, online version at http://www.oed.com/view/Entry/130002.

observed that "[t]he second sub-clause [of Article 1.1(a)(1)(iii) of the SCM Agreement] uses the term 'purchase', which is usually understood to mean that the person or entity providing the goods will receive some consideration in return"[442]. Thus, we find that the ordinary meaning of the term "purchase" suggests that for the purpose of Article 1.1(a)(1)(iii) of the SCM Agreement, government "purchases [of] goods" will arise when a government obtains possession over a good through some kind of payment (monetary or otherwise).

7.228 Having said that, like Canada[443], we observe that nothing in the ordinary meanings we have reviewed suggests that a "purchase" must involve obtaining *physical* possession over something. Although a purchase of goods may exist when an entity takes physical possession over of a good in exchange for a payment of some kind, it may also arise in other situations when a purchaser does not physically possess the purchased good. Canada has presented the following two examples of such purchases: (i) a book that is bought on the internet by an entity that directs the seller to deliver it to somebody else as a gift; and (ii) a product on a ship at sea that is bought and sold by means of its bill of lading[444]. In both examples, a purchase of goods is effected by means of an exchange of performance obligations involving the transfer of an *entitlement* to the purchased product from the seller to the purchaser. No actual physical possession of the product purchased is necessary.

7.229 That a purchase of goods may take place through the transfer of an entitlement to a product is particularly important when considering what it means to purchase *electricity*, which, as we have previously explained[445], is an intangible good that, in general, cannot be stored and must be consumed almost at the same time it is produced. Thus, given the specific characteristics of electricity, it is perhaps best to conceive of a purchase of electricity as involving the transfer of an *entitlement* to electricity, rather than the taking of physical possession over electricity. This appears to accord with Japan's view that "[d]espite the nature of electricity, which is drawn 'almost instantaneous[ly]" by consumers when consumers turn on their electronic devices, intermediaries in the transmission and distribution process (such as wholesalers and retailers) can and do take title to, and accordingly possess, the electricity on its way to the end consumer"[446].

7.230 Turning to the context of the term "purchases goods", the European Union argues that the language of Article 1.1(a)(1)(iii) opposes the word "purchase" to the term "provision", and that this is instructive for the purpose of interpreting the former. Specifically, the European Union suggests that this juxtaposition means that just as "the term 'provision' implies that the government is the entity supplying something for the use of the recipient, the term 'purchase' implies that the government is the entity being supplied with something for its use"[447]. We are not persuaded by this argument. In our view, there is little interpretative guidance to be drawn from the fact that the words "provides goods" and "purchases goods" appear in the same sub-paragraph. Certainly, we cannot see how the different language used in the two clauses of Article 1.1(a)(1)(iii) assists us in understanding whether "purchases [of] goods" must necessarily involve using the goods in question.

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[442] Appellate Body Report, *US – Large Civil Aircraft (Second Complaint)*, para. 619. We note that the notion of "consideration" is derived from common law, where it plays a critical role in determining the existence of a contract. However, the word "consideration" does not appear in the above dictionary definitions. Moreover, the notion of "consideration" is not a necessary element of contracts executed under civil law (and possibly other legal) systems. Thus, to the extent that the concept of "consideration" may inform the meaning of the term "purchase [of] goods" under Article 1.1(a)(1)(iii) of the SCM Agreement, it needs to be recalled that it is a legal construct that cannot be found in the legal systems of many WTO Members.

[443] Canada's second written submission, para. 93; and opening statement at the second meeting of the Panel, paras. 22-23.

[444] Canada's opening statement at the first meeting of the Panel, paras. 41-42.

[445] See above para. 7.11.

[446] Japan's second written submission, para. 39.

[447] European Union's opening statement at the second meeting of the Panel, para. 13.

7.231 It is important to recall that Article 1.1(a)(1)(iii) refers to "*government* … purchases goods". The first paragraph of Article 1.1 clarifies that the term "government" is to be understood to mean "government" or "public body". Thus, in the light of the foregoing analysis, it follows that "government purchases [of] goods" will arise under the terms of Article 1.1(a)(1)(iii) of the SCM Agreement when a "government" or "public body" obtains possession (including in the form of an entitlement) over a good by making a payment of some kind (monetary or otherwise). In our view, and for the reasons we explain in the following paragraphs, this is exactly what happens through the FIT Programme and its related FIT and microFIT Contracts.

7.232 We recall that the provisions of the FIT and microFIT Contracts expressly confirm that the funds transferred to qualifying Suppliers are intended to pay *for the electricity that is delivered* into Ontario's electricity grid[448]. Once a Supplier delivers electricity into the grid, it loses all rights and entitlements to that electricity, but it will be paid for the kWhs that are injected into the system. According to Japan and the European Union, the OPA does not take any form of possession over the electricity that is supplied. Canada has not contradicted the complainants' assertions as they relate to the OPA[449]. Nevertheless, Canada has argued that the "Government" of Ontario does take physical possession over the electricity delivered under the FIT Programme through the transmission and distribution operations of Hydro One and 77 of the 80 LDCs that currently operate in Ontario[450].

7.233 In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body explained that the term "government" is defined as the "continuous exercise of authority over subjects; authoritative direction or regulation and control", recalling that in *Canada – Dairy*, it had found that "the essence of government is that it enjoys the effective power to regulate, control, or supervise individuals, or otherwise restrain their conduct through the exercise of lawful authority"[451]. The Appellate Body went on to find that "public body" must be understood to mean "an entity that possesses, exercises or is vested with governmental authority"[452]. The Appellate Body has explained the nature of "governmental authority" in the following terms:

> There are many different ways in which government in the narrow sense could provide entities with authority. Accordingly, different types of evidence may be relevant to showing that such authority has been bestowed on a particular entity. Evidence that an entity is, in fact, exercising governmental functions may serve as evidence that it possesses or has been vested with governmental authority, particularly where such evidence points to a sustained and systematic practice. It follows, in our view, that evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions. We stress, however, that, apart from an express delegation of authority in a legal instrument, the existence of mere formal links between an entity and government in the narrow sense is unlikely to suffice to establish the necessary possession of governmental authority. Thus, for example, the

[448] See above, paras. 7.203-7.213.

[449] Although Canada maintains that the fact that the IESO does not take title to electricity "says nothing of the obtaining or acquisition by the OPA" (Canada's second written submission, para. 47), Canada has not specifically refuted Japan's allegation that "no provision of a FIT Contract … gives the OPA the right to take title to the renewable electricity delivered". Japan's second written submission, para. 39.

[450] Canada's response to Panel question No. 21 (first set); and opening statement at the second meeting of the Panel, paras. 30-32.

[451] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 290, referring to the Shorter Oxford English Dictionary, 6th Edition, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1139; and Appellate Body Report, *Canada – Dairy*, para. 97.

[452] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.

> mere fact that a government is the majority shareholder of an entity does not demonstrate that the government exercises meaningful control over the conduct of that entity, much less that the government has bestowed it with governmental authority. In some instances, however, where the evidence shows that the formal indicia of government control are manifold, and there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity concerned is exercising governmental authority[453].

7.234 Hydro One is an agent of the Government of Ontario[454]. As we have previously noted, the Government of Ontario describes a governmental "agent" as "a provincial government organization: [i] which is established by the government, but is not part of a ministry; [ii] which is accountable to the government; [iii] to which the government appoints the majority of the appointees; and [iv] to which the government has assigned or delegated authority and responsibility, or which otherwise has statutory authority and responsibility to perform a public function or service"[455]. It is particularly the last point included in the Government of Ontario's definition of a governmental agent that makes Hydro One a "public body" within the meaning of Article 1.1(a)(1) of the SCM Agreement.

7.235 That the Government of Ontario has "meaningful control" over Hydro One's activities in a way that confirms it is a "public body" within the meaning of Article 1.1(a)(1) of the SCM Agreement is evident from a number of more formal indicators. Starting with the statutory basis of Hydro One's incorporation, the *Electricity Act of 1998*, we note that the Government of Ontario has not only imposed a *duty* on Hydro One to "operate generation facilities and distribution systems" and "distribute electricity" in "such communities" as the Government may prescribe, but it has also granted itself broad powers to define the "conditions and restrictions" pursuant to which such operations must be conducted. Thus, Section 48.1(1) of the *Electricity Act of 1998* provides that:

> Hydro One Inc. shall, through one or more subsidiaries, operate generation facilities and distribution systems in, and shall distribute electricity within, such communities as may be prescribed by regulation, whether or not the community is connected to the IESO-controlled grid, and shall do so in accordance with such conditions and restrictions as may be prescribed by regulation[456].

Likewise, Section 48.2(1) of the *Electricity Act of 1998* reveals that the Government of Ontario has the power to prescribe mandatory provisions in Hydro One's articles of incorporation "governing the creation and issuance of one or more classes of special shares to be issued to the Minister, to hold on behalf of Her Majesty in right of Ontario", governing "constraints on the issue, transfer and ownership, including joint ownership, of voting securities of the corporation", and "with respect to the enforcement of the constraints"[457]. The scope of this power is clarified in Section 53(1)(c); while Section 53(2) identifies "[w]ithout limiting the generality of" Section 53(1)(c), the following examples of the areas where the Government may choose to intervene:

> (a) the mandatory disclosure of information in documents issued or published by the applicable corporation;

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[453] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.
[454] Government of Ontario: All Agencies List, Exhibit JPN-49.
[455] Government of Ontario: Agencies, Exhibit JPN-51, p. 1.
[456] The government's power to prescribe the communities to be targeted by Hydro One's generation and distribution activities, as well as the conditions and restrictions of such operations, is repeated in Section 53(1)(a) and (b) of the *Electricity Act of 1998*, Exhibit JPN-5.
[457] This power is repeated and clarified in Section 53(1)(c) of the *Electricity Act of 1998*, Exhibit JPN-5.

(b) the duties and powers of the directors to refuse to issue or register transfers of shares in accordance with the articles of the corporation;

(c) the limitations on voting rights of any shares held contrary to the articles of the corporation;

(d) the powers of the directors to require disclosure of beneficial ownership of shares of the corporation and the rights of the corporation and its directors, employees or agents to rely on the disclosure and the effects of the reliance;

(e) the manner of determining how much of the equity of a corporation a person or class of persons owns.

Finally as regards the *Electricity Act of 1998*, we note that Sections 50.4(1) and 50.4(4) require that Hydro One report to the Minister on the following basis:

> Hydro One Inc. shall, within 90 days after the end of every fiscal year, submit to the Minister an annual report on its affairs during that fiscal year, signed by the chair of the board of directors.
>
> Hydro One Inc. shall give such other reports and information to the Minister of Finance or to the Minister as each of them may require from time to time.

7.236 The 2008 Memorandum of Agreement ("MOU") between the Government of Ontario and Hydro One reveals how some of the above-mentioned government's powers and Hydro One duties have been implemented. Although directed to operate as a "commercial enterprise with an independent Board of Directors"[458], Hydro One must comply with the Government of Ontario's direction to undertake "special initiatives" in relation to "governance" issues. Hydro One must also "prioritize investments in transmission and distribution capacity to support projects necessary to maintain ongoing grid security and reliability". In this regard, Hydro One is directed to "prepare a three to five year investment plan for new projects", which after being approved by its Board of Directors, "will be submitted to the Minister of Energy and Minister of Finance for concurrence". Moreover, Hydro One "will obtain the approval of the Minister of Energy and Minister of Finance in advance with respect to: (i) any proposal to issue or transfer shares in the Corporation or any of its subsidiaries; (ii) any proposed acquisition or divestment of assets"[459].

7.237 In terms of communications and reporting, Hydro One's Board of Directors must meet the Minister of Energy "as needed" "to enhance mutual understanding of interrelated strategic matters". Hydro One's Chair, President and Chief Executive Officer will meet with the Minister of Energy "on a regular basis". Moreover, Hydro One's senior management is also required to meet with senior officials of the Ministry of Energy and the Ministry of Finance "on a regular basis and as needed to discuss ongoing issues and clarify expectations or to identify and address emergent issues"[460].

7.238 Finally, as regards Hydro One's "performance expectations", "[k]ey measures are to be agreed upon with the Minister of Energy and the Minister of Finance", and once approved by Hydro One's

[458] Memorandum of Agreement between the Government of Ontario and Hydro One, Exhibit CDA-107, p. 1.
[459] Memorandum of Agreement between the Government of Ontario and Hydro One, Exhibit CDA-107, p. 2.
[460] Memorandum of Agreement between the Government of Ontario and Hydro One, Exhibit CDA-107, p. 2.

Board of Directors, annual performance targets "will be submitted to the Minister of Energy and the Minister of Finance for concurrence"[461].

7.239 Thus, apart from the Government of Ontario's explicit description of Hydro One as its "agent", the above indicia of the Government of Ontario's "meaningful control" over Hydro One's corporate and business operations lead to the conclusion that Hydro One is a "public body" for the purpose of Article 1.1(a)(1) of the SCM Agreement. In this light, the fact that Hydro One owns and operates 97% of the transmission lines combined with the fact that it distributes electricity to 1.3 million customers, strongly suggests that the Government of Ontario purchases the electricity that is delivered into the grid under the FIT Programme[462]. In this regard, it is also important to recall that while the IESO (another "agent" of the Government of Ontario) has stated that it does not take any "title" to the electricity in the Ontario power grid[463], it nevertheless *controls* how electricity flows through that grid. Thus, the Government of Ontario not only contracts with FIT Programme generators through the OPA to supply electricity into the grid, but it also directs the movement of that electricity to and throughout that grid by means of IESO instructions, and then finally, through the operations of Hydro One, transmits and distributes the delivered electricity to end-user customers. In our view, the combined actions of all three "public bodies"[464] (but especially Hydro One and the OPA) demonstrate that the Government of Ontario purchases electricity within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.

7.240 Although both Japan and the European Union have identified the fact that FIT and microFIT generators will be paid for electricity they are directed by the IESO *not to supply* as evidence to support the conclusion that the OPA does not purchase electricity[465], Canada, as already noted, has explained that: (i) FIT generators have never been directed by the IESO to refrain from delivering electricity into the system; (ii) the IESO cannot make such requests of smaller FIT and microFIT generators because they are not connected to the IESO-controlled transmission grid; and (iii) supply contracts with generators that are "non-dispatchable" (such as the FIT solar PV and windpower generators) will typically include a clause allowing the IESO to direct a facility not to supply as a mechanism to prevent the oversupply of electricity into the grid[466].

7.241 To the extent that the FIT Contracts contemplate the possibility of FIT generators being paid for electricity that is not produced and delivered into the transmission grid by virtue of the IESO's

[461] Memorandum of Agreement between the Government of Ontario and Hydro One, Exhibit CDA-107, p. 3.

[462] In this regard, we note that the European Union argues that the purchaser of the electricity under the FIT Programme is not the OPA *but the distributors.* European Union's first written submission, para. 56. Similarly, Japan argues that the purchasers of electricity in Ontario are the *"intermediaries in the transmission and distribution process such as wholesalers and retailers"*. Moreover, Japan has submitted evidence suggesting that an electricity "marketer" takes title to electricity (and therefore in our view possession), by virtue of purchasing electricity for resale from power generators and wholesalers. Japan's second written submission, fn. 48 quoting from Ohio Electric Utility Institute, Glossary, ("Glossary of the Ohio Electric Utility Institute"), Exhibit JPN-224; Delaware Code, Title 26, Section 1001, ("Delaware Code"), Exhibit JPN-225; and Pennsylvania Code, Title 52, Section 54.2, ("Pennsylvania Code"), Exhibit JPN-226.

[463] IESO: Settlement Statements and Invoices, Exhibit JPN-62, p. 1.

[464] The OPA and the IESO are "agents" of the Government of Ontario. See Government of Ontario: All Agencies List, Exhibit JPN-49; Agency Details, OPA, Exhibit JPN-50; and Government of Ontario: Agencies, Exhibit JPN-51. There is no dispute between the parties that the OPA and the IESO are "public bodies" for the purpose of the SCM Agreement.

[465] Japan's response to Panel question No. 21 (first set); second written submission, para. 42; European Union's opening statement at the first meeting of the Panel, para. 18; and second written submission, para. 44.

[466] Canada's response to Panel question No. 21 (first set); and opening statement at the second meeting of the Panel, paras. 30-32.

instruction, it is clear to us that the OPA is paying for the existence of an exceptional mechanism that is needed to manage the risks of system overload. Given the inherent characteristics of electricity and the complexities of operating a safe and reliable electricity system[467], it seems to us that such a contractual clause would be a *sine qua non* to the purchase of electricity from non-dispatchable generators. Thus, in our view, the fact that the FIT Contract contemplates the payment of generators for electricity supply that is foregone under IESO direction, does not take away from the characterization of the challenged measures as "government purchases [of] goods".

Legislation, regulations and contracts

7.242 Finally, the third consideration that has led us to the conclusion that the challenged measures constitute government purchases of goods is the legislative and regulatory framework of the FIT Programme as well as the language found in certain clauses of the FIT and microFIT Contracts themselves[468]. In our view, these documents leave no doubt that the challenged measures are perceived by the Government of Ontario, and others in Ontario, as governmental activity that involves the procurement or purchase of electricity. This is the consistent and repeated message articulated in the legal instruments we have reviewed, and it is by no means contrived. We recognize, however, that as the complainants have emphasized, the label given to an instrument under municipal law is not dispositive of the analysis that we must undertake for the purpose of WTO law. Nevertheless, it is equally the case that such evidence cannot simply be ignored and it must form part of our analysis. Thus, while this evidence "cannot be the end of our analysis"[469], the fact that the *Electricity Act of 1998*, the Ministerial Direction, the FIT and microFIT Contracts and other documents, all in one way or another characterize the challenged measures as a procurement or purchase of electricity, is a relevant factor that we take into account in our analysis.

Conclusions

7.243 Thus, for all of the foregoing reasons, we conclude that the appropriate legal characterization to be given to the FIT Programme, and the FIT and microFIT Contracts, is as "government purchases [of] goods" under Article 1.1(a)(1)(iii) of the SCM Agreement. Although we recognize that the challenged measures exhibit some of the basic features of certain forms of "direct transfer[s] of funds", in that they involve an exchange of rights and obligations which includes the payment of money, we do not agree with the complainants that this means they can *also* be legally characterized as such for the purposes of the SCM Agreement.

7.244 In *US – Large Civil Aircraft (Second Complaint)*, the Appellate Body observed that a purchase of goods "is usually understood to mean that the person or entity providing the goods will receive some consideration in return"[470]. The ordinary meaning of the word "purchase" suggests that a government purchase of goods will arise when it makes some kind of payment in the form of "money or an equivalent" in exchange for taking possession (including by obtaining an entitlement) over a good[471]. Thus, we see two major differences between a "direct transfer of funds", in the form of a transaction involving an exchange of rights and obligations, and government "purchases [of] goods". First, a government providing a "direct transfer of funds" must transfer financial resources of some kind; whereas a government may use money *or an equivalent* to purchase goods. Second, whereas Article 1.1(a)(1)(iii) identifies only one object of a government's purchases, i.e. *goods*;

[467] See above paras. 7.11-7.18.
[468] See above paras. 7.195-7.214.
[469] Appellate Body Report, *US – Large Civil Aircraft (Second Complaint)*, para. 593.
[470] Appellate Body Report, *US – Large Civil Aircraft (Second Complaint)*, para. 619.
[471] See above paras. 7.225 and 7.227.

Article 1.1(a)(1)(i) does not specify the particular object of a government's direct transfer of funds (when this involves an exchange of rights and obligations).

7.245 In our view, the fact that Article 1.1(a)(1)(iii) specifically identifies "goods" as the objects that a government will purchase is significant and reveals an intention on the part of the drafters to focus the relevant sub-clause of this provision on *only* this form of financial contribution. It is difficult to imagine that the drafters expressly referred to "purchases [of] *goods*" in Article 1.1(a)(1)(iii) of the SCM Agreement intending that such transactions should also be properly covered under Article 1.1(a)(1)(i) as "direct transfers of funds". In this regard, we observe that the only two examples of "direct transfer[s] of funds" involving reciprocal rights and obligations that Article 1.1(a)(1)(i) identifies are "loans" and "equity infusion[s]". Government "purchases of goods" could have easily been added to these examples had the drafters considered that they should also be viewed as falling within the scope of Article 1.1(a)(1)(i) of the SCM Agreement, particularly given that they are explicitly mentioned in Article 1.1(a)(1)(iii) of the SCM Agreement.

7.246 Furthermore, finding that the challenged measures may be legally characterized as "direct transfer[s] of funds" would, in our view, be contrary to the principle of effective treaty interpretation, which requires an interpreter to refrain from adopting "a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility"[472]. We see no way of reading Articles 1.1(a)(1)(i) and (iii) in a way that enables us to conclude that government "purchases [of] goods" could also be legally characterized as "direct transfer[s] of funds" without infringing this principle[473]. While we recognize that one way the two provisions could be read together would be to limit the types of purchases covered under Article 1.1(a)(1)(iii) to only those effected through a payment that is *not monetary* in nature, we can find no support for such a restrictive interpretation of the ordinary meaning of the word "purchase" in the language of Article 1.1(a)(1)(iii) or its immediate context; and, indeed, the complainants have not ventured any.

7.247 Finally, the complainants claim that support for their views comes from the following observation made by the Appellate Body *in a footnote* in *US – Large Civil Aircraft (Second Complaint)*: "The structure of [Article 1.1(a)(1)] does not expressly preclude that a transaction could be covered by more than one subparagraph. There is, for example, no 'or' included between the subparagraphs"[474]. It is apparent that the content of this footnote does not amount to a *finding* that transactions properly characterized as "purchases [of] goods" can also constitute "direct transfer[s] of funds". On this specific issue, the Appellate Body did not come to any definitive conclusion. Thus, while we can see that it may be possible to characterize different aspects of the same measure as different types of "financial contributions" (for example, a governmental programme involving loans and purchases of goods), we do not believe that customary rules of interpretation of public international law allow us to accept the interpretation advanced by the complainants.

7.248 Having found that the challenged measures should be legally characterized as "government purchases of goods", and thereby rejecting that they amount to "direct transfer[s] of funds", we also

[472] Appellate Body Report, *US – Gasoline*, p. 23.

[473] The same conclusion led the panel in *US – Large Civil Aircraft (Second Complaint)* to state that it was "not free to accept the argument that transactions involving purchases of services (along with transactions involving purchases of goods) are covered by other sub-paragraphs and elements of Article 1.1(a)(1)", finding therefore that "transactions properly characterized as purchases of services are excluded from the scope of Article 1.1(a)(1)(i) of the SCM Agreement". Panel Report, *US – Large Civil Aircraft (Second Complaint)*, paras. 7.956 and 7.970. While the Appellate Body Report declared the panel's *finding* "moot and of no legal effect" (Appellate Body Report, *US – Large Civil Aircraft (Second Complaint)*, para. 620), we consider the panel's reasoning, as it relates to the concept of "purchases of goods", nevertheless a useful exposition of the interpretative problem that we believe is created by the complainants' arguments in these proceedings.

[474] Appellate Body Report, *US – Large Civil Aircraft (Second Complaint)*, fn. 1287.

find that they cannot be "potential direct transfers of funds". Equally, to the extent that Japan and the European Union may have argued that the challenged measures could be legally characterized as a form of "financial contribution" involving government entrustment or direction within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement, we also reject this argument.

The Challenged measures as a form of income or price support

7.249 Both complainants in these proceedings have advanced essentially parallel arguments focused around the wholesale market for electricity to substantiate their assertions concerning the existence of "benefit", irrespective of whether the challenged measures are legally characterized under Articles 1.1(a) or 1.1(a)(2) of the SCM Agreement[475]. In the section that follows, the Panel majority rejects the entirety of the complainants' "benefit" arguments as they relate to Article 1.1(a)(1)(iii). It follows that the complainants' subsidy claims must also fail regardless of whether the Panel majority agrees with their contentions that the FIT Programme, and the FIT and microFIT Contracts, constitute a form of "income or price support" within the meaning of Article 1.1(a)(2) of the SCM Agreement. In other words, the arguments the complainants have advanced to support their allegations about the extent to which the challenged measures confer a "benefit", when they are characterized as "income or price support" within the meaning of Article 1.1(a)(2) of the SCM Agreement, are essentially the same as those examined and rejected by the Panel majority in the following section of these Reports. In this light, we do not believe it is necessary, for the purpose of satisfactorily resolving the complainants' subsidy claims, to also decide whether the FIT Programme, and the FIT and microFIT Contracts, amount to "income or price support" under the terms of Article 1.1(a)(2) of the SCM Agreement. Therefore, on the grounds of judicial economy, we make no findings in respect of the complainants' allegations that the challenged measures may be legally characterized as "income or price support" under Article 1.1(a)(2) of the SCM Agreement.

3. Whether the challenged measures confer a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement

(a) Arguments of the parties

(i) Japan

7.250 Recalling that the Appellate Body and WTO panels have consistently found that a "financial contribution" confers a "benefit" when it is provided on terms that are better than those available to the recipient on the relevant market, Japan submits that the measures at issue confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement for two main reasons[476].

7.251 First, according to Japan, the challenged measures confer a benefit because they guarantee that FIT and microFIT generators will receive a price for the electricity[477] they produce that exceeds the price of electricity on the wholesale and/or retail markets in Ontario, or alternatively, in any one of four jurisdictions outside of Ontario ("out-of-Province jurisdictions"). To substantiate its view that the FIT and microFIT generators are remunerated in excess of the price of electricity on the wholesale electricity market, Japan advances seven wholesale "commodity" electricity price benchmarks. The

[475] See e.g. Japan's first written submission, paras. 219-247; and European Union's first written submission, paras. 63-89.

[476] Japan's first written submission, paras. 216-247; and second written submission, paras. 3-16.

[477] The focus of Japan's argument is on the "commodity charge" portion of wholesale electricity prices, which it describes as the "portion of the prices paid by consumers that serves as the payment for the electricity itself, as opposed to payment for services associated with the delivery of that electricity to consumers", or the "price that relates to payment for the electricity itself (as opposed to payment for the services of transmission/distribution and market operation)". Japan's first written submission, paras. 11 and 77.

first of the proposed benchmarks is what Japan considers to be the actual weighted average of the wholesale price of electricity in Ontario during 2010, namely, the weighted average HOEP[478]. The second and third proposed benchmarks Japan advances are the weighted average "wholesale rate" during 2010 for generators other than FIT and RESOP generators[479], and the "commodity portion" of the price paid by retail consumers under the Regulated Price Plan ("RPP") in 2010[480]. The remaining four wholesale electricity price benchmarks that Japan presents allegedly represent the 2010 average wholesale prices in the deregulated/competitive markets of Alberta, New York, New England and the Mid-Atlantic United States[481]. Japan submits that the Panel may turn to these out-of-Province benchmarks if it determines that the Ontario-based electricity price benchmarks are distorted in any way[482]. Finally, Japan argues that the RPP prices it has advanced may also serve as a benchmark against which to measure whether the challenged measures confer a benefit because, in Japan's view, they establish a ceiling for the amount that Ontario consumers will be willing to pay for electricity. According to Japan, 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[483]. Thus, to the extent that FIT and microFIT generators receive prices for delivered electricity that are in excess of the RPP prices, Japan submits that the challenged measures must confer a benefit.

7.252 The second argument that Japan makes to substantiate its allegations concerning benefit is based on the history of the Ontario electricity market, and the objective design and structure of the FIT Programme. In particular, Japan submits that the history of the Ontario electricity market demonstrates that Ontario established its present market structure, including the OPA and ultimately the FIT Programme, because the liberalized market that operated in 2002 did not attract sufficient electricity supply, in particular from renewable sources, to cover the needs of the Province[484]. According to Japan, the Government of Ontario decided to internalize the positive externalities of renewable energy by guaranteeing payments that cover the production costs and reasonable profits of the FIT and microFIT generators over a period of 20 years. Japan submits that such payments would not have been otherwise available to renewable electricity generators because the wholesale electricity market that would exist in the absence of the FIT Programme would have exposed them not only to lower pricing but also other less advantageous contractual terms and conditions. Thus, Japan argues that the history of the Ontario electricity and the objective design and structure of the FIT Programme shows that, in the absence of the FIT Programme, the FIT and microFIT generators would be unable to operate in today's wholesale electricity market[485].

[478] Japan's first written submission, paras. 219-220.

[479] Japan's first written submission, para. 221. This rate is calculated by finding the weighted average of the prices received for each kWh of electricity delivered into Ontario's electricity system in 2010 by "assets whose rates are not regulated or contracted (i.e., OPG's unregulated assets with no OPA contracts and IPPs with no OPA contracts)" and "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)". Japan explains that the former category of generators receive the same price – the HOEP – and that the second category of generators receive a price which is in part based on the level of the HOEP. Japan's first written submission, para. 32.

[480] Japan's first written submission, paras. 223-224.

[481] Japan's first written submission, para. 222.

[482] Japan's response to Panel question No. 7 (first set); second written submission, paras. 8-12; opening statement at the second meeting of the Panel, paras. 14-19; and response to Panel question No. 31 (second set).

[483] Japan's first written submission, paras 223-224; opening statement at the second meeting of the Panel, para. 19; responses to Panel question 28 (second set).

[484] Japan's second written submission paras. 5-6; opening statement at the second meeting of the Panel, paras. 11-12; comments on Canada's responses to Panel questions Nos. 1 and 42 (second set).

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

7.253 In response to Canada's submission that the proper market benchmark should be a price that reflects the higher costs of production of renewable electricity, Japan argues that Canada has not established that a distinct market for renewable electricity actually exists in Ontario, and therefore, Canada's contention must be rejected. On the contrary, Japan emphasizes that there is no such separate market because electricity is a commodity, and consumers in Ontario find one unit of electricity indistinguishable from another unit of electricity. Moreover, Japan notes that the FIT Programme does not give consumers the option to choose a renewable source for the electricity they use, and to pay a higher price for that electricity. Rather, according to Japan, the higher prices owed to FIT generators are distributed across all consumers via the Global Adjustment to establish a single price paid by consumers for electricity produced from all production technologies[486].

7.254 Finally, Japan calls the Panel's attention to the distinction between: (i) *regulated* prices that cover production costs plus reasonable profit; and (ii) *subsidized* prices that cover production costs plus reasonable profit. Japan submits that 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. According to Japan, 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 governmental *regulation*. By contrast, Japan argues that, 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 despite their inferior cost-efficiency, Japan submits that the government must *subsidize* them, which in Japan's view, is precisely what the FIT Programme does in Ontario[487].

(ii) European Union

7.255 Like Japan, the European Union advances two main lines of arguments to support its allegations of benefit. First, relying on the same wholesale electricity price market benchmarks advanced by Japan, the European Union submits that the challenged measures confer a benefit because they guarantee that FIT and microFIT generators will receive a price for the electricity they produce that exceeds the price of electricity on the wholesale electricity market in Ontario, or alternatively, in any one of the four out-of-Province jurisdictions referred to by Japan[488]. Secondly, the European Union argues that the inherent nature of the FIT Programme demonstrates the existence of benefit because it reveals that the Programme is intended to facilitate private investment in new renewable electricity generation that the wholesale market in Ontario is incapable of attracting. In this regard, the European Union points to two main features of the FIT Programme: (i) the allegedly above-market pricing for electricity that is produced by FIT generators; and (ii) the guaranteed 20-year duration of such allegedly above-market pricing (including "generous" price escalation at various intervals). According to the European Union, either of these features would not be available to the same renewable electricity generators if they had to operate on the wholesale electricity market in Ontario. Thus, the European Union submits that in the absence of the FIT Programme, the FIT generators would have been unable to participate in Ontario's wholesale electricity market[489].

7.256 The European Union rejects Canada's argument that the proper market benchmark should be a price that reflects the higher costs of production of renewable electricity. Like Japan, the

[486] Japan's opening statement at the first meeting of the Panel, paras. 30-45; and second written submission, para. 23.
[487] Japan's response to Panel question No. 33 (second set).
[488] European Union's first written submission, paras. 65-88; second written submission, paras. 86-102.
[489] European Union's second written submission, paras. 69-70, 103 and 105; opening statement at the first meeting of the Panel, paras. 23 and 27.

European Union emphasizes that electricity is a commodity, and that regardless of whether it is generated from a renewable or non-renewable source of energy, it is physically alike in all respects and perfectly substitutable. Moreover, the European Union observes that the electricity prices paid by consumers in Ontario do not distinguish between the different generating technologies. Thus, according to the European Union, in the context of the present disputes, there can be only one relevant product market for the purpose of the benefit analysis - the Ontario wholesale market for electricity that is generated from all sources of energy (i.e. renewable and non-renewable energy)[490].

7.257 Were the Panel to decide that the relevant market benchmark should take into account the existence of a distinction between electricity generated from renewable and non-renewable sources of energy, the European Union considers that the Panel could also determine the existence of benefit on the basis of the different prices that are guaranteed to FIT generators. In this regard, the European Union notes that the FIT Price Schedule reveals that the prices offered to generators using, for example, waterpower, biomass or biogas technologies, are lower than the prices offered to wind and solar PV generators. Thus, even assuming that there were a separate market for electricity produced from renewable energy sources, the higher prices paid to generators using wind and solar PV technologies compared with other "clean" technologies under the FIT Programme, demonstrate that the challenged measures confer a benefit to the generators using wind and solar PV technology.

7.258 Finally, the European Union submits that even if, as Canada argues, the cost of generating wind and solar electricity were an appropriate benchmark for the Panel's benefit analysis, the FIT Programme would nevertheless confer a benefit because it offers standardized prices to all generators regardless of their *actual* costs of production. According to the European Union, the fact that the location of a generating plant using solar or wind energy will influence its productivity implies that facilities in good locations will have relatively lower overall costs of production given that capital costs between different plants will be very similar. This, in turn, means that the standard pricing applied under the FIT Programme will inevitably exceed the costs of production of producers with facilities in good locations, and for this reason, will confer a benefit upon such generators. In this regard, the European Union recalls that the predecessor to the FIT Programme (the RESOP) functioned on the basis of the best prices offered by generators through a bidding process. Thus, the European Union submits that it is possible for Ontario to obtain electricity produced from renewable energy sources at lower cost compared with what is guaranteed under the FIT Programme[491].

(iii) Canada

7.259 Canada argues that the complainants have failed to establish that the challenged measures confer a benefit because their proposed electricity price benchmarks ignore the fundamental condition underlying the Government of Ontario's purchase of electricity under the FIT Programme, namely, that the purchased electricity is generated from renewable sources of energy. According to Canada, the appropriate electricity price benchmark for the purpose of the Panel's benefit analysis must be found on the "market" for electricity produced from wind and solar PV technology, reflecting the fact that it is the Government of Ontario (not the end-consumer) that is the purchaser of the electricity supplied under the FIT Programme. Canada suggests that such a benchmark may, in the first instance, be found in the prices paid in Ontario by private purchasers of electricity produced using windpower and solar PV technology. However, in Canada's view, the complainants have failed to advance any such benchmarks of this kind, including any alternatives based on, for example, the constructed costs

[490] European Union's second written submission, paras. 72-77; and opening statement at the first meeting of the Panel, para. 24.

[491] European Union's second written submission, paras. 82-85. The European Union also advances the use of import/export prices as a commercial benchmark in the present case. See, European Union's second written submission, para. 95.

of producing electricity generated using wind and solar PV technology or appropriate out-of-Province electricity prices adjusted for the conditions in Ontario[492].

7.260 Canada emphasizes that it would be inappropriate to use an electricity price benchmark that reflects a single price for blended or co-mingled commodity electricity, such as the HOEP, because there is no single market for such electricity in Ontario and the different generating technologies do not compete with each other. In this regard, Canada asserts that because of the range of factors that must be taken into account in order to secure a reliable and clean supply of electricity in Ontario, the varying cost structures and inherent attributes of the different generation technologies needed to achieve this objective must be taken into account and ultimately reflected in differential pricing. Canada explains that, for the most part, this is done by the Ontario Government through the application of regulated and contracted prices that are higher than the HOEP[493]. According to Canada, this approach to securing a sufficient electricity supply recognizes the limitations of wholesale markets worldwide in offering adequate incentives to new generation. This dilemma, known as the "missing money" problem, arises in electricity systems in which wholesale prices do not provide adequate compensation to pay for the fixed costs of generators or the total investment costs of new generators, with the resulting effect that investors will not decide to enter the market[494].

7.261 Apart from criticizing the complainants' proposed electricity price benchmarks on the basis that they represent a price for blended or co-mingled commodity electricity that does not reflect the nature of the challenged financial contributions and the "missing money" reality of wholesale electricity markets in Ontario and other jurisdictions, Canada rejects the complainants' characterization of the IESO-administered wholesale electricity market as a "competitive" market. According to Canada, the market clearing mechanism that produces the HOEP is merely a tool created by the Government of Ontario to help the IESO make dispatch decisions in order to balance *physical* supply and demand for electricity[495]. Canada asserts that the majority of generators participate in this mechanism by offering electricity at prices that do not cover their costs of production or any amount of return. These generators do not make price and volume offers on the grounds of ordinary commercial considerations, but rather to ensure that their electricity output is accepted by the IESO in order to earn the relevant regulated or contract price[496]. Thus, according to Canada, the HOEP does not reflect the costs and other operating conditions that most producers of electricity in Ontario face. Moreover, Canada points out that FIT generators do not make bids in the IESO market-clearing mechanism.

7.262 Canada contrasts the IESO-administered market that exists today with the liberalized wholesale electricity market that existed in Ontario between May and November 2002. Whereas the latter market functioned as a "venue" where buyers and sellers met to exchange electricity at an equilibrium price balancing supply and demand, Canada explains that the IESO-administered market that exists today does not set the price received by the vast majority of generators representing 92% of Ontario's generation capacity[497]. Moreover, Canada observes that the facilities that today receive the HOEP alone are older, state-owned, hydro and coal plants that the Government of Ontario has decided

[492] For instance, Canada's first written submission (DS412), paras. 125 and 136-150; first written submission (DS426), paras. 64-66; and opening statement at the second meeting of the Panel, paras. 111-120 and 136-142.
[493] Canada's first written submission (DS412), paras. 130-140; and first written submission (DS426), paras. 64-81.
[494] Canada's first written submission (DS412), para. 35; and first written submission (DS426), para. 72.
[495] Canada's first written submission (DS426), para. 8.
[496] Canada's first written submission (DS426), paras. 67-81; and first written submission (DS412), para. 138.
[497] Canada's opening statement at the second meeting of the Panel, paras. 113-117.

do not require higher contract or regulated rates in the light of largely depreciated capital costs, as well as (in the case of the coal facilities) imminent decommissioning[498].

7.263 Finally, Canada also contests the view that in the absence of the FIT Programme, the FIT generators would be left with having to survive on the basis of the HOEP. According to Canada, this counterfactual is incorrect because "in all likelihood", a prospective renewable electricity generator would approach the Government of Ontario through the OPA and attempt to negotiate a contract for the sale of electricity at prices reflective of the prevailing market conditions, which include the generator's costs of production and the government's supply requirements[499].

(b) Arguments of the third parties

(i) Australia

7.264 In Australia's view, the relevant market in these disputes, for purposes of the benefit analysis, is the electricity market. In its analysis of benefit, Canada predominantly focuses on the conditions of supply of renewable energy. However, Australia argues that the Panel should also consider the demand side of the electricity market in examining benefit, noting that consumers of electricity in Ontario do not – and cannot – distinguish between renewable and non-renewable sources of electricity. Moreover, 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, there are two possible ways in which FIT Contracts confer a benefit to FIT generators. First, the governmental support establishes a buyer for the renewable energy that would not otherwise exist. Second, FIT generators receive a higher price for their product than that which is otherwise available on the market. With regards to the second option, Australia considers that the HOEP used by the complainants is an appropriate comparator for determining benefit[500].

(ii) Brazil

7.265 Brazil considers that the appropriate benchmark in these disputes should be assessed in the light of the Appellate Body Report in *EC and certain member States – Large Civil Aircraft*. Brazil argues that the appropriate benchmark should take into account both the supply and the demand sides in the energy market, and thus cannot be based solely on the prices for which certain types of producers are willing to sell, or the prices set forth by the government. In addition, Brazil contends that the wholesale unregulated market prices in a strategic sector of an economy cannot form the basis for this benchmark[501].

(iii) China

7.266 China argues that the consideration of whether a benefit was conferred does not depend on the "proportion of non-subsidized recipients" or on the production cost of the recipient of a subsidy. With regard to the proportion of non-subsidized recipients, China considers that Canada has not addressed in detail (i) why the electricity market in Ontario is distorted due to the presence of the Government of Ontario as a "predominant" purchaser, and (ii) other factors that may affect the assessment of an appropriate benchmark. Moreover, China contends that the cost of production is not an appropriate basis to determine the benchmark price. China fails to see the reason why the HOEP is not an

[498] Canada's opening statement at the second meeting of the Panel, paras. 118-119.
[499] Canada's opening statement at the second meeting of the Panel, paras. 128-129.
[500] Australia's third-party submission (DS412), paras. 11-15; third-party submission (DS426), paras. 11-15; and third-party statement (DS412 and DS426), paras. 11-20.
[501] Brazil's third-party statement (DS412 and DS426), paras. 9-13.

appropriate benchmark, taking into account that electricity from renewable energy and that from other forms of energy are similar and comparable[502].

(iv) European Union (in WT/DS412)

7.267 As a third party in WT/DS412, the European Union contends that the FIT Programme will result in most cases in a benefit to FIT generators due to the difference between the market prices and the guaranteed prices. In the European Union's view, the benefit assessment should focus on the relevant market benchmark at the time the financial contribution is granted to the recipient[503].

(v) Korea

7.268 Korea notes that the selection of a "market price" for the benefit analysis at times requires a complex analysis that may involve an examination of returns over a longer period of time. Taking into account that 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. Korea recalls that it is common for profit-maximizing businesses to accept a short-term loss in order to obtain a greater long-term profit. From this perspective, it is not simple to select an appropriate benchmark where, as in these disputes, complex long-term business and policy considerations, and investments with lengthy pay-back periods, are involved. Thus, Korea considers that 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[504].

(vi) Kingdom of Saudi Arabia

7.269 Saudi Arabia considers that, pursuant to WTO rules, the domestic market provides the most appropriate benchmark in determining the existence and magnitude of a subsidy benefit. In Saudi Arabia's view, resort to external benchmarks, such as international market prices or prices in third countries, is generally inappropriate. Saudi Arabia contends that a panel may not use external benchmarks to measure the amount of "benefit" unless it has established that private prices in the country of provision are distorted, as defined by the Appellate Body in *US – Softwood Lumber IV*[505].

(c) Evaluation of the Panel

(i) Introduction

7.270 By way of introduction, we note that although the primary purpose of the complainants' benefit arguments was to substantiate their views that the challenged measures, when characterized as *direct or potential direct transfers of funds* under the terms of Article 1.1(a)(1)(i) of the SCM Agreement, and/or *income or price support* within the meaning of Article 1.1(a)(2), confer a benefit, we understand them to have each submitted that the same arguments have equal relevance and application to any analysis that would need to be undertaken for the purpose of evaluating whether the challenged measures, when characterized as *government purchases of goods*, confer a

[502] China's third-party submission (DS412), paras. 23-38; and third-party statement (DS412 and DS426), para. 4.
[503] European Union's third-party submission (DS412), paras. 21-22.
[504] Korea's third-party submission (DS412), paras. 46-54.
[505] Saudi Arabia's third-party submission (DS412), paras. 18-28; third-party submission (DS426), paras. 18-28; and third-party statement (DS412 and DS426), paras. 8-14.

benefit[506]. In this regard, we recall that both complainants have emphasized that were the challenged measures to be characterized as government purchases of goods, this would be consistent with their views that they amount to financial contributions[507]. Thus, although primarily submitted for the purpose of substantiating a different line of subsidization arguments, we see no legal impediment to evaluating the merits of the same contentions for the purpose of establishing whether the complainants have established that the challenged measures amount to subsidies when characterized as "government purchases [of] goods". To this end, we now turn to examine the parties' arguments by first recalling the relevant legal standard for the determination of the existence of "benefit" under the terms of Article 1.1(b) of the SCM Agreement. We then review the parties' specific assertions about how the FIT Programme, and the FIT and microFIT Contracts, confer (or do not confer) a "benefit" in the light of the relevant legal standard, directing particular attention to the extent to which the wholesale market for electricity in Ontario should be the appropriate focus of the benefit analysis. Finally, in last part of our evaluation, we set out our conclusions on the merits of the complainants' submissions in the light of our findings about the relevant focus of benefit analysis.

(ii) The legal standard for determining the existence of "benefit"

7.271 A financial contribution will confer a benefit upon a recipient within the meaning of Article 1.1(b) of the SCM Agreement when it provides an advantage to its recipient[508]. It is well established that the existence of any such advantage is to be determined by comparing the position of the recipient with and without the financial contribution, and that "the marketplace provides an appropriate basis for [making this] comparison"[509]. Article 14(d) of the SCM Agreement establishes guidelines for calculating the amount of subsidy in terms of benefit when there has been a government purchase of goods for the purpose of countervailing duty investigations. Although not intended to define the circumstances when a government purchase of goods will confer a benefit in disputes involving Part III of the SCM Agreement, Article 14(d) provides useful context for the analysis that is required in the present disputes. Article 14(d) reads as follows:

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

7.272 On its face, Article 14(d) stipulates that a government purchase of goods will not confer a benefit upon a recipient unless it is made for "more than adequate remuneration", and that the adequacy of this remuneration must be evaluated in relation to the "prevailing market conditions" for the good in question in the country of purchase, including "price, quality, availability, marketability,

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[506] European Union's opening statement at the second meeting of the Panel, para. 23; second written submission, para. 53; response to Panel question No. 21 (second set); and Japan's response to Panel question No. 22 (second set).

[507] European Union's first written submission, para. 54; response to Panel question No. 12 (first set); and Japan's response to Panel question No. 22 (second set).

[508] Appellate Body Report, *US – Softwood Lumber IV*, para. 51.

[509] Appellate Body Report, *Canada – Aircraft*, para. 157. We note that to date, the "marketplace" has not been explicitly used as a benchmark to determine whether financial contributions taking the form of the measures described in Article 1.1(a)(ii) of the SCM Agreement (i.e. where "government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)") confer a benefit. Panel Reports, *US – FSC*, para. 7.103; and *US – FSC (Article 21.5 – EC)*, paras. 8.44-8.48; and Appellate Body Reports, *US – FSC*, para. 140; and *US – FSC (Article 21.5 – EC)*, para. 198.

transportation and other conditions of purchase or sale". Thus, in the context of the present disputes, Article 14(d) suggests that *one* way to demonstrate that the challenged measures confer a benefit is by showing that the remuneration provided to FIT generators using windpower and solar PV technology to produce the electricity purchased by the OPA is "more than adequate" compared with the remuneration the same generators would receive on the "market" for electricity in Ontario, in the light of the "prevailing market conditions". As we see it, the starting point for this analysis is the identification of the relevant "market".

7.273 In *US – Upland Cotton*, the Appellate Body defined a "market" as "the area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices"[510]. Similarly, in *EC and certain member States – Large Civil Aircraft*, the Appellate Body clarified 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"[511]. Moreover, the Appellate Body has explained that:

> The terms of a financial transaction must be assessed against the terms that would result from unconstrained exchange in the relevant market. The relevant market may be more or less developed; it may be made up of many or few participants. ... 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 … [512]

7.274 In the specific context of Article 14(d), however, the relevant "marketplace" need not be one that is "undistorted by government intervention" or that excludes "situations in which there is government involvement"[513]. The relevant "market" need not be a "pure" marketplace that is devoid of any degree of government intervention[514]. Nevertheless, in previous disputes involving a government *provision* of goods, it has been held that where a "government's role in providing a financial contribution is so predominant that it effectively determines the price at which private suppliers will sell the same or similar goods, … the comparison contemplated by Article 14 would become circular"[515]. In other words, where a government's involvement as a provider of a particular good in a given market is such that "there is no way of telling whether the recipient is 'better off' absent the financial contribution"[516], the market that is the object of the government intervention cannot serve as an appropriate benchmark for the purpose of Article 14(d). We see no reason why the same considerations should not also apply to situations involving government *purchases* of goods.

7.275 Thus, as we understand the relevant jurisprudence, the "market" against which to evaluate whether a financial contribution in the form of a government purchase of goods confers a benefit need

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[510] Appellate Body Report, *EC and certain member States – LCA*, para. 1122, referring to Appellate Body Report, *US – Upland Cotton*, para. 408. The Appellate Body also noted that "The term 'market' has been defined as '{g}enerally, any context in which the sale and purchase of goods and services takes place' and '{a} collection of homogenous transactions. A market is created whenever potential sellers of a product are brought into contact with potential buyers and a means of exchange.'" Appellate Body Report, *EC and certain member States – LCA*, fn. 2467.

[511] Appellate Body Report, *EC and certain member States – LCA*, para. 981.

[512] Appellate Body Report, *Japan – DRAMs (Korea)*, para. 172.

[513] Appellate Body Report, *US – Softwood Lumber IV*, para. 87; and Panel Report, *US – Softwood Lumber IV*, paras. 7.50-7.51.

[514] Appellate Body Report, *US – Softwood Lumber IV*, para. 87; and Panel Report, *US – Softwood Lumber IV*, paras. 7.50-7.51.

[515] Appellate Body Report, *US – Softwood Lumber IV*, para. 93.

[516] Appellate Body Report, *US – Softwood Lumber IV*, para. 93.

not be one that is necessarily "perfectly competitive" in the sense of economic theory[517]. However, it must nevertheless be a market where there is effective competition, in the sense that prices for the purchased good must be established through the operation of unconstrained forces of supply and demand, and not by means of government intervention of a kind that renders "the comparison contemplated by Article 14 … circular"[518]. With this legal standard in mind, we turn to evaluate the merits of the parties' arguments.

(iii) The wholesale market for electricity as the relevant focus of the benefit analysis[519]

7.276 Fundamentally, the complainants' first and main line of benefit argument is that in the absence of the FIT Programme, a competitive wholesale market for electricity in Ontario could not support commercially viable operations of the contested FIT generators because the terms and conditions, including price, that would be attached to private purchases of electricity in such a market would expose them to significantly lower revenues and higher commercial risks compared with the terms and conditions associated with participation in the FIT Programme. To substantiate this argument, the complainants advance a number of proposed competitive wholesale market electricity price benchmarks, or proxies for this benchmark, that they submit demonstrate that the FIT Programme provides "more than adequate remuneration" for the OPA's purchases of electricity under the FIT and microFIT Contracts. The complainants also focus on the long-term (20-year) guaranteed pricing that is available under the FIT Programme, arguing that no such condition would be available from a private purchaser of electricity on the relevant market. Moreover, the complainants' note that one of the key uncontested objectives of the FIT Programme is to induce new investment in renewable energy generation facilities, arguing that this alone demonstrates that relevant FIT generators would not be operating in the Ontario wholesale electricity market in the absence of the FIT Programme.

7.277 Canada accepts that "most" of the contested FIT generators would be unable to conduct viable operations in a competitive wholesale market for electricity in Ontario. Indeed, Canada points out that one of the objectives of the FIT Programme was to encourage the construction of new renewable energy generation facilities that would not have otherwise existed[520]. However, Canada rejects the view that this demonstrates that the OPA's purchases of electricity under the FIT Programme confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement. Canada explains that the OPA's purchases of electricity, including from renewable energy generators under the FIT Programme, have been motivated by the inability of Ontario's wholesale electricity market to encourage the investment in new electricity generation facilities needed to secure a reliable and clean supply of electricity that is sufficient to meet Ontario's long-term requirements (i.e. the "missing money" problem)[521]. Canada emphasizes that given the different costs associated with the different technologies that must operate to achieve this objective, the most appropriate benchmark for the Panel's benefit analysis in relation to the FIT and microFIT Contracts must reflect what it considers to be the fundamental condition for the

[517] According to Nicholson, a perfectly competitive industry is one with the following characteristics: (a) a large number of firms producing a homogeneous product; (b) firms attempting to maximize profits; (c) firms assume that their own actions have no influence on market prices, i.e. they are price takers; (d) perfect information, i.e. prices are known by all market participants including consumers, and (e) costless transactions. W. Nicholson, *Microeconomic Theory: Basic Principles and Extension*, 8th ed. (Thomson Learning, 2002) ("Nicholson 2002"), p. 370.

[518] Unless otherwise indicated, we refer to this legal standard in the remainder of these Reports as either a "competitive" market or a market "where there is effective competition".

[519] The dissenting opinion of one of the members of the Panel with respect to whether the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement is set out in Section IX of these Reports.

[520] Canada's first written submission (DS412), para. 49.

[521] See above para. 7.261 and below para. 7.283.

Government of Ontario's purchases of electricity under the FIT Programme, namely, that the electricity be produced from renewable energy sources. Thus, Canada submits that the relevant "market" comparator must be the market for electricity produced from wind and solar PV generation technologies.

7.278 The different positions held by the complainants and Canada about what should be the appropriate "market" benchmark raise a number of important questions related to the nature of competitive wholesale electricity markets and the suitability of using one or more alleged examples of such markets to determine the existence of benefit in the present disputes. It is to these questions that we now turn, starting first with the "missing money" problem.

The economics of electricity markets and the "missing money" problem

7.279 As we have previously explained[522], electricity has some specific properties compared to other types of goods. It is intangible and, with some limited exceptions, cannot be effectively stored[523]. It is also delivered to consumers through networks of transmission and distribution lines that can fail if the quantity demanded (known as load) is greater or less than the quantity supplied for any length of time. These properties imply that electricity must be produced at the time that it is consumed, and that the flow of electricity through a transmission grid cannot be left to the choices of individual market participants, but rather it must be centrally coordinated and controlled[524]. Consumers, and therefore governments, regard electricity as an essential commodity because a safe, reliable and long-term supply is necessary for the smooth functioning of all modern economies. The fact that there are no close substitutes for electricity, combined with a lack of easily observable price signals on the demand side[525], implies that electricity demand is largely unresponsive to prices in the short run (i.e. it is relatively inelastic)[526]. Graphically, the demand curve can therefore be represented by a (nearly) vertical line in a traditional supply/demand diagram. This demand curve will shift from left to right and back again over the course of an hour, a day, a week, a month or year, as factors other than price cause the quantity demanded to change. Such factors include temperature, hours of daylight, time of the year and the structure and performance of an economy. The seasonal fluctuations in the demand for electricity in Ontario are depicted in the following diagram[527].

[522] See above paras. 7.11-7.13.

[523] As already noted, pumped-storage hydroelectric facilities provide a limited means of storing electricity. See above fn. 47.

[524] Hogan Report, Exhibit CDA-2, p. 13. The credentials of Professor William W. Hogan, the author of the Hogan Report, are set out above at fn. 47.

[525] Most consumers are unaware of the price of electricity at the moment that they use it. This causes them to consume more than they otherwise would in times of scarcity, and less than they otherwise would in times of surplus. Hogan Report, Exhibit CDA-2, p. 39; and Electricity Conservation and Supply Task Force, "Tough Choices: Addressing Ontario's Power Needs", Final Report to the Minister of Energy, January 2004, ("2004 Report of the ECSTF"), Exhibit CDA-59, pp. 38-39.

[526] IESO: Ontario's Physical Markets, Exhibit JPN-80, p. 4 ("Non-dispatchable loads simply draw electricity from the grid as needed. They pay the wholesale market price for electricity at the time of consumption, regardless of what the price might be. Non-dispatchable loads account for most of the energy consumed in Ontario"). See also Hogan Report, Exhibit CDA-2, p. 16-17.

[527] Smoothing the Peaks, IESO website ("IESO: Smoothing the Peaks"): referred to in European Union's second written submission, fn. 71.

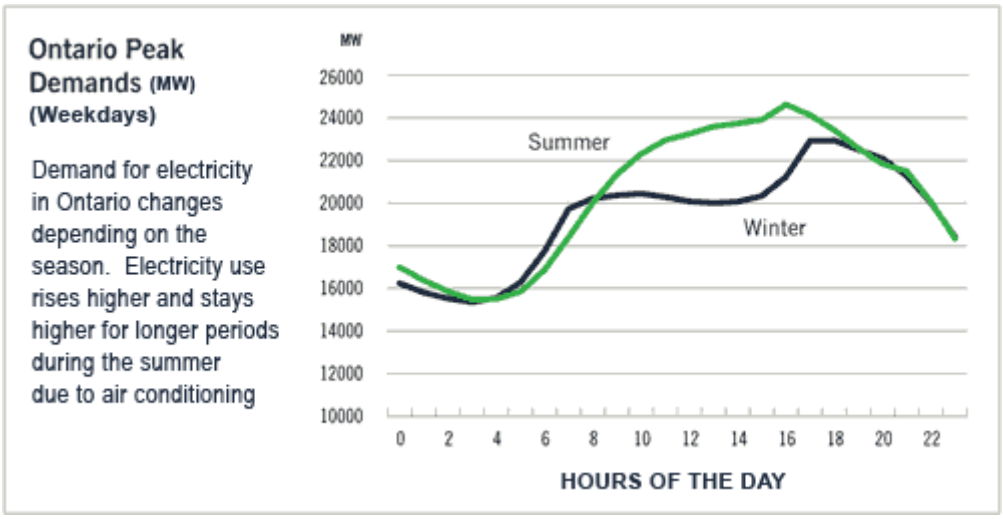

Diagram 4: Seasonal Fluctuations in the Demand for Electricity in Ontario

7.280 It is generally accepted that a diverse mix of generation technology is desirable on the supply side in the interest of securing a reliable and clean electricity system. Indeed, as we have explained elsewhere[528], the use of a range of generation technologies is a technical, economic and environmental imperative. The "conventional"[529] technologies can be separated into base-load generation (characterized by high fixed and low marginal costs, e.g. nuclear power), intermediate generation (moderate fixed and marginal costs, e.g. oil or gas-fired steam), and peak-load generation (low fixed costs and high marginal costs, e.g. single cycle gas combustion turbines)[530]. Base-load generators are designed to operate almost always[531], supplying electricity to satisfy core and sustained levels of demand in most hours of the day and, importantly, keep the grid "alive". Intermediate-load plants are used to supply electricity during periods when demand is above core minimum levels, but not at its peak. These generators typically operate during the day and evening[532]. Peak-load generators satisfy demand when it is very high, such as during the hottest days of summer, and some may operate for only a few hours per day[533]. The ability of generators to adjust their level of output quickly, known as *dispatchability*, tends to be lowest for base-load generators and highest for peak-load generators. Although hydroelectricity is usually classified as base load power, certain types of hydroelectric facilities can be dispatched[534]. Electricity generation by means of solar PV and wind technology provides variable or intermittent generation, meaning that power is produced only during certain times of the day and/or night. Typically, both types of facilities have relatively high capital costs per MW of energy produced[535], but they have little or no variable cost[536]. To replace part of the generating

[528] See above at paras. 7.13-7.18.
[529] Hogan Report, Exhibit CDA-2, p. 6.
[530] Hogan Report, Exhibit CDA-2, pp. 2-10; and The Tellus Institute, "Best Practice Guide: Integrated Resource Planning for Electricity", 2000, ("Best Practice Guide: Integrated Resource Planning for Electricity"), Exhibit CDA-45, pp. 13-15.
[531] According to Professor Hogan, base-load generators operate "for most hours of the year, perhaps 50% to 80% or more". Hogan Report, Exhibit CDA-2, p. 3.
[532] According to Professor Hogan, intermediate-load generators "typically achiev[e] capacity factors of 15%-50%". Hogan Report, Exhibit CDA-2, p. 5.
[533] Hogan Report, Exhibit CDA-2, p. 6.
[534] Hogan Report, Exhibit CDA-2, p. 5.
[535] In 2007, the capital cost of roof-mounted (0.5 MW) and ground-mounted (10 MW) solar facilities were, respectively, estimated to be CAD 6,690/kW and CAD 4,600/kW; and the capital cost of a "small wind farm" (10 MW) was estimated to be CAD 2,750. These figures compare with the 2007 capital costs of

capacity that will be lost when Ontario's coal-fired plants will be decommissioned at the end of 2014[537], Ontario's supply mix has expanded to include renewable technologies like wind and solar PV. It is expected that these technologies will account for 11.5% of Ontario's generating capacity by 2030[538]. The mix of electricity generation that existed in Ontario in 2010 and selected characteristics are set out in the following table[539].

Ontario Electricity Generation Mix

Generation Technology	Share of 2010 Installed Capacity	Approximate Share of 2010 Projected Generation	Type of Capacity	Relative Capital Cost	Relative Operating Cost per kWh	Relative Dispatchability
Nuclear	31%	52%	Baseload	High	Low	Low
Hydropower	22%	19%	Baseload, Peak-Load, Renewable	High	Low	Low for Run-of-River, High for Pondage
Coal	12%	8%	Intermediate	Medium	Low	High
Gas and Oil	25%	15%	Peak-Load	Low	High	High
Wind	4%	2%	Intermittent, Renewable	Very High	Very Low	Low
Solar PV	0.3%	< 0.1%	Intermittent, Renewable	Very High	Very Low	Low
Bioenergy	0.7%	1%	Intermediate, Renewable	Medium	Low	Low
Conservation	5%	4%	Baseload, Peak-Load	N/A	N/A	N/A

Table 2: Ontario Electricity Generation Mix

7.281 In a wholesale electricity market where there is effective competition, the bids that generators submit to the system operator should be usually quite close to their marginal cost of production[540]. Plotting such bids against their output defines a supply curve in the traditional supply/demand framework. Given these particular characteristics, the supply curve of a typical mix of generators would appear as an upward sloping step function that rises sharply as output approaches the market's capacity limit.

CAD 2,970 for nuclear (1000 MW), CAD 665 for frame single-cycle gas turbine (340 MW), and CAD 924 for combined-cycle gas turbine (500 MW) facilities. Hogan Report, Exhibit CDA-2, p. 8.

[536] Hogan Report, Exhibit CDA-2, p. 6.

[537] In 2003, coal-fired facilities accounted for 25% of Ontario's generation capacity, having increased by 127% from 1995 levels. Among the motivations for eliminating Ontario's coal-fired facilities appear to have been the conclusions reached in a 2005 study prepared for the Government ("Cost Benefit Analysis: Replacing Ontario's Coal-Fired Electricity Generation"), which found the annual health and environmental costs of coal at CAD 3 billion. Ontario's Long-Term Energy Plan, Exhibit CDA-6, pp. 2 and 19.

[538] Ontario's Long-Term Energy Plan, Exhibit CDA-6, p. 19.

[539] Hogan Report, Exhibit CDA-2, Table 2, p. 12.

[540] Hogan Report, Exhibit CDA-2, p. 16. More generally, it is recognized that, as long as a firm chooses to produce a positive amount of output, equating price and marginal cost is equivalent to profit maximization behaviour. See G. Jehle and P. Reny, *Advanced Microeconomic Theory*, 2nd ed. (Addison Wesley Longman, 2001), p. 144.

7.282 As usual, the intersection of supply and demand determines the market clearing price and quantity of electricity. However the steepness of both curves in typical electricity markets suggests that prices may be extremely volatile, rising or falling sharply in response to small changes in demand and/or supply. This is not necessarily an undesirable feature in an electricity market. As long as certain criteria are met (e.g. well informed consumers on the demand side, free entry/exit on the supply side), economic theory suggests that the outcome should be socially desirable[541]. For example, high prices should encourage households and businesses to consume less of the scarce commodity. Elevated prices also provide incentives for incumbent generators to increase their output and for new firms to enter the market by investing in new generation. Thus, in theory, "a well designed" electricity market will provide for a long-term equilibrium "built around a sequence of short-run wholesale market spot prices [that] would provide adequate incentive and compensation to support investment in new electricity generation"[542]. However, as Professor Hogan explains, "this theoretical market ideal has not yet been achieved in many electricity systems, including in Ontario"[543]. As we understand it, one of the main reasons for this is the complexity of incorporating appropriate demand-side responsiveness to supply-side price signals in times of scarcity - or, in other words, the difficulty of equipping electricity consumers with the information and means they need to respond to electricity supply constraints *in real-time*[544].

7.283 In the absence of demand that is more responsive (but not only for this reason), governments and regulators have sought to control potential/actual price volatility by intervening in the market because of the value of stable electricity prices to their economies, with the consequence that many countries have experienced insufficient investment in generation because the price achieved on their "organized" wholesale market is not allowed to rise to a level that, in the long-run, fully compensates generators for the all-in cost of their investments (including fixed and sunk costs)[545]. Private investors will not be willing to finance construction of new generation under such conditions; and in the absence of such investment, an electricity market will be unable to reliably meet future electricity demand. This is referred to as the "missing money" problem[546], and it affects not only more expensive solar PV and wind generation technologies, but also "conventional generating technologies, where energy-only markets do not support investment"[547]. To resolve this dilemma, "alternative mechanisms to wholesale spot markets have been required to provide incentives for long-term investment to meet forecasted demand", including power purchase agreements (as in Ontario) and "capacity" payments[548].

7.284 Thus, because of the specific features of electricity and the nature of competitive wholesale electricity markets, government intervention will often be necessary in order to secure an electricity supply that is safe, reliable and sustainable in the long-term.

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[541] These conditions allow real-world market outcomes to approximate ideal market outcomes under perfect competition (see above fn. 517). In a partial equilibrium competitive model, the competitive outcome is "efficient" in that it maximizes overall welfare as measured by the sum of consumer and producer surplus. See Nicholson 2002, p. 402.

[542] Hogan Report, Exhibit CDA-2, p. 16.

[543] Hogan Report, Exhibit CDA-2, p. 17.

[544] Hogan Report, Exhibit CDA-2, p. 16.

[545] Hogan Report, Exhibit CDA-2, pp. 13 and 15-19.

[546] Hogan Report, Exhibit CDA-2, pp. 18-19.

[547] Hogan Report, Exhibit CDA-2, p. 17.

[548] The Hogan Report defines electric "capacity" as "the capability of a generating unit to produce electricity (measured in kilowatts)". The Hogan Report notes that three regions in the United States – "PJM, New York and New England operate capacity markets to supplement spot market payments for electricity and ancillary services". Hogan Report, Exhibit CDA-2, pp. 13 and 18, and fn. 17 and 21.

Ontario's 2002 wholesale electricity market experience

7.285 The complainants assert that a competitive wholesale market for electricity existed in Ontario in 2002. Canada accepts that such a market existed between May and November 2002[549]. During this seven month period, electricity generated from facilities accounting for 94% of Ontario's generation capacity was bought and sold on the wholesale market at prices set through a market clearing mechanism administered by the Independent Market Operator[550]. As much as 90% of the generating capacity operating during this period was government owned and operated through the OPG[551], which was subject to a Market Power Mitigation Agreement imposing a price/revenue cap and other obligations to curtail its potential market power as the dominant operator[552]. Despite this, Canada explains that the wholesale market was "premised on all generators (including those owned by the government through Ontario Power Generation (OPG)) offering their electricity into the wholesale market based on their marginal costs of production"[553]. According to Canada, it was "hoped that this would allow generators to recover their operating and capital costs and earn a return"[554].

7.286 The mix of electricity generation technologies that operated in 2002 included nuclear, coal, hydroelectric and oil/gas facilities, which together accounted for over 99% of total available capacity (29,523 MW) and total electricity output (149,690 GWh) in 2002[555]. Although additional nuclear capacity owned by OPG had been expected to come into operation during the course of 2001[556], this was delayed significantly and therefore was not available at the time of market opening[557]. It was partly due to events that transpired because of the unavailability of this additional generation

[549] Canada's first written submission, para. 25; and response to Panel question No. 1 (second set).

[550] The remaining 6% was accounted for by electricity produced from NUGs, which were paid according to prices contained in pre-existing contracts with Hydro One, which were taken over by the OEFC. Canada's responses to Panel questions Nos. 1 and 26 (first set); and first written submission, para. 22(iv).

[551] In 2000, that is, two years before the "competitive" market was opened, 90% of Ontario's generating capacity was controlled by Ontario Power Generation. Final Report of the Market Design Committee to the Honourable Jim Wilson, Minister of Energy, Science and Technology, 29 January 1999, ("Final Report of the Market Design Committee"), Exhibit CDA-9. In 2011, the OPG accounted for approximately 70% of Ontario's generation capacity. Ontario Power Generation, Frequently Asked Questions, OPG website ("OPG FAQ"), Exhibit CDA-8. See also Ontario Power Generation, About OPG, OPG website, ("About OPG"), Exhibit CDA-10; and About the Ministry of Energy, Exhibit JPN-52.

[552] Final Report of the Market Design Committee, Exhibit CDA-9; and Ontario Energy Board, EB-2007-0905, In the Matter of an Application By Ontario Power Generation Inc., Payment Amounts for Prescribed Facilities, Decision with Reasons, 3 November 2008, ("OEB Decision on Payment Amounts for Prescribed Facilities"), Exhibit JPN-233, pp. 2-3.

[553] Canada' first written submission (DS426) para. 68.

[554] Canada' first written submission (DS426) para. 67.

[555] Other "miscellaneous" technologies accounted for less than 1% of capacity and output. Canada's response to Panel question No. 1 (second set).

[556] The first unit of the OPG's nuclear facilities at Pickering was initially expected to become available on 13 November 2001. On 17 December 2001, the IMO announced that this would be delayed until mid-2002. IMO, 18-Month Outlook: An Assessment of the Adequacy of the Ontario Electricity System from January 2002 to June 2003, ("IMO: 18-Month Outlook"), Exhibit CDA-90.

[557] According to Ontario's Long-Term Energy Plan, Exhibit CDA-6, Bruce Units 3 and 4 were returned to service in March 2004 and November 2003, respectively, while Pickering A Unit 1 was restarted in November 2005.

capacity[558], as well as a pre-existing lack of investment in new sources of generation, that Ontario's wholesale electricity market was brought to an end[559].

7.287 Canada explains that over the summer of 2002, very high temperatures drove up demand to levels that could not be satisfied by existing suppliers without significant price increases. Between May and November 2002, prices rose by an average of over 30%[560]. Canada attributes the inability of suppliers to respond to the spike in demand without significant price increases to the "market structure" that existed during this period, and the delay in re-establishing production at the Pickering Unit 4 nuclear plant[561]. Japan also appears to make the former point, asserting that it was because "the established market structure did not invite the sufficient entry of new generators … [that] the Government of Ontario enacted the Electricity Restructuring Act, 2004, amending the Electricity Act, 1998"[562].

7.288 In its Final Report to the Minister of Energy, the Electricity Conservation and Supply Task Force[563] (the "ECSTF") identified a number of events that took place around and during the period of the existence of the wholesale market that shaped the conditions in which it was required to operate. In particular, the ECSTF highlighted that the "financial markets expected to underwrite new capacity were severely impacted by Enron's collapse" and "the long-term energy trading market" at least temporarily ceased to function[564]. According to the ECSTF, this "loss undercut merchant generation, merchant transmission and robust emissions trading"[565]. Similarly, the ECSTF observed that the "retreat of the financial markets from the electricity industry" had the effect of slowing the development and construction of new gas-fired facilities, which were also impacted by "spiking natural gas prices and concerns over long-term supplies"[566]. Indeed, the ECSTF points out that during the period under review, gas-fired plants "became increasingly viewed as a fuel most appropriate for intermediate and peaking operations, rather than baseload"[567]. Obviously, this has implications for the economics of any future investment in gas generation, as intermediate and peaking plants would be expected to operate less than baseload plants. Finally, like Canada, the ECSTF emphasizes that "delays and cost increases in returning the four Pickering A nuclear units to service contributed to reduced supply and higher and more volatile prices", noting that this "added to concern that the Government would continue to make uneconomic investment decisions that would damage the competitive position of competing suppliers in the market"[568].

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[558] In 1997, the Ontario Government decided to take seven nuclear reactors off-line to address "critical maintenance and repair needs". This amounted to 8% of Ontario's generation capacity. 2004 Report of the ECSTF, Exhibit CDA-59, p. 23.

[559] Canada's first written submission (DS426), para. 70; response to Panel question No. 1(g) (second set); and Government of Ontario, Action Plan to Lower Your Hydro Bill, ("Action Plan to Lower Your Hydro Bill"), Exhibit CDA-96.

[560] Ontario's Long-Term Energy Plan, Exhibit CDA-6, p. 6.

[561] Canada's response to Panel question No. 1(g) (second set).

[562] Japan's first written submission, para. 25.

[563] The Electricity Conservation and Supply Task Force was established in June 2003 and charged with developing an action plan to address Ontario's need for an affordable, reliable and environmentally acceptable power supply over the period to 2020. The ECSTF "met thirty times and had detailed discussions with over 90 individuals and organizations representing all sectors of society". 2004 Report of the ECSTF, Exhibit CDA-59, pp. 1-2.

[564] 2004 Report of the ECSTF, Exhibit CDA-59, p. 84.

[565] 2004 Report of the ECSTF, Exhibit CDA-59, p. 84.

[566] 2004 Report of the ECSTF, Exhibit CDA-59, p. 84.

[567] 2004 Report of the ECSTF, Exhibit CDA-59, p. 84.

[568] 2004 Report of the ECSTF, Exhibit CDA-59, p. 84.

7.289 Thus, it appears that in addition to the price volatility problems associated with the inherent attributes of competitive wholesale electricity markets[569], a combination of other factors shaping the interaction of supply and demand for electricity in Ontario affected the operation of the competitive wholesale market that existed between May and November 2002, creating critical limits on what it could achieve.

7.290 According to Canada, the 2002 experience demonstrates that a competitive wholesale electricity market "would not be sufficient to encourage the construction of new generation facilities able to provide the additional long-term supply needed by Ontario residents"[570]. This is consistent with one of the main findings of the ECSTF, which concluded that "the market approach adopted in the late 1990s needs substantial enhancement if it is to deliver the new generation and conservation Ontario needs, within the timeframes we need them"[571]. In this latter regard, the ECSTF projected that in the absence of new capacity or demand reduction measures, there would be a supply shortfall in Ontario of 5000-7,000 MW by 2007 and approximately 25,000 MW by 2020. The ECSTF's projected supply and demand conditions are represented in the following table[572].

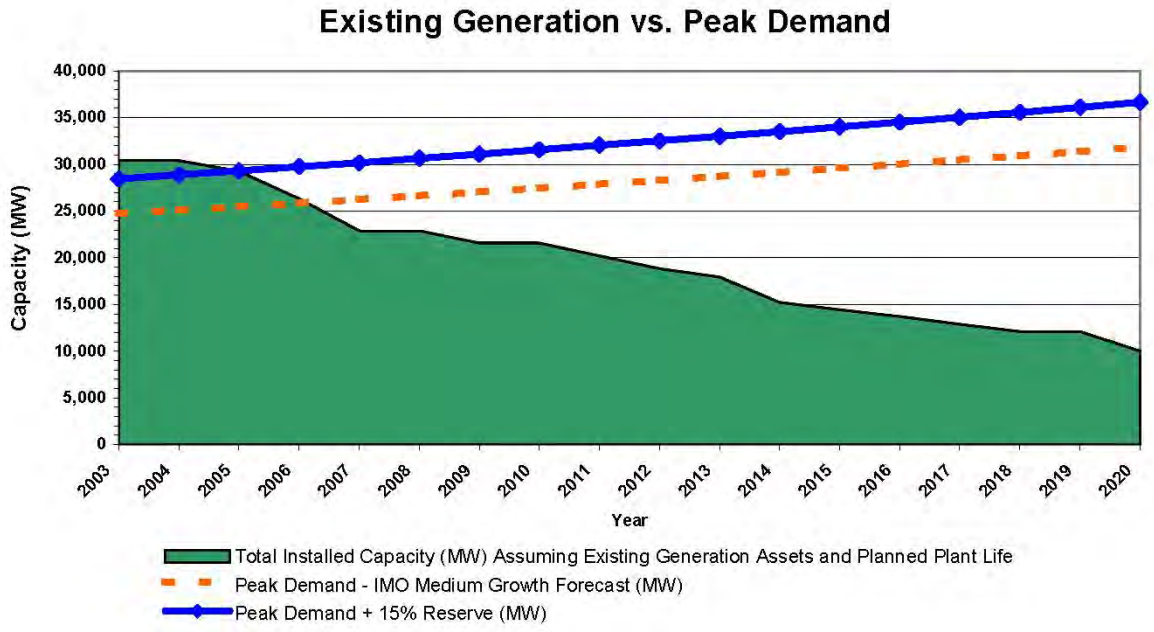

Diagram 5: Existing Generation vs. Peak Demand

7.291 After having "seriously debated" "market solutions and measures to demonstrate commitment to those solutions (such as a willingness to allow consumers to face whatever prices the market dictates and the sale of OPG's output to private traders and wholesalers)", the ECSTF opined that such a path "provides no assurance that the needed supply will be in place to replace Ontario's coal fired

[569] See discussion above at paras. 7.279-7.284. The Hogan Report explains that "[c]ost overruns in Ontario Hydro's nuclear construction program and the need to replace or refurbish much of the Province's aging electricity infrastructure provided the impetus for reform and restructuring", suggesting that supply conditions were already tight at the time that the market opened in May 2002. Hogan Report, Exhibit CDA-2, p. 19.
[570] Canada's first written submission, para. 27.
[571] 2004 Report of the ECSTF, Exhibit CDA-59, p. (i).
[572] 2004 Report of the ECSTF, Exhibit CDA-59, Figure 1A, p. 1.

generation in 2007 or to ensure an early start to the process of developing effective supply and demand options to rehabilitate or replace aging nuclear plant. It does not provide the stable and predictable prices Ontario consumers demand … [and] does not ensure that Ontario will have the diverse power mix we believe Ontario needs if its power prices are to remain competitive with neighbouring markets"[573]. The ECSTF concluded that "on balance, … relying on market signals alone is simply too risky an approach to take, given the potential consequences of failing to achieve the needed early investments in new supply and conservation"[574]. Thus, the ECSTF recommended that there should be "less reliance on the spot market as a signal for new investment"[575].

7.292 In our view, Ontario's 2002 market opening experience confirms what is suggested in the Hogan Report, namely, that competitive wholesale electricity markets will only rarely attract sufficient investment in the generation capacity needed to secure a reliable supply of electricity. The evidence before us indicates that this universal objective of all electricity systems could not have been achieved in Ontario in 2002 solely on the basis of the operation of a competitive wholesale electricity market.

The IESO-administered wholesale electricity market

7.293 Japan asserts that the current IESO-administered wholesale electricity market is a competitive wholesale electricity market. Japan argues that normal market forces, including supply and demand, and the cost of production, come together in this market to set wholesale electricity prices (i.e. the HOEP)[576]. According to Japan, these prices serve "not only as signals for when electricity should be dispatched, but also as signals for when electricity should be consumed, just as market prices do"[577]. Japan observes that the IESO Market Rules describe the objective of the IESO-administered markets as "to promote an efficient, competitive and reliable market for the wholesale and purchase of electricity and ancillary services in Ontario"[578]. Moreover, Japan notes that the IESO itself has described the market it administers as a "competitive wholesale market", where "wholesale prices are based on supply and demand, and reflect the cost of producing electricity"[579].

7.294 Although initially sharing many of Japan's assertions about the "competitive" nature of the IESO-administered wholesale electricity market[580], the European Union subsequently agreed with the contention that the IESO market mechanism "may not be" the "classical" competitive market where supply and demand meet[581]. Indeed, according to the European Union, "there may not be many 'classical' markets in many jurisdictions with respect to electricity or other products"[582].

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[573] 2004 Report of the ECSTF, Exhibit CDA-59, pp. 64-65. At the time of writing the 2004 Report of the ECSTF, the Government of Ontario had indicated that it would close down coal-fired facilities by 2007. Subsequently, it was decided that the last coal-fired facility would complete operations by end of 2014.

[574] 2004 Report of the ECSTF, Exhibit CDA-59, p. 4.

[575] 2004 Report of the ECSTF, Exhibit CDA-59, p. (iii).

[576] Japan's first written submission, paras. 79-81 and 219; and response to Panel question No. 45 (first set).

[577] Japan's comments on Canada's response to Panel question No. 43 (second set).

[578] Japan's comments on Canada's response to Panel question No. 43 (second set), referring to IESO, Market Rules for the Ontario Electricity Market, ("IESO Market Rules"), Exhibit CDA-106, Chapter 1, Section 3.1.1.

[579] Japan's first written submission, para. 79, referring to Quick Takes: Electricity Pricing, Exhibit JPN-3, p. 1.

[580] e.g. European Union's first written submission, paras. 70-73.

[581] However, the European Union nevertheless considers that "the IESO market mechanism is a market where demand, represented by the relevant competent authorities in Ontario, meets with supply (i.e., electricity

7.295 We note that while Japan has argued that the IESO-administered wholesale market is competitive, it has provided the following description of how the HOEP is actually determined:

> Dispatchable generators must submit price/quantity 'offers' for every five minute interval. Although many dispatchable generators will in fact receive regulated or contracted rates for the electricity they sell, they must nonetheless submit offers to the IESO to indicate the quantity they are willing to supply in a given five minute interval, and in doing so they must strategize about what price to offer such that their quantity will actually be selected by the IESO. Thus, the price offers by dispatchable generators serve as a dispatch signal – *i.e.*, a mechanism for the IESO to select electricity supply – and not as the rate that these generators actually receive. Generators for which it would be very costly to shut down, such as nuclear facilities, would likely offer a price at or near zero so they can always operate, while other generators would likely offer prices that cover their marginal costs of production[583].

7.296 Japan's description highlights two important points, the first being that most generators participating in the IESO-administered wholesale market do not receive the HOEP. In fact, facilities accounting for 92% of Ontario's 2010 generation capacity do not receive the HOEP, but a higher price established by the OEB (50% of capacity) or under contracts with the OPA or the OEFC (42% of capacity)[584]. The only generators that receive the HOEP *alone* are the OPG's unregulated hydroelectric facilities and two of its coal-fired generation facilities[585]. Canada has explained that these facilities are relatively old (most have operated for over 60 years) with largely depreciated capital costs[586]. In addition, the coal-fired facilities will be decommissioned by the end of 2014[587]. Because of this, the Government of Ontario has decided that these unregulated facilities should receive the HOEP instead of a price "guided by the principle of cost recovery and a margin of return"[588].

7.297 The second telling feature of the IESO-administered wholesale market that is apparent from Japan's description follows from the first, namely, that the primary motivation behind a generator's price offers is to be selected to dispatch electricity, and not to cover its marginal costs of production. Canada confirms that this is exactly what happens, explaining that OPG's regulated hydroelectric and nuclear facilities (which account for the majority of generation in Ontario) make offers into the IESO market clearing mechanism that are "so low (often negative rates) that the IESO must accept" them[589]. According to Canada, the OPG makes such low price offers "to ensure its electricity is accepted", knowing that they will not affect its revenue, which depends upon the regulated price that is set by the OEB. Similarly, for one category of contract generators, the NUGs, Hogan points out that "[b]ecause the contract prices are above both marginal cost and market clearing price during off-peak periods NUGs have incentives to produce uneconomic power off-peak"[590]. Generally, costs of production are also not a consideration for OPG's "unregulated assets" receiving the HOEP, as this price, as a matter

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generators); and it is the market mechanism chosen by the competent authorities in Ontario to regulate the exchanges of electricity". European Union's second written submission, para. 91.

[582] European Union's second written submission, para. 91.

[583] Japan's first written submission, Appendix II, para. 8. (footnote omitted, underline added)

[584] Canada's first written submission, para. 37. See also above, paras. 7.27-7.31.

[585] Canada's first written submission, para. 38.

[586] Professor Hogan describes these suppliers as "a small subset of old or infrequently operating generating facilities that have fully recovered their sunk costs, and thus, only need to meet their variable costs to be profitable". Hogan Report, Exhibit CDA-2, p. 10.

[587] Canada's response to Panel question No. 41 (second set).

[588] Canada's response to Panel question No. 26 (first set).

[589] Canada's response to Panel question No. 41 (second set).

[590] Hogan Report, Exhibit CDA-2, p. 30.

of policy, has been deemed to be sufficient for these older, largely depreciated assets, regardless of whether this enables them to cover marginal costs.

7.298 It follows from the above that the price offers attached to a generator's supply bids in the IESO-administered wholesale market are not motivated by the need to cover marginal costs of production (as would typically be the case in a competitive wholesale electricity market such as that which existed in Ontario in 2002[591]), but rather by the need for each generator to be chosen to supply electricity into the Ontario grid in order to receive its contracted or regulated prices. Thus, the IESO-administered wholesale market does not arrive at its equilibrium price (the HOEP) through forces of supply and demand that are unaffected by the policies of the Government of Ontario. To the extent that the Government of Ontario (through the OEB, the OPA and OEFC) ensures that 92% of Ontario's generation capacity is remunerated at prices above the HOEP, and instructs the OPG's unregulated assets to accept the HOEP irrespective of production costs, it is clear to us that the HOEP is not a market outcome that may be used for the purpose of conducting the present benefit analysis. This is because, in many important respects, the equilibrium level of the HOEP is a direct consequence of the electricity pricing policy and supply-mix decisions of the Government of Ontario. Thus, as Canada and Professor Hogan emphasize, the IESO-administered wholesale market clearing mechanism is perhaps best characterized as a tool for the IESO to make the dispatch decisions needed to balance *physical* supply and demand for electricity[592].

7.299 The European Union submits that "one possible means to assess whether the HOEP represents the price of electricity in Ontario under market conditions" is to compare it with the prices of Ontario electricity imports and exports[593]. After reviewing the average import and export prices of electricity to and from neighbouring Provinces (including Manitoba) and the United States (Michigan, Minnesota and New York) over the past three years, the European Union concludes that the "similarity between the HOEP and the import and export prices is … revealing of the fact that the HOEP faithfully reflects the price practiced in Ontario and neighbouring jurisdictions under market conditions"[594]. The European Union considers this to be a valid conclusion because "neither the Canadian provinces nor the US States are submitted to overarching governmental regulations" implying that "these entities trade electricity entirely based on their demand and their available supply"[595]. We have a number of problems with the inferences the European Union draws from the data.

7.300 First, we recall that the HOEP does not represent an equilibrium price that is set in a competitive wholesale market of a kind that may be used for the purpose of conducting the present benefit analysis. Rather, the HOEP is a price that is heavily influenced by the electricity pricing policy and supply-mix decisions and regulations of the Government of Ontario. Thus, to the extent that export and import prices reflect or are "tied to" the HOEP, they cannot be considered to reflect prices established in a competitive wholesale electricity market.

7.301 Secondly, if, as Professor Hogan suggests, exporters of electricity will supply to Ontario when the difference between wholesale prices in different jurisdictions is "large enough" to warrant

[591] In this regard, Canada emphasizes that the IESO-administered wholesale market is qualitatively different to the wholesale market operated by the IMO during the 2002 market opening experience because in the case of the latter, electricity generators competed on the basis of both price and volume offers, whereas there is no such competition between generators operating today. Canada's responses to Panel questions Nos. 41-43 (second set).

[592] Canada's first written submission (DS426), para. 71; opening statement at the first meeting of the Panel, para. 83; and Hogan Report, Exhibit CDA-2, pp. 37-41.

[593] European Union's second written submission, para. 92.

[594] European Union's second written submission, para. 95.

[595] European Union's second written submission, para. 92.

arbitrage between the two systems, it follows that the price level in an exporter's domestic wholesale market will significantly influence the price of exports. However, apart from asserting that the relevant exporters "trade electricity entirely based on their demand and their available supply", the European Union has advanced no evidence to demonstrate that the domestic wholesale electricity markets in Manitoba, Michigan, Minnesota and New York are themselves based on "market conditions" that are not significantly distorted by government intervention. In this light, the fact that the HOEP is similar to export and import prices could simply reflect the existence of less than competitive wholesale markets in the neighbouring jurisdictions. Moreover, as explained in more detail in the section that follows, the wholesale electricity market in New York is not the only source of remuneration that keeps generators participating in the New York electricity system[596].

7.302 The above features of electricity import and export exchanges suggest to us that the price of electricity that is traded between Ontario and its neighbouring jurisdictions does not, as the European Union argues, verify that the HOEP "represents the price of electricity in Ontario under market conditions".

Wholesale electricity markets outside of Ontario

7.303 The complainants argue that the price of electricity in four allegedly competitive wholesale electricity markets operating outside of Ontario could be used as a proxy for the wholesale market price of electricity in Ontario. In particular, the complainants refer to the prices established in the wholesale electricity markets of Alberta, New York State, the State of New England and the Mid-Atlantic region of the United States (the PJM Interconnection). To substantiate the alleged competitive nature of these markets, Japan, supported by the European Union[597], highlights *inter alia* the following statements made in publications from each of the four markets[598]:

> Alberta's power market is unique in Canada. It's wholesale and retail markets are open to competition … Investment in generation is at the developers' risk …[599].
>
> NYISO (and more generally, New York's competitive wholesale market) has performed extremely well on many if not most of the outcomes to which the state's restructuring of its electric industry aspired. In many respects, NYISO stands as a model of a well-functioning electric market that relies extensively on competitive markets to provide benefits to the state's electricity consumers[600].
>
> To assess the competitiveness of the electric energy markets, the [Internal Market Monitor of ISO New England] examined two types of measures of market competitiveness: structural measures, which analyze the concentration of generation-resource ownership in the New England markets; and price-based measures, which compare wholesale market prices to the estimated cost of providing electric energy. The results of the concentration analyses show that the market is structurally competitive … Market results show that electric energy prices reflect supplier costs to

[596] See discussion below paras. 7.304-7.305.
[597] e.g. European Union's, response to Panel question No. 27 (second set).
[598] Japan's response to Panel question No. 31 (second set). See also Japan's response to Panel question No. 7 (first set).
[599] Independent Power Producers Society of Alberta, Alberta's Power Market, ("Alberta's Power Market"), Exhibit JPN-208.
[600] The New York Independent System Operator: A Ten-Year Review, Analysis Group, 12 April 2010, ("New York Independent System Operator"), Exhibit JPN-209, p. 3.

> produce electric energy (i.e., largely fuel prices), which is consistent with the finding that the market is competitive[601].
>
> The overall market results support the conclusion that prices in PJM are set, on average, by marginal units operating at, or close to, their marginal costs. This is evidence of competitive behavior and competitive market outcomes[602].

7.304 Although Canada does not appear to specifically challenge the complainants' allegations concerning the competitive nature of the above-mentioned wholesale markets, we find it instructive for the purpose of evaluating the nature of the wholesale markets that exist in New York, New England and the PJM, to read in the Hogan Report that because of the "missing money" problem:

> [A]lternative mechanisms to wholesale spot markets have been required to provide incentives for long-term investment to meet forecasted demand. In some regions, such as Ontario, centralized decision makers employ purchased power contracts to finance new investment. Many organized markets in the U.S. have taken a similar path, developing parallel capacity markets and requiring ratepayers to pay additional capacity charges for their share of required levels of capacity, to meet resource adequacy requirements and provide the additional compensation to generators[603].

7.305 The Hogan Report identifies New York, New England and PJM as examples of regions that "operate capacity markets to supplement spot market revenues for electricity and ancillary services"[604]. In other words, the wholesale spot market prices for electricity in New York, New England and PJM, are not the only sources of revenue for generators supplying electricity into their respective systems. Generators in these systems also receive "capacity" payments. Thus, not unlike Ontario's market opening experience in 2002, the fact that generators in New York, New England and PJM operate on the basis of more than just the revenues obtained from the wholesale spot market for electricity evidences the difficulties that competitive wholesale markets have to, *on their own*, attract sufficient investment in the generation capacity needed to secure a reliable system of electricity supply.

7.306 Turning to the complainants' reference to the Province of Alberta, we observe that the fact that a "market" approach "has had some success in Alberta" was noted by the ECSTF. However, in the light of *inter alia* the conditions of supply and demand forecast to exist in Ontario between 2003 and 2020[605], the ECSTF concluded that following the same approach in Ontario involved risks that "were simply too great"[606]. As already noted, the ECSTF found that "on balance … relying on market signals alone is simply too risky an approach to take, given the potential consequences of failing to

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[601] ISO New England, 2010 Annual Markets Report, 3 June 2011, ("New England 2010 Annual Markets Report"), Exhibit JPN-210, pp. 4-6 and 56-64.

[602] Monitoring Analytics, 2010 State of the Market Report for PJM, 10 March 2011, ("2010 State of the Market Report for the PJM Interconnection"), Exhibit JPN-211, pp. 30-32.

[603] Hogan Report, Exhibit CDA-2, p. 18.

[604] Hogan Report, Exhibit CDA-2, fn. 21.

[605] The Electricity Conservation and Supply Task Force was established in June 2003 and was charged with "developing an action plan to address the province's need for an affordable, reliable and environmentally acceptable power supply over the period to 2020". 2004 Report of the ECSTF, Exhibit CDA-59, p. 1.

[606] 2004 Report of the ECSTF, Exhibit CDA-59, p. 64.

achieve the needed early investments in new supply and conservation"[607], and recommended that there should be "less reliance on the spot market as a signal for new investment"[608].

7.307 Although the ECSTF did not explicitly identify the specific differences between Alberta and Ontario that led it to draw the above conclusions, the contents of its Report suggest that they must, at least in part, have had to do with the conditions of supply and demand in the two Provinces. Thus, while there is no evidence before us to doubt the contention that Alberta operates a competitive wholesale electricity market, it is perhaps best characterized as one of the exceptions alluded to in the Hogan Report. Most importantly, however, the ECSTF charged with devising a plan for *Ontario's* electricity future up to 2020 concluded, in 2004, that it would not be possible to introduce a competitive wholesale market in Ontario that guaranteed the same degree of success as Alberta.

Conclusions concerning the wholesale electricity market as the relevant focus of the benefit analysis

7.308 We recall that Article 14(d) of the SCM Agreement provides useful guidance for determining whether "financial contribution[s]" in the form of "government purchases [of] goods" confer a benefit for the purpose of claims made under Part III of the SCM Agreement. According to this guidance, one way the challenged measures may be found to confer a benefit is by demonstrating that the remuneration obtained by FIT generators operating on the basis of windpower and solar PV technology under the FIT Programme is "more than adequate" compared with the remuneration the same generators would receive on the relevant "market" for electricity in Ontario, in the light of the "prevailing market conditions". Throughout these proceedings, the complainants' principal argument has been that the benchmark for "adequate remuneration" should be found in the allegedly competitive wholesale electricity market that exists in Ontario or four out-of-Province jurisdictions. However, for the reasons we have explained above, the evidence before us indicates that the wholesale electricity market that currently exists in Ontario is not a market where there is effective competition. Rather, Ontario's wholesale electricity market is perhaps better characterized as a part of an electricity system that is defined in almost all aspects by the Government of Ontario's policy decisions and regulations pertaining to the supply mix needed to ensure that Ontario has a safe, reliable and long-term sustainable supply of electricity, as well as how the costs of that system will be recuperated. We have little doubt that the HOEP results from the operation of forces of supply and demand that are significantly affected by government intervention in a way that renders it an inappropriate benchmark to conduct the present benefit analysis. In the light of the benefit standard that has thus far been applied in WTO disputes[609], we find that the HOEP and all of the HOEP-derivatives that the complainants have advanced[610], cannot serve as appropriate benchmarks for the purpose of the benefit analysis.

7.309 Importantly, the complainants have not convinced us of the premise underlying their two main lines of benefit arguments, namely, that in the absence of the FIT Programme, the FIT generators would be faced with having to operate in a competitive wholesale electricity market. The evidence before us indicates that competitive wholesale electricity markets, although a theoretical possibility, will only rarely operate in a way that remunerates the mix of generators needed to secure a *reliable* electricity system with enough revenue to cover their all-in costs, let alone a system that pursues *human health and environmental* objectives through the inclusion of facilities using solar PV and wind technologies into the supply-mix. In the specific context of Ontario, the 2002 market opening experience illustrates this point. Although intended to operate as a "classical" competitive

[607] 2004 Report of the ECSTF, Exhibit CDA-59, p. 4.
[608] 2004 Report of the ECSTF, Exhibit CDA-59, p. (iii).
[609] See above at paras. 7.271-7.275.
[610] Specifically, the weighted average "wholesale rate" during 2010 for generators other than FIT and RESOP generators, and the price paid by retail consumers under the Regulated Price Plan in 2010.

market where generators would sell electricity at spot prices equal to marginal costs, the conditions of supply and demand that existed at that time made it impossible for the market to attract the investment in generation capacity needed to secure a reliable system of electricity supply. By saying that it was because "the established market structure did not invite the sufficient entry of new generators … [that] the Government of Ontario enacted the Electricity Restructuring Act, 2004, amending the Electricity Act, 1998"[611], Japan appears to recognize the limits of the competitive market experience in Ontario.

7.310 The complainants have referred to examples of what they consider to be competitive wholesale markets existing outside of Ontario. However, as we have explained, the evidence before us suggests that because of, at least in part, the particular conditions of supply and demand that were forecast in 2003 for Ontario up to 2020, the ECSTF found that the Alberta experience could not be reproduced in Ontario with the same degree of success. Given the significant volume of generating capacity (around 43%) that it is projected will need to be renewed, replaced or added to Ontario's electricity system by 2030[612], and in the light of the limitations that are inherent to competitive wholesale electricity markets, the complainants' benefit arguments fail to convince us that the recommendations of the ECSTF do not also hold true today. With respect to the three examples of allegedly competitive wholesale markets in the United States, it appears from the Hogan Report that these markets do not, in fact, provide participating generators with *all* of the revenues they need to be present on the market. As Professor Hogan explains, the New York, PJM and New England electricity systems have developed "parallel capacity markets and [require] ratepayers to pay additional capacity charges for their share of required levels of capacity, to meet resource adequacy requirements and provide the additional compensation to generators"[613]. It follows that the allegedly competitive New York, PJM and New England wholesale electricity markets do not represent examples of competitive wholesale markets that are capable, *on their own*, of attracting sufficient investment in generation capacity to secure a reliable system of electricity supply.

7.311 We note that all parties to these proceedings agree that FIT generators using solar PV and windpower technology would be unable to conduct viable operations on the basis of the equilibrium prices that could be achieved in a competitive wholesale electricity market[614]. However, Canada has also suggested that there would be unacceptable risks to the *reliability* of Ontario's electricity system if the structure of Ontario's supply-mix were left to be settled by competitive forces of supply and demand. We tend to agree. Given the technical complexities of electricity systems, the inherent limitations of competitive wholesale electricity markets, and recalling, in particular, Ontario's failed 2002 market-opening experience, as well as the current and projected conditions of supply and demand in Ontario, we are not convinced that a *reliable* supply of electricity could be secured at present in Ontario solely through the operation of a competitive wholesale electricity market.

7.312 In our view, the application of a competitive wholesale market standard in the circumstances of the present disputes would not only insufficiently respond to the considerable challenges faced by

[611] Japan's first written submission, para. 25.

[612] Ontario's Long-Term Energy Plan reveals that 15,000 MW of Ontario's existing 35,000 MW of generation capacity will need to be renewed, replaced or added by 2030. This is due to the fact that Ontario's nuclear facilities will be temporarily shut down for maintenance between 2010 and 2020, and because coal-fired facilities will be eliminated by the end of 2014. Canada's first written submission (DS412), para. 34, referring to Ontario's Long-Term Energy Plan, Exhibit CDA-6, pp. 10 and 23. On this basis, it would appear that the potential for the same tight supply conditions that existed a decade ago, which at least in part informed the ECSTF recommendations, continues today.

[613] Hogan Report, Exhibit CDA-2, p. 18.

[614] Japan's second written submission, paras. 3-7; opening statement at the second meeting of the Panel, paras. 10-13; comments on Canada's responses to Panel questions Nos. 1 and 42 (second set); European Union's opening statement at the second meeting of the Panel, para. 18; and Canada's first written submission (DS412), paras. 27 and 39.

electricity systems that are caused by the specific properties of electricity, but it would also overlook the particular situation in Ontario. Importantly, it would ignore the evidence indicating that the prevailing conditions of supply and demand in Ontario suggest that a competitive wholesale electricity market would fail to attract the degree of investment in generating capacity needed to secure a reliable supply of electricity, and that, at present, this goal can only be achieved by means of government intervention in what would otherwise be unacceptable competitive market outcomes. In these circumstances, and given the critical importance of electricity to all facets of modern life, we cannot accept that it would be appropriate to determine whether the FIT Programme and the FIT and microFIT Contracts confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement by comparing the terms and conditions of participation in the FIT Programme with those that would be available to generators participating in a wholesale electricity market where there is effective competition[615].

7.313 Thus, for all of the foregoing reasons, we conclude that:

(a) the HOEP is a price set through the interaction of supply and demand forces that in many critical aspects are significantly influenced by the supply-mix and pricing policy decisions and regulations of the Government of Ontario, and therefore, the HOEP and all of the related HOEP-derivatives the complainants have submitted as appropriate benchmarks for the purpose of the benefit analysis cannot be accepted;

(b) the complainants have failed to convince us that, in the absence of the FIT Programme, the FIT generators would be faced with having to operate in a competitive wholesale electricity market because: (i) the economics of competitive wholesale electricity markets suggest that they will only rarely attract the degree of investment in the generation capacity needed to secure a reliable electricity system; and (ii) the weight of the evidence before us indicates that, at present, a competitive wholesale electricity market would fail to achieve this outcome in Ontario; and

(c) in the light of our conclusions in (a) and (b), and given the critical importance of electricity to all facets of modern life, we find that the question whether the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement cannot be resolved by applying a benchmark that is derived from the conditions for purchasing electricity in a competitive wholesale electricity market.

(iv) Alternatives to the wholesale market for electricity as the relevant focus of the benefit analysis

7.314 Both Japan and the European Union have advanced a number of alternative benchmarks to the competitive wholesale electricity market which they consider may be used to demonstrate that the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement.

7.315 First, Japan and European Union both argue that even if the HOEP is not the price established in a competitive wholesale electricity market, it is nevertheless the *actual price* that would be received by the FIT generators but for the existence of the FIT Programme[616], and for this reason, it should be used as the appropriate benchmark for the purpose of the benefit analysis. Although the complainants have not explained this argument in great detail, we understand that it is premised on a counterfactual where, in the absence of the FIT and microFIT Contracts, the non-FIT suppliers currently operating in

[615] See further in this regard at para. 7.320.

[616] The European Union appears to makes this argument by characterizing the HOEP as the price that is formed in the "nominal" wholesale electricity market. European Union's second written submission, para. 88.

Ontario would continue to operate in the same way, thereby maintaining the HOEP at current levels. In our view, this could only happen if the existing suppliers would continue to receive the (generally) above-HOEP prices that have been contracted with the OPA and the OEFC or regulated by the OEB. In other words, in the counterfactual posited by the complainants the Government of Ontario would continue to play the role of contracting and regulating electricity wholesale electricity prices[617]. In this light, it is difficult for us to accept that the *only* option, in the absence of the FIT Programme, for a generator using solar PV and windpower technology to enter the market would be to accept the HOEP. Rather, as Canada suggests, the most probable course of action for such new entrants would be to agree to a price negotiated with the Government of Ontario.

7.316 The European Union also argues that an alternative to, or a proxy for, a benchmark found in the competitive wholesale electricity market could be the prices of imports and exports of electricity into and out of Ontario[618]. We respectfully disagree. As we have explained above, to the extent that such prices reflect or are "tied to" the HOEP, they cannot be considered to be competitive market prices, and therefore cannot be used for the purpose of conducting the present benefit analysis.

7.317 According to Japan, another way of determining whether the challenged measures confer a "benefit" could be by comparing the FIT and microFIT Contract Prices with the prices offered under the Regulated Price Plan ("RPP"). Although at a different level of trade to the wholesale market benchmarks it has advanced, Japan argues that RPP prices may nevertheless be taken into account as possible benchmarks because "no generator of electricity in Ontario should expect to receive a rate in excess of the price paid by retail consumers in their commodity portion of the bill"[619]. Japan argues that RPP prices represent the "ceiling" for the amount that Ontario consumers are willing to pay for electricity[620], an assertion that Japan submits is confirmed by the evidence it has advanced of the prices set in two private retail contracts offered in a recent promotion in Ontario[621]. Thus, Japan appears to argue that because the (wholesale level) Contract Prices offered under the FIT Programme are greater than RPP prices paid at the retail level, the challenged measures must confer a benefit. We are not able to share Japan's point of view. As we have already explained, RPP prices are regulated prices that are inherently linked to the HOEP, which we have found cannot serve as an appropriate benchmark for determining the existence of "benefit". In our view, in order to be used for the argument that Japan is attempting to make, the retail level prices that Japan relies upon would need to be determined in a competitive marketplace. Thus, even if we were to accept that a *retail level* electricity price may serve as an appropriate benchmark against which to determine whether the *wholesale level* prices paid to FIT generators confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement, the relevant retail level prices could not be those set under the RPP because, in the same way as the HOEP, the RPP is significantly influenced by the supply-mix and pricing policy decisions and regulations of the Government of Ontario. Given these considerations, we cannot accept Japan's argument that RPP prices may serve as appropriate benchmarks for the benefit analysis.

7.318 Finally, we note that throughout these proceedings Canada has argued that the relevant "market" for the purpose of the benefit analysis should be the market for electricity produced from solar PV and windpower technology, reflecting the fact that it is electricity generated from renewable sources of energy that is purchased by the Government of Ontario under the FIT Programme.

[617] A counterfactual where the Government of Ontario is not present at all would imply the existence of a competitive wholesale market, which we have already rejected as being the appropriate focus of the benefit analysis.

[618] European Union's second written submission, para. 95.

[619] Japan's first written submission, para. 223.

[620] Japan's opening statement at the second meeting of the Panel, para. 19.

[621] Japan's response to Panel question No. 28 (second set), referring to offers made by "Canada Energy", Canada Energy website, ("Canada Energy"), Exhibit JPN-229; and "MyRate Energy", MyRate Energy website, ("MyRate Energy"), Exhibit JPN-230.

According to the complainants, however, there can be only *one* relevant market for the purpose of the benefit analysis, namely, the market for electricity that is generated from all sources of energy, including solar and wind energy. This is because multiple distinct electricity markets based on differences in generation technologies do not exist in Ontario. On this particular point, we agree with the complainants. As both Japan and the European Union have convincingly argued, at present, consumers of electricity in Ontario, whose demand instantaneously determines the purchases made at the wholesale level, do not distinguish electricity on the basis of different generation technologies, either by way of price or usage[622]. Moreover, there are no arguments before us to suggest that the physical properties of electricity change depending upon how it is generated. There is therefore no basis to accept that a separate wholesale market for electricity generated from solar PV and windpower technologies would be the appropriate focus of the benefit analysis in the present disputes[623].

7.319 Thus, we find that none of the alternatives that have been advanced by the complainants (or Canada) may be used as appropriate benchmarks against which to measure whether the FIT Programme and the FIT and microFIT Contracts confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement. In particular, we have determined that the HOEP would not be the only option available to potential generators using solar PV and windpower technology in the absence of the FIT Programme. The HOEP cannot therefore be used to test whether the FIT and microFIT Contract Prices confer a benefit upon FIT Programme generators. The two other alternatives advanced by the complainants (electricity import and export prices, and RPP prices) are both inherently connected to the HOEP and, thereby, the electricity pricing policy decisions and regulations of the Government of Ontario. Therefore, these alternatives also cannot be relied upon to determine whether the FIT Programme confers a benefit. Finally, we have found that there is no evidence to support the existence in Ontario of a separate wholesale market for electricity that is generated solely from solar PV and windpower technology. There is therefore no factual basis to support Canada's contention that the existence of benefit could have been determined in the present disputes by comparing FIT and microFIT Contract Prices with the prices established in such a market.

(v) Final conclusions and observations on the existence of benefit

7.320 We have carefully reviewed the parties' legal and factual arguments in the light of the legal standard for determining the existence of benefit that has to date been applied in WTO dispute settlement. In the particular circumstances of these disputes, we have concluded that determining whether the challenged measures confer a benefit on the basis of a benchmark derived from a *competitive* wholesale electricity market, would mean that the FIT and microFIT Contracts could be legally characterized as subsidies by means of a comparison with a market standard that has not been demonstrated to actually exist nor one that could be reasonably achieved in Ontario - a market standard that the complainants have not contested will only rarely, if at all, attract sufficient investment in generation capacity to secure a reliable system of electricity supply even outside of Ontario[624]. In our view, such an outcome would fail to reflect the reality of modern electricity

[622] Japan's opening statement at the first meeting of the Panel, para. 31; response to question No. 53 (first set); second written submission, para. 23; comments on Canada's response to Panel question No. 41 (second set); European Union's response to Panel question No. 64 (first set); second written submission, para. 74; and opening statement at the second meeting of the Panel, para. 25.

[623] Having rejected Canada's submissions concerning the appropriate approach to determining the existence of benefit, it is not necessary for us to evaluate the merits of the European Union's alternative arguments advanced to demonstrate that even according to Canada's line of argument, the FIT and microFIT Contracts amount to financial contributions that confer a benefit upon the FIT generators within the meaning of Article 1.1(b) of the SCM Agreement.

[624] On this point, we note that the general descriptions the complainants have presented of their own electricity systems confirm that differing degrees of government intervention in market outcomes are also a

systems, which by their very nature need to draw electricity from a range of diverse generation technologies that play different roles and have different costs of production and environmental impacts. As we have emphasized on a number of occasions, it is only in exceptional circumstances that the generation capacity needed from all such technologies will be attracted into a wholesale market operating under the conditions of effective competition. Thus, the competitive wholesale electricity market that is at the centre of the complainants' main submissions cannot be the appropriate focus of the benefit analysis in these disputes. Furthermore, for the reasons we have outlined above, the alternatives to the wholesale electricity market that have been presented to us also cannot stand as appropriate benchmarks against which to measure whether the challenged measures confer a benefit. There is therefore no basis to uphold the complainants' benefit arguments.

7.321 In coming to this conclusion, we note that the complainants have asked the Panel not to limit its analysis to rejecting the benchmarks proposed by the parties, inviting the Panel to "find the appropriate benchmark to make a finding on the existence or absence of benefit"[625] and "identify the proper benchmark to complete the benefit analysis"[626]. Indeed, according to the European Union, the Panel is under an obligation to do so[627]. We do not share the European Union's conviction. In our view, there is no authority in WTO law that *compels* us to review the merits of the complainants' prohibited subsidy claims on the basis of arguments that they have not themselves advanced. We are not convinced that the passages the European Union has referred to from the Appellate Body report in *Japan – DRAMS* and the panel report in *Canada – Aircraft*[628], stand for the proposition that the Panel majority in these disputes cannot limit its analysis to rejecting the complainants' benefit arguments. Moreover, we recall that it has been consistently recognized in WTO dispute settlement practice that it is for a complaining party to establish a claimed infringement of the covered agreements by presenting at least a *prima facie* case of violation on the basis of relevant legal and factual arguments[629]. Thus, while a panel has a duty to engage with and explore such arguments and make objective findings upon their merits, a panel is not entitled to make a *prima facie* case for a party that bears the burden of making it[630]. With these principles in mind, and in the light of the complainants' explicit requests for the Panel to explain its own position with respect to benefit were it to reject the substantial and diverse range of submissions they themselves have made on the issue, we set out in the following paragraphs our own *observations* on one approach to the question of benefit that we believe could have been validly pursued in these disputes.

7.322 Because we have found that the very existence of a reliable electricity supply in Ontario at present requires comprehensive government intervention in the wholesale electricity market, one way we believe it is possible to evaluate whether the challenged measures confer a benefit, that at the same time maintains a market-based discipline, is by evaluating the commercial nature of the FIT and microFIT Contracts against the actions of private purchasers of electricity in a wholesale market where the conditions of supply and demand mirror those that currently exist in Ontario. For this

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feature of wholesale electricity markets in Japan and the European Union. For instance, the European Union explains that "some EU Member States have taken steps to make further use of nuclear power, whereas others prefer not to rely on (or to phase out) that particular source of energy". European Union's response to Panel question No. 27 (second set). Similarly, Japan states that "only GEUs may supply electricity to small-scale users, and they must do so at rates regulated by the Government. … Wholesale rates for sales of electricity to GEUs may be subject to regulation by the Government". Japan's response to Panel question No. 27 (second set).

[625] European Union's closing statement at the second meeting of the Panel, para. 19.

[626] Japan's closing oral statement at the second meeting of the Panel, para. 7.

[627] European Union's closing statement at the second meeting of the Panel, para. 19.

[628] In particular, the European Union refers to Appellate Body Report, *Japan – DRAMs*, para. 174; and Panel Report, *Canada - Aircraft*, para. 9.312.

[629] Appellate Body Report, *US – Gambling*, para. 282; Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, at 335.

[630] See, for example, Appellate Body Report, *Japan – Agricultural Products II*, para. 129.

purpose, we believe it is important to recall that: (i) the Government of Ontario has decided to eliminate coal-fired electricity plants by the end of 2014; (ii) that because of this, and due to the scheduled maintenance of Ontario's nuclear facilities between now and 2020, approximately 43% of Ontario's generation capacity will need to be renewed, replaced or added to Ontario's electricity system by 2030[631]; and (iii) that the Government of Ontario has decided that at least part of the additional generating capacity needed to address future needs up to 2030 must come from renewable sources of energy, including small and large-scale projects using solar PV and windpower technologies[632]. Thus, one way to determine whether the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement would involve testing them against the types of arm's length purchase transactions that would exist in a wholesale electricity market whose broad parameters are defined by the Government of Ontario[633]. In the present set of circumstances, this could be done by comparing the terms and conditions of the challenged FIT and microFIT Contracts with the terms and conditions that would be offered by commercial distributors of electricity acting under a government-imposed obligation to acquire electricity from generators operating solar PV and windpower plants of a comparable scale to those functioning under the FIT Programme. We are attracted by such an approach because not only does it take into account the complexities of electricity markets and the particular conditions of supply and demand that currently exist in Ontario, but it also evaluates the Government of Ontario's actions against a commercial benchmark.

7.323 In our view, any rational distributor charged with having to purchase a volume of electricity that is not insignificant from generators (including small-scale facilities) using solar PV and windpower technology would, acting on the basis of commercial considerations, try to negotiate a supply contract with terms and conditions that ultimately enable it to maximize or optimize the overall return it makes from trading activities (i.e. buying and selling electricity). In general, this means that a distributor will endeavour to enter into a supply contract with any electricity generator that has the lowest overall net cost. By the measure of this simple standard[634], we are of the view that one approach to determining whether the challenged measures confer a benefit could be to compare the rate of return obtained by the FIT generators under the terms and conditions of the FIT and microFIT Contracts with the average cost of capital in Canada for projects having a comparable risk profile in the same period. In our view, such a comparison would allow for an immediate and clear

[631] See above para. 7.310.

[632] In particular, as we have already noted, Ontario's Long-Term Energy Plan envisages that electricity generated from projects using wind and solar PV technologies (including small-scale projects) should account for 11.5% of Ontario's electricity generation capacity by 2030. Ontario's Long-Term Energy Plan, Exhibit CDA-6, pp. 18 and 28. Although the OPA has observed that small-scale projects will not produce economies of scale, it also recognizes that such projects can "reduce system costs by reducing transmission losses". Moreover, because small-scale projects "can be considered to reduce marginal demand at the times that they are running", they can also be "credited with reducing marginal losses". RESOP, Exhibit CDA-55, p. 20. Small-scale solar PV and windpower projects are also among the technologies considered to be appropriate for local and dispersed power generation. See Best Practice Guide: Integrated Resource Planning for Electricity, Exhibit CDA-45, p. 14.

[633] Governments regularly intervene in markets for a variety of reasons including in order to avoid outcomes that are believed to be socially unacceptable, or to address various market failures. For instance, governments may decide to limit the availability of certain products because of human health and environmental concerns, or as the Government of Ontario has done, choose to end the use of a particular production technology (coal-fired electricity generation) for the same reasons. These kinds of actions are designed to internalize the social costs (in the case of negative externalities) and benefits (in the case of positive externalities) of certain actions in the production and consumption decisions of economic agents. However, where such government intervention is limited to defining the broad parameters of a market, significant scope will remain for private actors to operate within those parameters on the basis of commercial considerations.

[634] We acknowledge that the considerations shaping a distributor's purchases of electricity under the defined government direction would no doubt involve a range of other issues. However, in our view, the overall guiding principle would be that of cost minimization with a view to maximizing or optimizing returns.

determination of whether FIT generators are being overcompensated, and thereby subsidized within the terms of the SCM Agreement.

7.324 The rate of return of a particular project involving the investment of capital is a measure of the extent to which that project realizes a profit (or loss). In other words, the rate of return represents the proportion of money earned on a particular project relative to the capital actually invested. Typically, a rate of return that is at least equal to the opportunity cost of capital in a given economy for a project having a comparable risk profile will signal that an investment is an efficient use of capital. On the other hand, where the rate of return associated with a particular project is below the opportunity cost of capital, it would not make sense to invest in that project because the funds at issue could be used more efficiently by being invested elsewhere in the economy. It follows that an electricity generator in Ontario using solar PV and windpower technology will only be willing to enter into an electricity supply contract with a distributor if its terms and conditions allow the generator to achieve a rate of return on the required investment that is at least equal to the opportunity cost of capital in Canada for comparable projects (i.e., the average cost of capital in Canada). As the minimum requirement that would need to be satisfied in order for such a generator to enter into a supply contract, it is evident that the cost to the distributor of entering into a contract that delivers this desired rate of return must also represent the lowest cost outcome for the distributor. Thus, a distributor directed to purchase electricity produced by generators (including small-scale facilities) operating in Ontario on the basis of solar PV and windpower technology will, when acting under commercial considerations, seek to ensure that the terms and conditions it agrees to under the supply contract result in a rate of return for the generator that falls within an acceptable range above or below the average cost of capital in Canada for projects having a comparable risk profile. It is therefore possible, in this light, to determine whether the purchases of electricity effected by the Government of Ontario under the FIT Programme confer a benefit by examining whether the rates of return associated with the FIT and microFIT Contracts are significantly above the average cost of capital in Canada for projects having a comparable risk profile. Were this to be the case, it could be concluded that the Government of Ontario was overcompensating FIT Programme generators, relative to what they could expect to achieve under supply contracts with private distributors acting under a government instruction to purchase electricity from solar PV and windpower plants (including small-scale generators) on the basis of commercial considerations, thereby conferring a benefit upon such generators under the terms of the SCM Agreement.

7.325 Canada has disclosed that the rate of return of the FIT Contracts used to develop the FIT Contract Price Schedule was set in 2009 at "approximately 11%"[635]. The evidence reveals that this percentage represents an *after tax* rate of return, implying that the pre-tax rate of return would be higher[636]. Canada has not explained why the 11% after tax rate of return was chosen as the appropriate target for the prices set under the FIT Programme. Moreover, the precise methodology that was used in the Discounted Cash Flow model applied to establish the FIT prices on the basis of the 11% rate of return is not entirely clear. For instance, there is no information before us about the extent to which the Discounted Cash Flow model takes account of the premium paid to Aboriginal and Community Participation projects or the potential revenues that may accrue to the Government of Ontario through the assignment of Environmental Attributes or from the sale of Future Contract Related Products[637].

[635] Canada's responses to Panel questions Nos. 26 (first set) and 12 (second set).

[636] Proposed FIT Price Schedule Presentation, Exhibit CDA-46, slides 28 and 30. The latter slide reveals that the actual income tax rate used in the OPA's calculations was 30.5%.

[637] A general overview of the Discounted Cash Flow model used to establish the FIT Price Schedule is described in the Proposed FIT Price Schedule Presentation, Exhibit CDA-46. This overview reveals that "[n]o credit [was] assumed for revenues from [the] federal ecoENERGY program". However, there is no indication whether the premium paid to Aboriginal and Community Participation projects or the potential revenues from the assignment of Environmental Attributes or Future Contract Related Products is, or is not, taken into account.

In addition, the European Union questions the validity of the 11% rate of return, arguing that it underestimates the actual rates of return that could be achieved by the most efficient FIT generators on the basis of the FIT Contract Prices[638].

7.326 Turning to the evidence that is before us with respect to the average cost of capital in Canada for projects with a risk profile that is comparable to solar PV and windpower FIT projects, we note that the OEB set the target rate of return on equity for Ontario's regulated utilities in 2009 at 9.75%[639]. However, this rate was calculated on the basis of an average equity risk premium of 550 basis points for Ontario's regulated electricity *and gas* utilities. Thus, the 550 basis points figure is not specific to Ontario's electricity producing utilities. In this regard, we note that the data used by the OEB to arrive at the equity risk premium reveals that the equity risk premium for electricity utility projects on their own could be as high as 871 basis points[640], suggesting that the rate of return on equity for regulated electricity utilities could be as high as 12.96%[641]. It is also important to recall that Ontario's regulated electricity utilities operate nuclear and hydro-electric facilities. Given the major technical differences between the latter types of operations, which it should be recalled are also long-established and government-controlled, and the solar PV and windpower projects operating under the FIT Programme, we do not think it would be appropriate to accept that the risk premium associated with Ontario's regulated electricity assets could be automatically compared with the rate of return associated with solar PV and windpower projects under the FIT Programme. It appears, therefore, that the record of these disputes does not contain any appropriate information that can be used to determine the average cost of capital in Canada for projects with a comparable risk profile to the challenged FIT and microFIT projects during the relevant period.

7.327 Thus, while we believe that a comparison between the relevant rates of return of the challenged FIT and microFIT Contracts with the relevant average cost of capital in Canada would be a useful way to determine, on the basis of the benefit standard we have outlined above, whether the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement, a number of important questions and factual issues would need to be explored and resolved in order for any such analysis to be undertaken.

4. Overall conclusion with respect to the claims of subsidization

7.328 In the light of our evaluation of the merits of the parties' arguments and the findings that we have made in Sections VII.C.1 to 3 of these Reports, we conclude that:

(i) the FIT Programme, and the FIT and microFIT Contracts, amount to government purchases of goods within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement; and

(ii) Japan and the European Union have failed to establish that the challenged measures confer a benefit, within the meaning of Article 1.1(b) of the SCM Agreement.

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[638] See, e.g. European Union's opening statement at the second meeting of the Panel, para. 26; response to Panel question 34 (second set); comments on Canada's response to Panel question 12 (second set).

[639] OEB Report on the cost of capital for Ontario's regulated utilities, Exhibit CDA-64, p. 37.

[640] OEB Report on the cost of capital for Ontario's regulated utilities, Exhibit CDA-64, pp. 38 and 40.

[641] The rate of return of 9.75% was set by the OEB on the basis of the forecast long-term Canadian government bond yield (4.25%) plus the equity risk premium (550 basis points). The 12.96% figure can be calculated by adding the 4.25% forecast long-term Canadian government bond yield to the 871 basis points equity risk premium determined by one of the OEB's consultants. OEB Report on the cost of capital for Ontario's regulated utilities, Exhibit CDA-64, pp. 37 and 40.

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 As already noted in the cover page to these Reports, our conclusions and recommendations have been set out separately with respect to each dispute in the following sections.

A. COMPLAINT BY JAPAN (DS412)

1. Conclusions

8.2 In the light of the findings set out in the foregoing sections of this Report, we conclude that Japan has established that the "Minimum Required Domestic Content Level" prescribed under the FIT Programme, and implemented through the individual FIT and microFIT Contracts executed since the FIT Programme's inception, places Canada in breach of its obligations under Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994.

8.3 On the other hand, in the light of the findings set out in the foregoing sections of this Report, we conclude that Japan has failed to establish that the FIT Programme, and the individual solar PV and windpower FIT and microFIT Contracts executed since the FIT Programme's inception, constitute subsidies, or envisage the granting of subsidies, within the meaning of Article 1.1 of the SCM Agreement, and thereby that Canada has acted inconsistently with Articles 3.1(b) and 3.2 of the SCM Agreement.

2. Recommendations

8.4 Pursuant to Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent Canada has acted inconsistently with Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994, Canada has nullified or impaired benefits accruing to Japan.

8.5 We recommend that Canada bring its measures into conformity with its obligations under the TRIMs Agreement and the GATT 1994.

B. COMPLAINT BY THE EUROPEAN UNION (DS426)

1. Conclusions

8.6 In the light of the findings set out in the foregoing sections of this Report, we conclude that European Union has established that the "Minimum Required Domestic Content Level" prescribed under the FIT Programme, and implemented through the individual FIT and microFIT Contracts executed since the FIT Programme's inception, places Canada in breach of its obligations under Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994.

8.7 On the other hand, in the light of the findings set out in the foregoing sections of this Report, we conclude that the European Union has failed to establish that the FIT Programme, and the individual solar PV and windpower FIT and microFIT Contracts executed since the FIT Programme's inception, constitute subsidies, or envisage the granting of subsidies, within the meaning of Article 1.1 of the SCM Agreement, and thereby that Canada has acted inconsistently with Articles 3.1(b) and 3.2 of the SCM Agreement.

2. Recommendations

8.8 Pursuant to Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent Canada has acted inconsistently with Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994, Canada has nullified or impaired benefits accruing to the European Union.

8.9 We recommend that Canada bring its measures into conformity with its obligations under the TRIMs Agreement and the GATT 1994.

IX. DISSENTING OPINION OF ONE MEMBER OF THE PANEL WITH RESPECT TO WHETHER THE CHALLENGED MEASURES CONFER A BENEFIT WITHIN THE MEANING OF ARTICLE 1.1(B) OF THE SCM AGREEMENT

A. INTRODUCTION

9.1 The Panel majority has undertaken a long and careful evaluation of the parties' arguments concerning the question whether the challenged measures confer a benefit, ultimately concluding that the complainants have failed to establish the existence of subsidization[642]. While I agree with parts of the Panel majority's benefit analysis, I respectfully disagree with certain key aspects of its reasoning and ultimate findings. In essence, the Panel majority has found that the circumstances of ensuring a reliable supply of electricity that achieves certain objectives sought by the Government of Ontario justifies the rejection of the competitive wholesale electricity market as the relevant focus of the benefit analysis. The Panel majority has furthermore suggested that, in these circumstances, the existence of benefit could be determined by focusing upon the rate of return associated with the FIT and microFIT Contracts and comparing this with the average cost of capital in Canada for projects having a comparable risk profile.

9.2 I respectfully disagree with these findings and the alternative benefit test. The wholesale electricity market that currently exists in Ontario is recognizable as a market for the buying and selling of electricity. It is undeniable that the supply of electricity, its price and competition between electricity generators – in particular, market entry – are very heavily regulated and conditioned in the market by the Government of Ontario. The wholesale electricity market that currently exists in Ontario is therefore not the kind of market where price is determined by the unconstrained forces of supply and demand. The regulatory impacts on the market are not simply in the nature of framework regulation, within which those forces may operate. The Government of Ontario (through Hydro One) and the municipal governments (through Local Distribution Companies) account for almost all purchases of electricity made at the wholesale level. The same product, which in this case is electricity, is purchased by these entities at different prices depending upon its method of generation or particular status in the Government of Ontario's electricity supply policy, including under the FIT Programme. In these circumstances the complainants have expressed their concern that an advantage is being given to the market participants that are receiving the highest prices for the electricity they produce, namely generators using solar PV and windpower technologies operating under the FIT Programme. The Panel's task is to test that concern according to the disciplines of the SCM Agreement.

9.3 The relevant question that a Panel in a case such as this must address is whether a benefit is conferred on the recipient of the financial contribution. The wholesale electricity market in Ontario does not allow for the discovery of a single market-clearing price established through the unconstrained forces of supply and demand. In that market the Government of Ontario and the municipal governments are the chief buyers of the goods concerned. In these circumstances the Panel must consider whether there is some appropriate frame of reference for determining if a benefit is conferred in the provision of that financial contribution. In my view, the competitive wholesale market for electricity that *could* exist in Ontario is the appropriate focus of the benefit analysis. Furthermore, I am of the view that facilitating the entry of certain technologies into the market that does exist – such as it is – by way of a financial contribution can itself be considered to confer a benefit. In the light of these considerations, it follows from the arguments and evidence presented by the complainants, as well as Canada's own statements, that the challenged measures confer a benefit, within the meaning of Article 1.1(b) of the SCM Agreement.

[642] See above at Section VII.C.3.

B. THE COMPETITIVE WHOLESALE ELECTRICITY MARKET IS THE RELEVANT FOCUS OF THE BENEFIT ANALYSIS

9.4 As the Panel majority explained, a financial contribution will confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement when it confers an advantage upon its recipient. It is well established that the existence of any such advantage is to be determined by comparing the position of the recipient with and without the financial contribution, and that "the marketplace provides an appropriate basis for [making this] comparison"[643]. Having found that the challenged measures amount to "financial contribution[s]" in the form of "government purchases [of] goods", it follows that the relevant "marketplace" must be the competitive market where electricity is purchased at the same level of trade as the government purchases that are challenged in the present disputes, namely, the wholesale level of trade.

9.5 The Panel majority concluded that the wholesale electricity market currently operating in Ontario cannot be used for the purpose of conducting the benefit analysis. In addition, the Panel majority found that the competitive wholesale electricity market that could, in theory, exist in Ontario could also not be used as a basis for the benefit analysis because, in the light of the prevailing conditions of supply and demand, such a market would fail to attract the generation capacity needed to secure a reliable supply of electricity for the people of Ontario[644]. In my view, however, the fact that a competitive market might not exist in the absence of government intervention or that it may not achieve all of the objectives that a government would like it to achieve, does not mean it cannot be used for the purpose of conducting a benefit analysis. Indeed, it is because competitive markets do not often work the way that governments would like them to that governments will decide to influence market outcomes by, for example, becoming a market participant, regulating market participants or providing them with incentives (or creating disincentives) to behave in a particular way. A government might also choose to intervene in competitive market outcomes by granting subsidies, as defined in Article 1.1 of the SCM Agreement. Provided that such subsidies are not prohibited under Article 3 of the SCM Agreement, a government will be entitled to maintain such measures, subject to the remedies available to other WTO Members under Parts III and V of the SCM Agreement where either "adverse effects" or "material injury" is proven.

9.6 The Panel majority has come to a number of conclusions about the shortcomings of competitive wholesale electricity markets and the inability of the market to achieve the legitimate objectives of the Government of Ontario for its electricity system. However the fact that a market is imperfect in its operation or does not meet the objectives that a government might have for the goods or services which are traded in it does not shield financial contributions which take place in the market from the benefit analysis that is required under the SCM Agreement. In this regard, it is important to recall that the Appellate Body has consistently identified the "marketplace" as the relevant focus of a benefit analysis, regardless of its particular characteristics or imperfections:

> The terms of a financial transaction must be assessed against the terms that would result from unconstrained exchange in the relevant market. The relevant market may be more or less developed; it may be made up of many or few participants. ... 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 … [645]

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[643] Appellate Body Report, *Canada – Aircraft*, para. 157.
[644] See above para. 7.312.
[645] Appellate Body Report, *Japan – DRAMs (Korea)*, para. 172.

9.7 On the basis of the above considerations, I now turn to examine the merits of the two lines of argument the complainants have advanced in support of their allegations of subsidization.

C. WHETHER THE CHALLENGED MEASURES PROVIDE FOR "MORE THAN ADEQUATE REMUNERATION" WITHIN THE MEANING OF ARTICLE 14(D) OF THE SCM AGREEMENT

9.8 The first line of benefit argument advanced by the complainants follows the approach that is described in the guidelines for calculating the amount of subsidy in terms of benefit contained in Article 14(d) of the SCM Agreement. Although intended to guide benefit determinations for the purpose of countervailing duty investigations, previous disputes tell us that the approach adopted by the complainants may be one way of demonstrating the existence of benefit in the present proceedings[646]. Thus, the complainants have advanced a series of different prices for electricity, which they submit represent the price that a distributor or trader would have to pay for electricity in Ontario's current wholesale electricity market, or are a proxy for that price. As the complainants note, each of the proposed benchmark prices is outwardly lower than the prices received by solar PV and windpower projects under the FIT Programme.

9.9 Before evaluating the merits of the complainants' arguments, it is important to recall that the guidelines in Article 14(d) of the SCM Agreement stipulate that the amount of benefit may be calculated by identifying the extent to which "more than adequate remuneration" has been paid for a purchased product "in relation to prevailing market conditions" in the *country* of purchase. In the present disputes, the complainants have not advanced *country*-specific price benchmarks, but rather benchmarks based on prices established in regional intra-national markets operating in Canada, and also the United States. The complainants appear to have done so because there are no national electricity wholesale markets in Canada. In other words, the "prevailing market conditions" in the country of purchase (Canada) are such that there are no country-wide electricity markets. In my view Article 14(d) does not suggest that the prevailing market conditions can only be those of a national market. Market conditions in a regional market of a country are, relevantly, market conditions "in the country of purchase". In this light, the complainants' approach is not inconsistent with the guidelines stipulated in Article 14(d) of the SCM Agreement.

9.10 Returning to the substance of the complainant's benefit submissions, the competitive nature of the IESO-administered wholesale electricity market in Ontario was closely examined by the Panel majority, which found that the equilibrium level of the HOEP that is set in this market is directly related to the electricity pricing policy and supply-mix decisions of the Government of Ontario[647]. I agree with this finding. The Government of Ontario's intervention in the IESO-administered wholesale market price outcomes encompasses participation not only as a purchaser of electricity, but also a generator, transmitter, distributor and price-setter (for both generators and consumers). As a result, the price outcomes of the IESO-administered wholesale market (the HOEP) are significantly distorted by the actions and policies of the Government of Ontario. For this reason, the HOEP and all related derivatives advanced by the complainants cannot be used as appropriate market benchmarks for the purpose of performing a benefit analysis under the terms of Article 14(d) of the SCM Agreement[648]. They do not represent a price established on a competitive wholesale electricity market in Ontario.

9.11 The complainants also present the prices for electricity paid in four allegedly competitive wholesale electricity markets outside of Ontario as proxies for the wholesale market price of

[646] See above paras. 7.271-7.275.
[647] See above paras. 7.298 and 7.300.
[648] In this regard, I agree with the description of the relevant legal standard that is set out in the Panel majority opinion above at paras. 7.271-7.275.

electricity in Ontario, and argue that these prices demonstrate that the challenged measures confer a benefit. They are prices in Alberta, Canada (the "Alberta benchmark") and prices in New York, New England, and the PJM Interconnection (the "US benchmarks")[649].

9.12 In *US - Softwood Lumber IV*, the Appellate Body found that where private prices for a particular good provided by a government are "distorted because of the government's predominant role in providing those goods", Article 14(d) of the SCM Agreement permits investigating authorities to use the price of the same or similar goods in a market outside of the country in question as a benchmark for conducting a benefit analysis[650]. However, the Appellate Body cautioned that when "an investigating authority proceeds in this manner, it is under an obligation to ensure that the resulting benchmark relates or refers to, or is connected with, prevailing market conditions in the country of provision, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale, as required by Article 14(d)". In addition, investigating authorities must keep in mind that:

> [P]rices in the market of a WTO Member would be expected to reflect prevailing market conditions in that Member; they are unlikely to reflect conditions prevailing in another Member. Therefore, it cannot be presumed that market conditions prevailing in one Member, for instance the United States, relate or refer to, or are connected with, market conditions prevailing in another Member, such as Canada for example. Indeed, it seems to us that it would be difficult, from a practical point of view, for investigating authorities to replicate reliably market conditions prevailing in one country on the basis of market conditions prevailing in another country. First, there are numerous factors to be taken into account in making adjustments to market conditions prevailing in one country so as to replicate those prevailing in another country; secondly, it would be difficult to ensure that all necessary adjustments are made to prices in one country in order to develop a benchmark that relates or refers to, or is connected with, prevailing market conditions in another country, so as to reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale in that other country.[]
>
> It is clear, in the abstract, that different factors can result in one country having a comparative advantage over another with respect to the production of certain goods. In any event, any comparative advantage would be reflected in the market conditions prevailing in the country of provision and, therefore, would have to be taken into account and reflected in the adjustments made to any method used for the determination of adequacy of remuneration, if it is to relate or refer to, or be connected with, prevailing market conditions in the market of provision. …[651]

9.13 Like the Panel majority, I see no reason why the above principles that were pronounced in the context of a dispute involving a financial contribution in the form of a government *provision* of goods should not also apply in the context of the present disputes involving government *purchases* of goods.

9.14 Thus, in order for the complainants' US benchmarks to be validly applied in the benefit analysis, it must be shown that they: (i) represent prices established in competitive wholesale electricity markets – that is, wholesale electricity markets that are not significantly distorted by government intervention such as that in Ontario; and (ii) must be adjusted to reflect the "prevailing market conditions" for electricity in Ontario. The application of the Alberta benchmark is subject to

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[649] Collectively, the "out-of-Province" benchmarks.
[650] Appellate Body Report, *US – Softwood Lumber IV*, paras. 90, 103, and 115.
[651] Appellate Body Report, *US – Softwood Lumber IV*, paras. 108-109. (footnote omitted)

the same consideration as set out in (i). Given that the Alberta benchmark is a price which does exist "in the *country* of… purchase" a question arises as to whether the consideration set out in (ii) is also applicable. In my opinion it is equally applicable, because the "prevailing market conditions" in the country of purchase include those of both Ontario and Alberta. Determining whether a benefit is conferred "in relation to" prevailing market conditions in Canada includes a consideration of the divisions between markets in that country, and how the conditions of a regional market (that of Ontario) might need to be reflected in a price benchmark adopted from another regional market in that country (that of Alberta).

9.15 With respect to whether the prices in the out-of-Province markets are established through the unconstrained forces of supply and demand, Canada has not contested the complainants' assertions that the wholesale electricity markets in Alberta and in New York, New England and in the PJM Interconnection are competitive and would be available as market price benchmarks (were it not for the fact that they ignore the fundamental condition that the benchmark must relate to the purchase of electricity generated from renewable sources of energy). Nevertheless, the complainants have not presented the same detailed analysis of the alleged competitive nature of these markets as has been advanced in respect of the IESO-administered wholesale market in Ontario. This is an important deficiency because it is clear from the Hogan Report and other arguments and evidence presented in these proceedings that governmental regulation of electricity systems and/or markets is very pronounced across the world. There are many political, social and economic considerations underlying such regulation. Moreover, the specific characteristics of electricity (intangibility, inability to store effectively and almost simultaneous production-consumption) and its critical importance to all facets of modern life make it the type of product whose production, distribution and usage will invariably be susceptible to varying degrees of government intervention. Thus, in the absence of more detailed information about how each of the four out-of-Province markets actually operates, it is difficult to draw any definitive conclusions about their competitive nature for the purpose of conducting a benefit analysis under Article 1.1(b) of the SCM Agreement[652].

9.16 In any case, the complainants have not made any of the adjustments to the prices in the out-of-Province markets that would need to be made in order to use them as appropriate benchmarks for assessing the existence of benefit. As already noted, such adjustments would need to take into account the "prevailing market conditions" in Ontario for electricity at the wholesale level of trade. Such conditions might include: (i) the mix of generation technologies that are currently needed to satisfy Ontario's overall baseload, intermediate load and peak load demand; (ii) Ontario's particular transmission grid characteristics; (iii) Ontario's comparative advantage (or disadvantages) with respect

[652] Japan has referred the Panel to the website of the Independent Power Producers Society of Alberta, and also provided Exhibits containing information about the electricity markets of Alberta, New York, New England and the PJM Interconnection. (Japan's response to Panel question No. 7 (first set), introducing Exhibits JPN-208-211.) The information contained in these Exhibits suggests that competitive market benchmarks may be derived from experiences in other electricity markets. However, the information provided by Japan was not detailed enough to permit any definitive conclusions in this regard. In this respect, Japan argued that:

> Even if these benchmarks are not "perfect", they are "reasonable and objective", which as the panel explained in *US – Anti-Dumping and Countervailing Duties (China)*, is all that is required for purposes of the benefit analysis. (footnote omitted)

The comments of the panel in *US – Anti-Dumping and Countervailing Duties (China)* that Japan refers to were made in the context of its review of a decision by an investigating authority to impose a countervailing measure. The panel's comments did not, however, relate to the acceptance of an out-of-country benchmark *per se*. The comments related to the need for an investigating authority to identify a benchmark that "relates or refers to, or is connected with" the prevailing market conditions in the country of provision. It was a description of this relationship, and of the adjustments necessary to allow the acceptance of a benchmark based on out-of-country information, that were absent from the submissions of the complainant in that dispute.

to accessing energy sources used to generate electricity; and (iv) key demand characteristics such as population size, industrial base as well as seasonal or daily consumption fluctuations. The complainants have failed to make any adjustments to the out-of-Province prices to account for these and other "prevailing market conditions" in Ontario, nor have they adequately explained away why such adjustments need not be made. Thus, in my view, the evidence is not in a sufficient state to enable the Panel to conduct the benefit analysis under the terms of Article 14(d) of the SCM Agreement in the way the Appellate Body has insisted that it should be conducted[653].

D. WHETHER THE CHALLENGED MEASURES ENABLE SOLAR PV AND WINDPOWER GENERATORS TO CONDUCT VIABLE OPERATIONS AND THEREBY PARTICIPATE IN THE WHOLESALE ELECTRICITY MARKET

9.17 The second line of benefit argument advanced by the complainants is focused on the very nature and objectives of the FIT Programme. In particular, the complainants submit that the FIT Programme was created and operates for the purpose of allowing generators of electricity from renewable sources of energy, including solar and wind, to supply electricity into the Ontario electricity system because a competitive wholesale electricity market could not support such high cost producers. Thus, the complainants argue that in the absence of the FIT Programme, solar PV and windpower generators would be unable to support commercially viable operations in the wholesale electricity market in Ontario[654].

9.18 Canada accepts that in the absence of the FIT Programme, "most" of the contested FIT generators would be unable to conduct viable operations. Thus, Canada explains that:

> Like FIT programs in other parts of the world, the Ontario FIT Program was created to induce new renewable generation. As recognized by Japan, the Ontario '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[655].

9.19 Moreover, referring to Ontario's episodic market opening experience in 2002, Canada states that "the market alone would not be sufficient to encourage the construction of new generation facilities able to provide the long-term supply needed by Ontario residents", adding that "[a]s recognized by Japan, the OPA was created 'because the market structure established immediately following the dissolution of Ontario Hydro in 1998 did not invite the sufficient entry of new

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[653] As made clear by the chapeau, Article 14(d) is a method for determining benefit "[f]or the purpose of Part V" of the SCM Agreement. Article 1.1(b) is in Part I of the SCM Agreement. Nonetheless, Article 14(d) strongly informs the interpretation of Article 1.1(b) in the case of the conferral of benefit from the sale or purchase of products. In every case, considering whether and how to adjust an out-of-country benchmark so that it could be said to be "in relation to prevailing market conditions" in the country concerned is a relevant consideration. The European Union made reference to "the natural conditions prevailing in Ontario" in the context of a comparison "with the rates in France and Germany, in addition to all the evidence already put forward by the European Union" (European Union's response to Panel question No. 27 (second set)). However this reference does not discharge the burden of the "strong obligation" of considering "prevailing market conditions" insisted upon by the Appellate Body in *US - Softwood Lumber IV*, para. 106.

[654] Japan's second written submission, paras. 3-7; opening statement at the second meeting of the Panel, paras. 10-13; comments on Canada's response to Panel questions No. 1 and 42 (second set); European Union's second written submission, paras. 69-70, 103 and 105; and opening statement at the first meeting of the Panel, paras. 23 and 27.

[655] Canada's first written submission (DS412), para. 39.

generators, particularly generators using alternative and renewable energy sources'"[656]. Thus, the OPA was established with a mandate to:

> [R]estructure Ontario's electricity sector, to promote the expansion of electricity supply and capacity, including supply and capacity from alternative and renewable energy sources … [657]

9.20 That the FIT Programme was intended to bring about the entry of new generating capacity from renewable sources of energy that would otherwise not exist in the Ontario wholesale electricity market can also be understood from the objectives of the FIT Programme described in the Ministerial Direction, which include to "[i]ncrease capacity of renewable energy supply to ensure adequate generation and reduce emissions", to "[p]rovide incentives for investment in renewable energy technologies" and "[e]nable new green industries through new investment and job creation"[658]. Similarly, the FIT Rules explain that the "fundamental objective of the FIT Program, in conjunction with the *Green Energy and Green Economy Act of 2009* is to facilitate the increased development of Renewable Generating Facilities of varying sizes, technologies and configurations …"[659].

9.21 Professor Hogan confirms that renewable energy technologies are typically too expensive to be supported by the spot prices achieved on wholesale electricity markets[660]. Table 2 (Ontario Electricity Generation Mix) contained in the Panel majority's opinion identifies solar PV and windpower technologies as having "very high" relative capital costs, with albeit "very low" relative operating costs per kWh of electricity generated. This reflects the following specific cost data that is provided in the Hogan Report[661]:

Cost and Operating Characteristics of Different Generating Technologies

Plant Type	Typical Plant Size	Capital Cost	Fixed Operating Cost	Variable Operating Cost	Fuel Cost	Heat Rate	Start Fue	Start Cos	Project Life	Average Annual Availability	Capacity Factor
	(MW)	(2007 C$/kW)	(2007 C$/kW)	(2007 C$/MWh)	(2007 C$/MWh)	(BTU/kWh HHV)	(BTU/kW/Start HHV)	(2007 C$/Start/Unit)	(years)	(%)	(%)
Frame Single-Cycle Gas Turbine[1]	340	$665	$16	$3.50		9,500	700	$10,000	20	97%	10-30%[3]
Aeroderivative Single-Cycle Gas Turbine[1]	93	$1,174	$34	$3.50		8,700	200	$375	20	97%	10-30%[3]
Combined Cycle Gas Turbine[1]	500	$924	$17	$2.75		7,000	800	$10,000	20	95%	
Nuclear[1]	1,000	$2,970	$89	$1.50	$6				30	90%	70-80% or higher[3]
Large Wind Farm[1]	100	$1,741	$37	$0					20	98%	13.5-43%[4]
Landfill Gas[1]	1	$2,288	$140	$0	$0	10,000			15	85%	
Wood-Residue Biomass[1]	20	$2,096	$231	$4.00	$23	14,800			20	85%	
Wastewater Biogas[1]	2	$4,215	$68	$13.00	$0	10,000			15	85%	85%
Small Wind Farm[1]	10	$2,750	$41	$0					20	98%	13.5-43%[4]
District Energy Combined Heat and Power[1]	2	$2,346	$24	$8.00		5,700	0	$0	20	95%	
Industrial Combined Heat and Power[1]	50	$1,413	$22	$3.00		6,300	150	$0	20	95%	
Gas Engine Distributed Generation[1]	0.5	$1,172	$9	$16.00		10,770	0	$0	15	85%	
Roof-mounted Solar[2]	0.5	$6,690	$12	$0					20		13%
Ground-mounted Solar[2]	10	$4,600	$15	$0					20		14%

Sources:
1 "Evaluation of Costs of New Entry, Prepared for: Ontario Power Authority", Navigant Consulting, February 21, 2007, page 35, biogas capacity factor on page 30 (Exhibit CDA-49).
2 "Proposed Feed-In Tariff Price Schedule Stakeholder Engagement - Session 4", Ontario Power Authority, April 7, 2009, page 36. Shown statistics are in 2008 C$ (Exhibit CDA-46).
3 IESO Monthly Generator Disclosure Report Overview, http://www.ieso.ca/imoweb/marketdata/genDisclosure.asp
4 Dr. Khaqan Kahn, Ontario IESO, "Growing Wind in Canada: An Ontario Perspective on Wind", CanWEA 2008 Annual Conference and Trade Show, October 20, 2008, p. 9 (Exhibit CDA-47).

Table 3: Cost and Operating Characteristics of Different Generating Technologies

[656] Canada's first written submission (DS412), para. 27.
[657] Highlights of the *Electricity Restructuring Act of 2004*, Exhibit JPN-9.
[658] Minister's 2009 FIT Direction, Exhibit JPN-102, p. 1.
[659] FIT Rules, Exhibit JPN-119, Section 1.1.
[660] Hogan Report, Exhibit CDA-2, pp. 15-18 and 36.
[661] Hogan Report, Exhibit CDA-2, Table 1, p. 8.

9.22 According to Professor Hogan, the major costs differences between solar and windpower generating facilities compared with more "conventional" technologies exist for the following reasons:

> The relatively small scale of wind and solar facilities leads to few if any economies of scale in generation in comparison with large nuclear, coal, hydro and gas plants.
>
> Wind and solar facilities have relatively low capacity factors, due to their dependence on the wind and the sun, meaning that the generating facilities produce electricity for a much smaller proportion of the hours of the year or day than conventional generating technologies.
>
> The relatively small base of experience in operating wind and solar generating facilities means that there are fewer efficiencies in operating new facilities.
>
> The lack of experience in constructing wind and solar generating facilities, leading to relatively fewer efficiencies in constructing new facilities[662].

9.23 Thus, by contracting to purchase electricity produced from solar PV and windpower technologies under the FIT Programme at a price intended to provide for a reasonable return on the investment associated with a "typical" project, the Government of Ontario ensures that qualifying generators are remunerated at a level that allows them to recoup the entirety of their "very high" capital costs. As the complainants argue and Canada accepts, such levels of remuneration would never be achieved through the unconstrained forces of supply and demand in a competitive wholesale electricity market in Ontario. Nor could they be achieved within the constrained forces of supply and demand which actually do operate within the wholesale electricity market in Ontario, without an intervention which remunerates the facilities which generate power from solar PV and windpower technologies at a higher rate than is paid in respect of electricity generated by the other technologies[663]. It follows that by bringing these high cost and less efficient electricity producers into the wholesale electricity market, when they would otherwise not be present, the Government of Ontario's purchases of electricity from solar PV and windpower generators under the FIT Programme clearly confer a benefit upon the relevant FIT generators, within the meaning of Article 1.1(b) of the SCM Agreement.

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[662] Hogan Report, Exhibit CDA-2, p. 10.

[663] Moreover, both Japan and the European Union point to the 20-year guaranteed pricing available to FIT generators as features of the FIT and microFIT Contracts that demonstrate the existence of benefit. See e.g. Japan's opening statement at the second meeting of the Panel, paras. 10-13; and European Union's opening statement at the second meeting of the Panel, para. 22.

WORLD TRADE ORGANIZATION

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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

FIRST AND SECOND WRITTEN SUBMISSIONS OF THE PARTIES, RESPONSES TO QUESTIONS AND ORAL STATEMENTS OF THE PARTIES AT THE FIRST AND SECOND SUBSTANTIVE MEETINGS OF THE PANEL

ANNEX A-1

INTEGRATED EXECUTIVE SUMMARY OF JAPAN

TABLE OF CONTENTS

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

[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;

[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]

[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

[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.

[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

INTEGRATED EXECUTIVE SUMMARY OF THE EUROPEAN UNION

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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

TABLE OF CONTENTS

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).

[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,

[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

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.

[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

* 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)

TABLE OF CONTENTS

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.

[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.

[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

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*.

[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]

[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.

WORLD TRADE ORGANIZATION

WT/DS412/R/Add.1
WT/DS426/R/Add.1
19 December 2012

(12-6816)

Original: English

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.

LIST OF ANNEXES

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REQUESTS FOR THE ESTABLISHMENT OF A PANEL

ANNEX A

FIRST AND SECOND WRITTEN SUBMISSIONS OF THE PARTIES, RESPONSES TO QUESTIONS AND ORAL STATEMENTS OF THE PARTIES AT THE FIRST AND SECOND SUBSTANTIVE MEETINGS OF THE PANEL

ANNEX A-1

INTEGRATED EXECUTIVE SUMMARY OF JAPAN

TABLE OF CONTENTS

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

[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;

[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]

[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

[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.

[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

INTEGRATED EXECUTIVE SUMMARY OF THE EUROPEAN UNION

TABLE OF CONTENTS

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

TABLE OF CONTENTS

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).

[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,

[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

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.

[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

* 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)

TABLE OF CONTENTS

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.

[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.

[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

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*.

[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]

[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.