



**CANADA – CERTAIN MEASURES AFFECTING THE RENEWABLE ENERGY  
GENERATION SECTOR**

**CANADA – MEASURES RELATING TO THE FEED-IN TARIFF PROGRAM**

AB-2013-1

*Reports of the Appellate Body*

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Note by the Secretariat:

The Appellate Body is issuing these Reports in the form of a single document constituting two separate Appellate Body Reports: WT/DS412/AB/R and WT/DS426/AB/R. The cover page, preliminary pages, sections 1 through 5 and the annexes are common to both Reports. The page header throughout the document bears the two document symbols WT/DS412/AB/R and WT/DS426/AB/R, with the following exceptions: section 6 on pages JPN-141 and JPN-142, which bears the document symbol for and contains the Appellate Body's findings and conclusions in the Appellate Body Report WT/DS412/AB/R; and section 6 on pages EU-143 and EU-144, which bears the document symbol for and contains the Appellate Body's findings and conclusions in the Appellate Body Report WT/DS426/AB/R.

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**Table of Contents**

<b>1</b>	<b>INTRODUCTION</b> .....	<b>15</b>
<b>2</b>	<b>ARGUMENTS OF THE PARTICIPANTS AND THIRD PARTICIPANTS</b> .....	<b>25</b>
<b>2.1</b>	<b>Claims of error by Canada – Appellant</b> .....	<b>25</b>
2.1.1	Article III:8(a) of the GATT 1994.....	25
2.1.2	Article 11 of the DSU – "Commercial resale" .....	27
<b>2.2</b>	<b>Arguments of Japan – Appellee</b> .....	<b>30</b>
2.2.1	Article III:8(a) of the GATT 1994.....	30
2.2.2	Article 11 of the DSU – "Commercial resale" .....	31
<b>2.3</b>	<b>Arguments of the European Union – Appellee</b> .....	<b>32</b>
2.3.1	Article III:8(a) of the GATT 1994.....	32
2.3.2	Article 11 of the DSU – "Commercial resale" .....	34
<b>2.4</b>	<b>Claims of error by Japan – Other appellant</b> .....	<b>37</b>
2.4.1	The order in which the Panel dealt with Japan's claims under the SCM Agreement and its claims under the TRIMs Agreement and the GATT 1994.....	37
2.4.2	Claims under Article III:8(a) of the GATT 1994.....	38
2.4.2.1	The Panel's finding that the FIT Programme and Contracts involve "procurement by governmental agencies of products purchased" .....	38
2.4.2.2	The Panel's interpretation of the word "for" in term "for governmental purposes" .....	39
2.4.2.3	The Panel's interpretation and application of the term "with a view to commercial resale".....	40
2.4.3	The Panel's decision to exercise judicial economy with respect to Japan's "stand-alone" claim under Article III:4 of the GATT 1994 .....	41
2.4.4	Claims under the SCM Agreement .....	42
2.4.4.1	Article 1.1(a) – "Financial contribution" or "income or price support" .....	42
2.4.4.2	Article 1.1(b) – "Benefit" .....	44
2.4.4.3	Article 11 of the DSU – "Benefit" .....	47
<b>2.5</b>	<b>Claims of error by the European Union – Other appellant</b> .....	<b>48</b>
2.5.1	The relationship between the TRIMs Agreement and Article III:4 of the GATT 1994.....	48
2.5.2	Claims under Article III:8(a) of the GATT 1994.....	49
2.5.2.1	The Panel's finding that the domestic content requirements "govern" procurement of electricity .....	50
2.5.2.2	The Panel's interpretation of the term "governmental purposes" .....	51
2.5.3	Claims under the SCM Agreement .....	52
2.5.3.1	Article 1.1(b) – "Benefit" .....	52
2.5.3.2	Article 11 of the DSU – "Benefit" .....	54
<b>2.6</b>	<b>Arguments of Canada – Appellee</b> .....	<b>56</b>
2.6.1	The order in which the Panel dealt with Japan's claims under the SCM Agreement and its claims under the TRIMs Agreement and the GATT 1994.....	56
2.6.2	The relationship between the TRIMs Agreement and Article III:4 of the GATT 1994.....	56
2.6.3	Claims under Article III:8(a) of the GATT 1994.....	57
2.6.3.1	The Panel's finding that the FIT Programme and Contracts involve "procurement by governmental agencies of products purchased" .....	57
2.6.3.2	The Panel's finding that the domestic content requirements "govern" the procurement of electricity .....	58
2.6.3.3	The Panel's interpretation of the term "governmental purposes" .....	58
2.6.3.4	The Panel's interpretation of the word "for" in the term "for governmental purposes" .....	59
2.6.3.5	The Panel's interpretation of the term "with a view to commercial resale".....	59
2.6.3.6	Canada's request for completion of the analysis.....	60

2.6.4	The Panel's decision to exercise judicial economy with respect to Japan's "stand-alone" claim under Article III:4 of the GATT 1994 .....	61
2.6.5	Claims under the SCM Agreement .....	61
2.6.5.1	Article 1.1(a) – "Financial contribution" or "income or price support" .....	61
2.6.5.2	Article 1.1(b) – "Benefit" .....	63
2.6.5.3	Article 11 of the DSU – "Benefit" .....	65
<b>2.7</b>	<b>Arguments of the third participants .....</b>	<b>66</b>
2.7.1	Australia .....	66
2.7.2	Brazil .....	67
2.7.3	China .....	68
2.7.4	India .....	69
2.7.5	Norway .....	69
2.7.6	Saudi Arabia .....	69
2.7.7	Turkey .....	70
2.7.8	United States .....	70
<b>3</b>	<b>ISSUES RAISED IN THIS APPEAL .....</b>	<b>73</b>
<b>4</b>	<b>BACKGROUND AND OVERVIEW OF THE MEASURES AT ISSUE .....</b>	<b>74</b>
<b>4.1</b>	<b>Electricity networks .....</b>	<b>74</b>
<b>4.2</b>	<b>Ontario's electricity market .....</b>	<b>76</b>
<b>4.3</b>	<b>The FIT Programme .....</b>	<b>81</b>
<b>5</b>	<b>ANALYSIS OF THE APPELLATE BODY .....</b>	<b>83</b>
<b>5.1</b>	<b>The order in which the Panel dealt with Japan's claims under the SCM Agreement and its claims under the TRIMs Agreement and the GATT 1994 .....</b>	<b>83</b>
<b>5.2</b>	<b>The applicability of Article III:8(a) of the GATT 1994 to measures falling under Article 2.2 of the TRIMs Agreement and the Illustrative List annexed thereto .....</b>	<b>85</b>
5.2.1	The Panel's findings .....	86
5.2.2	Claims and arguments on appeal .....	87
5.2.3	Is Article III:8(a) of the GATT 1994 applicable to measures falling within the scope of Article 2.2 of the TRIMs Agreement and the Illustrative List annexed thereto? .....	88
<b>5.3</b>	<b>Article III:8(a) of the GATT 1994 .....</b>	<b>91</b>
5.3.1	The Panel's findings .....	91
5.3.2	Claims and arguments on appeal .....	94
5.3.3	Interpretation of Article III:8(a) of the GATT 1994 .....	96
5.3.4	Application of Article III:8(a) of the GATT 1994 to the facts of these disputes .....	101
<b>5.4</b>	<b>Did the Panel properly exercise judicial economy when it declined to make a finding under Japan's "stand-alone" claim under Article III:4 of the GATT 1994? .....</b>	<b>103</b>
<b>5.5</b>	<b>Claims under the SCM Agreement .....</b>	<b>108</b>
5.5.1	Article 1.1(a) – "Financial contribution" or "income or price support" .....	108
5.5.1.1	The Panel's findings .....	109
5.5.1.2	Whether the Panel erred in finding that the FIT Programme and Contracts are government "purchases [of] goods" under Article 1.1(a)(1)(iii) of the SCM Agreement .....	110
5.5.1.3	Did the Panel err in exercising judicial economy with respect to the allegations that the measures at issue constitute "income or price support"? .....	116

5.5.2	Article 1.1(b) – "Benefit" .....	117
5.5.2.1	The Panel's findings.....	119
5.5.2.2	Whether the Panel erred in finding that the European Union and Japan failed to establish that the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement.....	121
5.5.2.3	Whether the Panel acted inconsistently with Article 11 of the DSU in finding that the European Union and Japan failed to establish that the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement .....	134
5.5.2.4	Completion of the analysis .....	134
<b>6</b>	<b>FINDINGS AND CONCLUSIONS IN THE APPELLATE BODY REPORT WT/DS412/AB/R.....</b>	<b>JPN-141</b>
<b>6</b>	<b>FINDINGS AND CONCLUSIONS IN THE APPELLATE BODY REPORT WT/DS426/AB/R.....</b>	<b>EU-143</b>
ANNEX 1	NOTIFICATION OF AN APPEAL BY CANADA .....	145
ANNEX 2	NOTIFICATION OF AN OTHER APPEAL BY JAPAN .....	146
ANNEX 3	NOTIFICATION OF AN OTHER APPEAL BY THE EUROPEAN UNION .....	149
ANNEX 4	PROCEDURAL RULING BY THE APPELLATE BODY .....	152

## CASES CITED IN THESE REPORTS

Short Title	Full Case Title and Citation
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, 1527
<i>Canada – Aircraft</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377
<i>Canada – Aircraft (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU</i> , WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, p. 4299
<i>Canada – Autos</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985
<i>Canada – Autos</i>	Panel Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, 3043
<i>Canada – Dairy</i>	Appellate Body Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products</i> , WT/DS103/AB/R, WT/DS113/AB/R and Corr.1, adopted 27 October 1999, DSR 1999:V, p. 2057
<i>Canada – Feed-in Tariff Program</i>	Panel Report, <i>Canada – Measures Relating to the Feed-in Tariff Program</i> , WT/DS426/R and Add.1, circulated to WTO Members 19 December 2012
<i>Canada – Periodicals</i>	Appellate Body Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449
<i>Canada – Renewable Energy</i>	Panel Report, <i>Canada – Certain Measures Affecting the Renewable Energy Generation Sector</i> , WT/DS412/R and Add.1, circulated to WTO Members 19 December 2012
<i>Canada – Wheat Exports and Grain Imports</i>	Appellate Body Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, p. 2739
<i>Canada – Wheat Exports and Grain Imports</i>	Panel Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/R, adopted 27 September 2004, upheld by Appellate Body Report WT/DS276/AB/R, DSR 2004:VI, 2817
<i>Chile – Price Band System</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3045 (Corr.1, DSR 2006:XII, 5473)
<i>China – Auto Parts</i>	Appellate Body Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, adopted 12 January 2009, DSR 2009:I, p. 3

Short Title	Full Case Title and Citation
<i>China – Intellectual Property Rights</i>	Panel Report, <i>China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights</i> , WT/DS362/R, adopted 20 March 2009, DSR 2009:V, 2097
<i>China – Publications and Audiovisual Products</i>	Panel Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, DSR 2010:II, 261
<i>China – Raw Materials</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
<i>EC – Bananas III</i>	Panel Reports, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , (Ecuador) WT/DS27/R/ECU, (Guatemala and Honduras) WT/DS27/R/GTM, WT/DS27/R/HND, (Mexico) WT/DS27/R/MEX, (United States) WT/DS27/R/USA, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, p. 695 to DSR:1997:III, p. 1085
<i>EC – Export Subsidies on Sugar</i>	Appellate Body Report, <i>European Communities – Export Subsidies on Sugar</i> , WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005, DSR 2005:XIII, p. 6365
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
<i>EC – Sardines</i>	Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359
<i>EC – Selected Customs Matters</i>	Panel Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/R, adopted 11 December 2006, as modified by Appellate Body Report WT/DS315/AB/R, DSR 2006:IX-X, p. 3915
<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011
<i>India – Autos</i>	Panel Report, <i>India – Measures Affecting the Automotive Sector</i> , WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, DSR 2002:V, p. 1827
<i>Indonesia – Autos</i>	Panel Report, <i>Indonesia – Certain Measures Affecting the Automobile Industry</i> , 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
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
<i>Japan – DRAMs (Korea)</i>	Appellate Body Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , WT/DS336/AB/R and Corr.1, adopted 17 December 2007, DSR 2007:VII, p. 2703

Short Title	Full Case Title and Citation
<i>Korea – Alcoholic Beverages</i>	Appellate Body Report, <i>Korea – Taxes on Alcoholic Beverages</i> , WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, 3
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5
<i>Philippines – Distilled Spirits</i>	Appellate Body Reports, <i>Philippines – Taxes on Distilled Spirits</i> , WT/DS396/AB/R / WT/DS403/AB/R, adopted 20 January 2012
<i>Turkey – Rice</i>	Panel Report, <i>Turkey – Measures Affecting the Importation of Rice</i> , WT/DS334/R, adopted 22 October 2007, DSR 2007:VI, 2151
<i>US – Anti-Dumping and Countervailing Duties (China)</i>	Appellate Body Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , WT/DS379/AB/R, adopted 25 March 2011
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
<i>US – Certain EC Products</i>	Appellate Body Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, p. 373
<i>US – COOL</i>	Appellate Body Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
<i>US – Large Civil Aircraft (2<sup>nd</sup> complaint)</i>	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/AB/R, adopted 23 March 2012
<i>US – Section 211 Appropriations Act</i>	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, p. 589
<i>US – Softwood Lumber IV</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, 571
<i>US – Softwood Lumber IV</i>	Panel Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/R and Corr.1, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R, DSR 2004:II, p. 641
<i>US – Tuna II (Mexico)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/AB/R, adopted 13 June 2012
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
<i>US – Upland Cotton</i>	Panel Report, <i>United States – Subsidies on Upland Cotton</i> , 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, p. 299

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Short Title	Full Case Title and Citation
<i>US – Upland Cotton (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, 809
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323



### ABBREVIATIONS USED IN THESE REPORTS

Abbreviation	Description
CES	Clean Energy Supply
CHP	Combined Heat and Power
complainants	Japan and the European Union
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
Electricity Act of 1998	Electricity Act, 1998, <i>Service Ontario 1998</i> , Chapter 15, Schedule A, as amended (Panel Exhibit JPN-5)
Electricity Restructuring Act of 2004	An Act to amend the Electricity Act, 1998 and the Ontario Energy Board Act, 1998 and to make consequential amendments to other Acts, <i>Service Ontario 2004</i> , Chapter 23 (Panel Exhibits CDA-18 and JPN-8)
EU Panel Report	Panel Report, <i>Canada – Measures Relating to the Feed-in Tariff Program</i> (WT/DS426/R)
FIT	feed-in tariff
FIT Programme	Ontario Power Authority Feed-in Tariff Program
FIT Programme Interpretations	FIT Program Interpretations of the Domestic Content Requirements (Panel Exhibit EU-7)
FIT Standard Definitions	Ontario Power Authority, Feed-in Tariff Appendix 1 – Standard Definitions (version 1.5.1), 15 July 2011 (Panel Exhibit JPN-135)
GA	Global Adjustment
GATT 1994	General Agreement on Tariffs and Trade 1994
GPA	Agreement on Government Procurement
Green Energy and Green Economy Act of 2009	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, <i>Service Ontario 2009</i> , Chapter 12 (Panel Exhibit JPN-101)
HCI	Hydroelectric Contract Initiative
HEPCO	Hydro-Electric Power Commission of Ontario
HOEP	Hourly Ontario Energy Price
Hogan Report	Professor William W. Hogan, Harvard University, "Overview of the Electricity System in the Province of Ontario", 21 December 2011 (Panel Exhibit CDA-2)
IESO	Independent Electricity System Operator
IESO Market Manual	Independent Electricity System Operator, Market Manual
IESO Market Rules	Independent Electricity System Operator, Market Rules for the Ontario Market
IPP	Independent Power Producer
Japan Panel Report	Panel Report, <i>Canada – Certain Measures Affecting the Renewable Energy Generation Sector</i> (WT/DS412/R)
kW	kilowatts
kWh	kilowatt hour

Abbreviation	Description
LDC	Local Distribution Company
MCP	market clearing price
Memorandum of Agreement	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 (Panel Exhibit CDA-107)
Minister's 2009 FIT Direction	Direction dated 24 September 2009 from the Deputy Premier and Minister of Energy and Infrastructure to the Chief Executive Officer, Ontario Power Authority to develop a feed-in tariff (FIT) programme (Panel Exhibit JPN-102)
MW	megawatts
NUG	Non-Utility Generator
OEB	Ontario Energy Board
OEFC	Ontario Electricity Financial Corporation
OPA	Ontario Power Authority
OPA Proposed FIT Price Schedule Presentation	OPA, Presentation on "Proposed Feed-in Tariff Price Schedule Stakeholder Engagement – Session 4", 7 April 2009 (Panel Exhibit CDA-46)
OPG	Ontario Power Generation
Panel Reports	Panel Report, <i>Canada – Certain Measures Affecting the Renewable Energy Generation Sector</i> (WT/DS412/R) and Panel Report, <i>Canada – Measures Relating to the Feed-in Tariff Program</i> (WT/DS426/R)
PJM Interconnection	Mid-Atlantic region of the United States
PV	photovoltaic
RES	Renewable Energy Supply
RESOP	Renewable Energy Standard Offer Program
RPP	Regulated Price Plan
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SSS	Standard Supply Service
TRIM	trade-related investment measure
TRIMs Agreement	Agreement on Trade-Related Investment Measures
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

**PANEL EXHIBITS CITED IN THESE REPORTS**

Exhibit	Description
CDA-2	Professor William W. Hogan, Harvard University, "Overview of the Electricity System in the Province of Ontario", 21 December 2011
CDA-6	Government of Ontario, <i>Ontario's Long-Term Energy Plan</i> (Queen's Printer for Ontario, 2010)
CDA-16	Ontario Energy Board webpage, "Electricity Prices: ... OEB's Role in Electricity Prices", available at: < <a href="http://www.ontarioenergyboard.ca/OEB/Consumers/Electricity/Electricity+Prices#role">http://www.ontarioenergyboard.ca/OEB/Consumers/Electricity/Electricity+Prices#role</a> >
CDA-18	An Act to amend the Electricity Act, 1998 and the Ontario Energy Board Act, 1998 and to make consequential amendments to other Acts, <i>Service Ontario 2004</i> , Chapter 23
CDA-46	Ontario Power Authority, Presentation on "Proposed Feed-in Tariff Price Schedule Stakeholder Engagement – Session 4", 7 April 2009
CDA-52	Ontario Ministry of Energy, Request for Proposals for 300 MW of Renewable Energy Supply (RES I), issued 24 June 2004
CDA-53	Ontario Ministry of Energy, Request for Proposals for 1,000 MW of Renewable Energy Supply (RES II), issued 17 June 2005
CDA-54	Ontario Ministry of Energy, Request for Proposals for approximately 500 MW of Renewable Energy Supply (RES III), issued 22 August 2008
CDA-55	Ontario Power Authority, Joint Report to the Minister of Energy: Recommendations on a Standard Offer Program for Small Generators connected to a Distribution System, 17 March 2006
CDA-59	Electricity Conservation & Supply Task Force, Tough Choices: Addressing Ontario's Power Needs, Final Report to the Minister of Energy (January 2004)
CDA-64	Ontario Energy Board, EB-2009-0084, Report of the Board on the Cost of Capital for Ontario's Regulated Utilities, 11 December 2009
CDA-85	S. Arrowsmith, "Government Procurement in the WTO", <i>Studies in Transnational Economic Law</i> , Vol. 16 (Kluwer Law International, 2002), p. 53
CDA-106	Independent Electricity System Operator, Market Rules for the Ontario Market, Chapter 11 of the 7 March 2012 issue
CDA-107	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
CDA-128	S. Arrowsmith, "Government Procurement in the WTO", <i>Studies in Transnational Economic Law</i> , Vol. 16 (Kluwer Law International, 2002), p. 51
CDA-129	A. La Chimia and S. Arrowsmith, "Addressing Tied Aid: Towards a More Development-Oriented WTO?", <i>Journal of International Economic Law</i> , Vol. 12 (September 2009), pp. 707-747
EU-4	Ontario Power Authority, Feed-in Tariff Program Rules (version 1.5.1), 31 October 2011
EU-5	Ontario Power Authority, Feed-in Tariff Contract (version 1.5.1), 31 October 2011
EU-6	Ontario Power Authority, microFIT Contract (version 1.6.1), 31 October 2011
EU-7	FIT Program Interpretations of the Domestic Content Requirements
EU-20	European Wind and Energy Association, <i>The Economics of Wind Energy</i> (March 2009) (extracts)

Exhibit	Description
JPN-5	Electricity Act of 1998, <i>Service Ontario 1998</i> , Chapter 15, Schedule A, as amended
JPN-7	Blake, Cassels & Graydon webpage, "Overview of Electricity Regulation in Canada", accessed at: < <a href="http://www.blakes.com/english/legal_updates/reference_guides/Overview%20of%20Electricity%20in%20Canada.pdf">http://www.blakes.com/english/legal_updates/reference_guides/Overview%20of%20Electricity%20in%20Canada.pdf</a> > (no longer available)
JPN-8	An Act to amend the Electricity Act, 1998 and the Ontario Energy Board Act, 1998 and to make consequential amendments to other Acts, <i>Service Ontario 2004</i> , Chapter 23
JPN-11	IESO webpage, "Global Adjustment Archive", available at: < <a href="http://www.ieso.ca/imoweb/b100/ga_archive.asp">http://www.ieso.ca/imoweb/b100/ga_archive.asp</a> >
JPN-26	Ontario Power Authority, A Progress Report on Electricity Supply: Fourth Quarter 2010
JPN-30	FIT Price Schedule, 3 June 2011
JPN-31	microFIT Price Schedule, 13 August 2010
JPN-32	FIT Price Schedule, 13 August 2010
JPN-33	FIT Price Schedule, 2 July 2010
JPN-34	FIT Price Schedule, 24 September 2009
JPN-38	Ontario Power Authority, Micro Feed-in Tariff Program: Program Overview (2010)
JPN-41	Hydro One, News Release, "Hydro One Releases 2010 Year-End Financial Results", 10 February 2011, available at: < <a href="http://www.hydroone.com/OurCompany/MediaCentre/Documents/NewsReleases2011/02_10_2011_Year-End_Financials.pdf">http://www.hydroone.com/OurCompany/MediaCentre/Documents/NewsReleases2011/02_10_2011_Year-End_Financials.pdf</a> >
JPN-43	Hydro One webpage, "Our Subsidiaries", available at: < <a href="http://www.hydroone.com/OurCompany/Pages/OurSubsidiaries.aspx">http://www.hydroone.com/OurCompany/Pages/OurSubsidiaries.aspx</a> >
JPN-44	Independent Electricity System Operator webpage, "The Power System", available at: < <a href="http://www.ieso.ca/imoweb/siteShared/power_system.asp">http://www.ieso.ca/imoweb/siteShared/power_system.asp</a> >
JPN-46	Electricity Distributors Association webpage, "Delivering Safe, Reliable and Environmentally Responsible Electricity to Ontarians", July 2010, available at: < <a href="http://www.eda-on.ca/eda/edaweb.nsf/0/762d9f4c8b3b490385257331004c49ba/\$FILE/DELIVERING_ECONOMIC_BENEFITS.pdf">http://www.eda-on.ca/eda/edaweb.nsf/0/762d9f4c8b3b490385257331004c49ba/\$FILE/DELIVERING_ECONOMIC_BENEFITS.pdf</a> >
JPN-47	IESO webpage, "Find Your Local Utility", available at: < <a href="http://www.ieso.ca/imoweb/siteshared/local_dist.asp?sid=ic">http://www.ieso.ca/imoweb/siteshared/local_dist.asp?sid=ic</a> >
JPN-48	Department of Justice Canada, Constitution Acts, 1867 to 1982, Part VI – Distribution of Legislative Powers, Sections 91-95
JPN-49	Government of Ontario webpage, "All Agencies List", available at: < <a href="http://www.pas.gov.on.ca/scripts/en/BoardsList.asp">http://www.pas.gov.on.ca/scripts/en/BoardsList.asp</a> >
JPN-50	Government of Ontario webpage, "Agency Details, Ontario Power Authority", available at: < <a href="http://www.pas.gov.on.ca/scripts/en/BoardDetails.asp?boardID=141181">http://www.pas.gov.on.ca/scripts/en/BoardDetails.asp?boardID=141181</a> >
JPN-51	Government of Ontario webpage, "Agencies: Boards, Commissions, Councils, Authorities and Foundations", available at: < <a href="http://www.ontario.ca/en/your_government/ONT06_018949.html">http://www.ontario.ca/en/your_government/ONT06_018949.html</a> >
JPN-52	Government of Ontario webpage, "About the Ministry of Energy", available at: < <a href="http://www.energy.gov.on.ca/en/about/">http://www.energy.gov.on.ca/en/about/</a> >
JPN-55	Ontario Power Authority webpage, "Directives to OPA from Minister of Energy", available at: < <a href="http://www.powerauthority.on.ca/about-us/directives-opa-minister-energy-and-infrastructure">http://www.powerauthority.on.ca/about-us/directives-opa-minister-energy-and-infrastructure</a> >

Exhibit	Description
JPN-57	Government of Ontario webpage, "Agency Details, Independent Electricity System Operator", available at: < <a href="http://www.pas.gov.on.ca/scripts/en/BoardDetails.asp?boardID=128220">http://www.pas.gov.on.ca/scripts/en/BoardDetails.asp?boardID=128220</a> >
JPN-59	Independent Electricity System Operator webpage, "About the IESO", available at: < <a href="http://www.ieso.ca/imoweb/about/about_the_ieso.asp">http://www.ieso.ca/imoweb/about/about_the_ieso.asp</a> >
JPN-62	Independent Electricity System Operator, Settlement Statements and Invoices: Marketplace Training (December 2010)
JPN-63	Government of Ontario webpage, "Agency Details, Ontario Energy Board", available at: < <a href="http://www.pas.gov.on.ca/scripts/en/BoardDetails.asp?boardID=764">http://www.pas.gov.on.ca/scripts/en/BoardDetails.asp?boardID=764</a> >
JPN-64	Ontario Energy Board webpage, "What We Do", available at: < <a href="http://www.ontarioenergyboard.ca/OEB/Industry/About+the+OEB/What+We+Do">http://www.ontarioenergyboard.ca/OEB/Industry/About+the+OEB/What+We+Do</a> >
JPN-71	Ontario Energy Board, Retail Settlement Code, 1 October 2011 revision
JPN-75	IESO webpage, "Global Adjustment", available at: < <a href="http://www.ieso.ca/imoweb/b100/b100_ga.asp">http://www.ieso.ca/imoweb/b100/b100_ga.asp</a> >
JPN-79	Independent Electricity System Operator, Market Rules for the Ontario Market, Chapters 7 and 9 of the 12 October 2011 issue
JPN-80	Independent Electricity System Operator, Introduction to Ontario's Physical Markets: IESO Training (October 2011)
JPN-82	Independent Electricity System Operator, Market Manual, Part 5.5
JPN-84	Independent Electricity System Operator, <i>HST Guide for IESO Transactions</i> , Issue 26.0 (12 October 2011)
JPN-90	Independent Electricity System Operator webpage, "Retail Contracts", available at: < <a href="http://www.ieso.ca/imoweb/siteshared/retailers.asp">http://www.ieso.ca/imoweb/siteshared/retailers.asp</a> >
JPN-91	Independent Electricity System Operator brochure, "What You Need to Know About Changes to Electricity Prices Coming November 1, 2009: A Guide For Ontario's Public Sector"
JPN-101	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, <i>Service Ontario 2009</i> , Chapter 12
JPN-102	Direction dated 24 September 2009 from the Deputy Premier and Ontario Minister of Energy and Infrastructure to the Chief Executive Officer, Ontario Power Authority to develop a feed-in tariff (FIT) program
JPN-119	Ontario Power Authority, Feed-in Tariff Program Rules (version 1.5.1), 15 July 2011
JPN-120	Ontario Power Authority, Feed-in Tariff Program Rules (version 1.1), 30 September 2009
JPN-121	Ontario Power Authority, Feed-in Tariff Program Rules (version 1.2), 19 November 2009
JPN-122	Ontario Power Authority, Feed-in Tariff Program Rules (version 1.3.0), 9 March 2010
JPN-123	Ontario Power Authority, Feed-in Tariff Program Rules (version 1.3.1), 2 July 2010
JPN-124	Ontario Power Authority, Feed-in Tariff Program Rules (version 1.3.2), 29 October 2010
JPN-125	Ontario Power Authority, Feed-in Tariff Program Rules (version 1.4), 8 December 2010
JPN-126	Ontario Power Authority, Feed-in Tariff Program Rules (version 1.5), 3 June 2011
JPN-127	Ontario Power Authority, Feed-in Tariff Contract (version 1.5.1), 15 July 2011

Exhibit	Description
JPN-128	Ontario Power Authority, Feed-in Tariff Contract (version 1.1), 30 September 2009
JPN-129	Ontario Power Authority, Feed-in Tariff Contract (version 1.2), 19 November 2009
JPN-130	Ontario Power Authority, Feed-in Tariff Contract (version 1.3.0), 9 March 2010
JPN-131	Ontario Power Authority, Feed-in Tariff Contract (version 1.3.1), 2 July 2010
JPN-132	Ontario Power Authority, Feed-in Tariff Contract (version 1.3.2), 29 October 2010
JPN-133	Ontario Power Authority, Feed-in Tariff Contract (version 1.4), 8 December 2010
JPN-134	Ontario Power Authority, Feed-in Tariff Contract (version 1.5), 3 June 2011
JPN-135	Ontario Power Authority, Feed-in Tariff Appendix 1 – Standard Definitions (version 1.5.1), 15 July 2011
JPN-145	Ontario Power Authority, FIT Application Form, 1 December 2009
JPN-154	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", as amended
JPN-157	Ontario Power Authority, microFIT Rules (version 1.6.1), 10 August 2011
JPN-158	Ontario Power Authority, microFIT Rules (version 1.1), 30 September 2009
JPN-159	Ontario Power Authority, microFIT Rules (version 1.2), 19 November 2009
JPN-160	Ontario Power Authority, microFIT Rules (version 1.3), 10 December 2009
JPN-161	Ontario Power Authority, microFIT Rules (version 1.4), 2 July 2010
JPN-162	Ontario Power Authority, microFIT Rules (version 1.5), 25 August 2010
JPN-163	Ontario Power Authority, microFIT Rules (version 1.6), 8 December 2010
JPN-164	Ontario Power Authority, microFIT Contract (version 1.6.1), 10 August 2011
JPN-165	Ontario Power Authority, microFIT Contract (version 1.1), 30 September 2009
JPN-166	Ontario Power Authority, microFIT Contract (version 1.2), 19 November 2009
JPN-167	Ontario Power Authority, microFIT Contract (version 1.3), 10 December 2009
JPN-168	Ontario Power Authority, microFIT Contract (version 1.4), 2 July 2010
JPN-169	Ontario Power Authority, microFIT Contract (version 1.5), 25 August 2010
JPN-170	Ontario Power Authority, microFIT Contract (version 1.6), 8 December 2010
JPN-171	Ontario Power Authority, Conditional Offer of microFIT Contract (version 1.6.1)
JPN-229	Canada Energy webpage, "Mid and Peak Tier Time-of-Use Rate Rises 8% on May 1", news article posting, <i>The Toronto Star</i> , 19 April 2012, available at: < <a href="http://www.canadaenergy.ca/">http://www.canadaenergy.ca/</a> >
JPN-230	My Rate Energy Ontario, Canada webpage, "Price Protection for Electricity", available at: < <a href="http://myrateenergy.ca/electricity-info.php">http://myrateenergy.ca/electricity-info.php</a> >

WORLD TRADE ORGANIZATION  
APPELLATE BODY

**Canada – Certain Measures Affecting the Renewable Energy Generation Sector (DS412)**

AB-2013-1

**Canada – Measures Relating to the Feed-in Tariff Program (DS426)**

Appellate Body Division:

Ramírez-Hernández, Presiding Member  
Bhatia, Member  
Unterhalter, Member

Canada

*Appellant/Appellee*

Japan

*Other Appellant/Appellee/Third Participant*

European Union

*Other Appellant/Appellee/Third Participant*

Australia, *Third Participant*

Brazil, *Third Participant*

China, *Third Participant*

El Salvador, *Third Participant*

Honduras, *Third Participant*<sup>1</sup>

India, *Third Participant*

Korea, *Third Participant*

Mexico, *Third Participant*

Norway, *Third Participant*

Saudi Arabia, *Third Participant*

Separate Customs Territory of Taiwan, Penghu,

Kinmen and Matsu, *Third Participant*

Turkey, *Third Participant*<sup>2</sup>

United States, *Third Participant*

## 1 INTRODUCTION

1.1. Canada, Japan, and the European Union each appeals certain issues of law and legal interpretations developed in the Panel Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*<sup>3</sup> and *Canada – Measures Relating to the Feed-in Tariff Program*<sup>4</sup> (Panel Reports).<sup>5</sup> The Panel was established<sup>6</sup> to consider complaints by Japan<sup>7</sup> and the European Union<sup>8</sup> (the complainants) with respect to certain domestic content requirements in the feed-in tariff programme (FIT Programme) established by the Canadian Province of Ontario.

<sup>1</sup> In DS412 only.

<sup>2</sup> In DS426 only.

<sup>3</sup> WT/DS412/R, 19 December 2012 (Japan Panel Report (DS412)).

<sup>4</sup> WT/DS426/R, 19 December 2012 (EU Panel Report (DS426)).

<sup>5</sup> The Panel issued its findings in the form of a single document containing two separate reports, with a common cover page, table of contents, and sections I through VII (including the Panel's findings), and with separate conclusions and recommendations in respect of the dispute initiated by Japan and in respect of the dispute initiated by the European Union.

<sup>6</sup> At its meetings held on 20 July 2011 and 20 January 2012, the Dispute Settlement Body (DSB) established two panels pursuant to, respectively, Japan's request in document WT/DS412/5 and the European Union's request in document WT/DS426/5, in accordance with Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). (Panel Reports, para. 1.4)

On 6 October 2011, the Director-General composed the Panel in DS412. With respect to DS426, following the agreement of the parties, the Panel was composed, on 23 January 2012, with the same persons as in DS412. 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. As in the Panel Reports, the Panels in DS412 and DS426 are herein collectively referred to as the "Panel". (See *ibid.*, paras. 1.6 and 1.7 and fn 5 thereto)

<sup>7</sup> Request for the Establishment of a Panel by Japan, WT/DS412/5.

<sup>8</sup> Request for the Establishment of a Panel by the European Union, WT/DS426/5.

1.2. The measures at issue in these disputes, as identified by the Panel<sup>9</sup>, are the following:

- a. the FIT Programme, as evidenced by the following measures:
  - i. the Electricity Act of 1998<sup>10</sup>, 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, 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<sup>11</sup> (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<sup>12</sup> (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. 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"<sup>13</sup>;
  - v. the Independent Electricity System Operator (IESO) Market Manual, including in particular Part 5.5 – Physical Markets Settlement Statements<sup>14</sup>;
  - vi. the IESO Market Rules, including in particular Chapter 7 – System Operations and Physical Markets, Chapter 9 – Settlements and Billing, and Chapter 11 – Definitions<sup>15</sup>;
  - vii. 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 the OPA to develop a feed-in tariff (FIT) programme and include a requirement that the applicant submit a plan for meeting the domestic (i.e. Ontario) content goals in the FIT Rules<sup>16</sup> (Minister's 2009 FIT Direction);
  - viii. all versions of the FIT Rules<sup>17</sup> and microFIT Rules<sup>18</sup> 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<sup>19</sup>, and microFIT Contract, including Appendices and the Conditional Offer of microFIT Contract<sup>20</sup>, issued by the OPA since the inception of the FIT Programme;

<sup>9</sup> Panel Reports, para. 2.1.

<sup>10</sup> *Service Ontario 1998*, Chapter 15, Schedule A (Panel Exhibit JPN-5).

<sup>11</sup> *Service Ontario 2009*, Chapter 12 (Panel Exhibit JPN-101).

<sup>12</sup> *Service Ontario 2004*, Chapter 23 (Panel Exhibits CDA-18 and JPN-8).

<sup>13</sup> As amended (Panel Exhibit JPN-154).

<sup>14</sup> IESO, Market Manual, Part 5.5 (Panel Exhibit JPN-82).

<sup>15</sup> IESO, Market Rules for the Ontario Market, Chapters 7 and 9 of the 12 October 2011 issue (Panel Exhibit JPN-79), and Chapter 11 of the 7 March 2012 issue (Panel Exhibit CDA-106).

<sup>16</sup> Panel Exhibit JPN-102.

<sup>17</sup> Panel Exhibits JPN-119 through JPN-126 and EU-4.

<sup>18</sup> Panel Exhibits JPN-157 through JPN-163.

<sup>19</sup> Panel Exhibits JPN-127 through JPN-134 and EU-5.

<sup>20</sup> Panel Exhibits JPN-164 through JPN-171 and EU-6.



- x. all versions of the FIT Application Form<sup>21</sup> and online microFIT Application issued by the OPA since the inception of the FIT Programme;
  - xi. all versions of the FIT Price Schedule<sup>22</sup> and microFIT Price Schedule<sup>23</sup> issued by the OPA since the inception of the FIT Programme; and
  - xii. all versions of the FIT Program Interpretations of the Domestic Content Requirements<sup>24</sup> (FIT Programme Interpretations) issued by the OPA since the inception of the FIT Programme;
- b. the individual FIT Contracts for wind or solar photovoltaic (PV) sources executed by the OPA since the inception of the FIT Programme; and
  - c. the individual microFIT Contracts for solar PV source executed by the OPA since the inception of the FIT Programme.

1.3. The FIT Programme is a scheme implemented by the Government of the Province of Ontario and its agencies in 2009, through which generators of electricity produced from certain forms of renewable energy are paid a guaranteed price per kilowatt hour (kWh) of electricity delivered into the Ontario electricity system under 20-year or 40-year contracts.<sup>25</sup> 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 PV, renewable biomass, biogas, landfill gas, and waterpower.<sup>26</sup> It is administered by the OPA and implemented through the application of a standard set of rules, standard contracts, and, for each class of generation technology, standard pricing.<sup>27</sup> The FIT Programme is divided into two streams: (i) the FIT stream – for projects with a capacity to produce electricity that exceeds 10 kilowatts (kW), but is no more than 10 megawatts (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.<sup>28</sup> The microFIT stream is intended to provide "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".<sup>29</sup> Only projects that satisfy all of the specific eligibility requirements, and that can be connected to the Ontario electricity system, will be offered a FIT or microFIT Contract by the OPA, and thereby permitted to participate in the FIT Programme.<sup>30</sup>

1.4. Under the FIT stream, electricity generation facilities utilizing windpower and solar PV technologies must comply with "Minimum Required Domestic Content Levels", which must be satisfied in the development and construction of these facilities.<sup>31</sup> The microFIT stream also imposes Minimum Required Domestic Content Levels, but only on generation facilities utilizing solar PV technology.<sup>32</sup> The "Domestic Content Level" of a facility participating in either stream of the FIT Programme is calculated pursuant to a methodology that identifies a range of different "Designated Activities" and an associated "Qualifying Percentage".<sup>33</sup> For each Designated Activity that is performed in relation to a facility, an associated Qualifying Percentage will be achieved. A project's Domestic Content Level "will be determined by adding up the Qualifying Percentages

<sup>21</sup> See Panel Exhibit JPN-145.

<sup>22</sup> Panel Exhibits JPN-30, JPN-32, JPN-33, and JPN-34.

<sup>23</sup> See Panel Exhibit JPN-31.

<sup>24</sup> See Panel Exhibit EU-7.

<sup>25</sup> Panel Reports, para. 7.64.

<sup>26</sup> Panel Reports, para. 7.66 (referring to FIT Rules (version 1.5.1), Section 2.1(a); and OPA, Feed-in Tariff Appendix 1 – Standard Definitions (version 1.5.1), 15 July 2011 (FIT Standard Definitions) (Panel Exhibit JPN-135), Definition Nos. 215 and 216).

<sup>27</sup> Panel Reports, para. 7.67.

<sup>28</sup> Panel Reports, para. 7.66 (referring to FIT Rules (version 1.5.1), Section 2.1(a)(iii); and microFIT Rules (version 1.6.1), Section 2.1(a)(iv)).

<sup>29</sup> Panel Reports, para. 7.209 (quoting OPA, Micro Feed-in Tariff Program: Program Overview (2010) (Panel Exhibit JPN-38), p. 1 and Section 1.2(a); and microFIT Rules (version 1.6.1), Section 1.1).

<sup>30</sup> Panel Reports, paras. 7.68 (referring to FIT Rules (version 1.5.1), Sections 2, 3, and 5.2; and microFIT Rules (version 1.6.1), Sections 2, 3, and 4.1).

<sup>31</sup> Panel Reports, para. 7.9.

<sup>32</sup> Panel Reports, para. 7.64.

<sup>33</sup> Panel Reports, para. 7.159.

associated with all of the Designated Activities performed in relation to that particular project".<sup>34</sup> The Minimum Required Domestic Content Levels prescribed under both streams of the FIT Programme are set out in Table 1.

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

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

\*Solar PV microFIT applications received by the OPA on or before 8 October 2010 may satisfy the 40% domestic content requirement.

Source: Panel Reports, para. 7.158, Table 1, and fn 310 thereto.

1.5. Further information about the factual aspects of these disputes is set forth in greater detail in paragraphs 2.1 and 7.9-7.68 of the Panel Reports, and in section 4 of these Reports.

1.6. Both complainants claimed that the challenged measures are inconsistent with Articles 3.1(b) and 3.2 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), Article 2.1 of the Agreement on Trade-Related Investment Measures (TRIMs Agreement), and Article III:4 of the General Agreement on Tariffs and Trade 1994 (GATT 1994). More specifically, Japan put forward the following claims:

- 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 requirements of the FIT Programme, as well as individually executed FIT and microFIT Contracts for wind and solar PV projects, accord 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 and individually executed FIT and microFIT Contracts for wind and solar PV projects constitute trade-related investment measures (TRIMs) inconsistent with the provisions of Article III of the GATT 1994, and therefore in violation of Article 2.1 of the TRIMs Agreement.<sup>35</sup>

1.7. For its part, the European Union claimed:

- 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 Members of the World Trade Organization (WTO), 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

<sup>34</sup> Panel Reports, para. 7.160.

<sup>35</sup> Panel Reports, para. 3.1.

- 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.<sup>36</sup>

1.8. The Panel Reports were circulated to WTO Members on 19 December 2012.

1.9. In its Reports, the Panel explained that it decided first to assess the complainants' claims under the TRIMs Agreement and the GATT 1994 before entertaining the claims under the SCM Agreement. The Panel explained, in this regard, 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."<sup>37</sup> This suggested to the Panel 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, with the aspects of the FIT Programme, and the FIT and microFIT Contracts, that are at the centre of the complainants' concerns."<sup>38</sup> The Panel stated that it would therefore proceed as follows:

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, 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.<sup>39</sup>

1.10. In response to the complainants' claims under the TRIMs Agreement and the GATT 1994, Canada invoked Article III:8(a) of the GATT 1994, arguing that the FIT Programme is not subject to the obligations of Article III. Canada argued that this is 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 an 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".<sup>40</sup> Both Japan and the European Union disagreed with Canada that the measures at issue fall within Article III:8(a) of the GATT 1994.<sup>41</sup> The European Union additionally countered that Article III:8(a) does not apply to measures that fall within the scope of Article 2.2 of the TRIMs Agreement and paragraph 1(a) of the Illustrative List annexed thereto.<sup>42</sup>

1.11. The Panel thus considered that it had to resolve the following three issues:

- a. whether the measures at issue are TRIMs within the meaning of Article 1 of the TRIMs Agreement<sup>43</sup>;
- b. if so, 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<sup>44</sup>; and

<sup>36</sup> Panel Reports, para. 3.4.

<sup>37</sup> Panel Reports, para. 7.70.

<sup>38</sup> Panel Reports, para. 7.70 (referring to Appellate Body Report, *EC – Bananas III*, para. 204).

<sup>39</sup> Panel Reports, para. 7.70. (fn omitted)

<sup>40</sup> Panel Reports, para. 7.86 (referring to Canada's first written submission to the Panel (DS412), para. 67).

<sup>41</sup> See Panel Reports, paras. 7.74-7.77 and 7.81-7.85.

<sup>42</sup> See Panel Reports, para. 7.80.

<sup>43</sup> Panel Reports, para. 7.108.

<sup>44</sup> Panel Reports, para. 7.113.

- c. 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) of the GATT 1994.<sup>45</sup>

1.12. First, the Panel found 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."<sup>46</sup> Second, the Panel rejected the European Union's argument about the applicability of Article III:8(a) of the GATT 1994 to measures falling within the scope of paragraph 1(a) of the Illustrative List annexed to the TRIMs Agreement. The Panel considered that, "[g]iven the language of Article 2.1, it would ... 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."<sup>47</sup>

1.13. Next, the Panel assessed the measures in the light of the various elements of Article III:8(a) of the GATT 1994. The Panel found 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)"; and (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".<sup>48</sup> However, the Panel found that "the Government of Ontario's 'procurement' of electricity under the FIT Programme is undertaken 'with a view to commercial resale'."<sup>49</sup> In the light of the last intermediate finding, the Panel concluded:

[W]e 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.<sup>50</sup>

1.14. Having found that the measures at issue are not covered by the terms of Article III:8(a), the Panel turned to the assessment of these measures under paragraph 1(a) of the Illustrative List of the TRIMs Agreement. The Panel found 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.<sup>51</sup>

<sup>45</sup> Panel Reports, para. 7.113.

<sup>46</sup> Panel Reports, para. 7.112.

<sup>47</sup> Panel Reports, para. 7.120. (original emphasis)

<sup>48</sup> Panel Reports, para. 7.152.

<sup>49</sup> Panel Reports, para. 7.151.

<sup>50</sup> Panel Reports, para. 7.152.

<sup>51</sup> Panel Reports, para. 7.166.

1.15. Hence, as regards Japan's and the European Union's claims under the TRIMs Agreement and the GATT 1994, the Panel concluded:

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.<sup>52</sup>

1.16. As regards the complainants' claims under the SCM Agreement, the Panel noted Japan's position that the measures at issue are "direct transfer[s] of funds" and "potential direct transfers of funds" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement. Alternatively, Japan submitted that the measures are "income or price support" within the meaning of Article 1.1(a)(2).<sup>53</sup> The European Union's "primary" argument was that the challenged measures constitute "income or price support". The European Union also argued that the measures at issue could be characterized as "direct transfer[s] of funds". In the alternative, the European Union contended that the measures at issue are "potential direct transfers of funds" under subparagraph (i) or "entrust[ment] or direct[i]on" within the meaning of subparagraph (iv) of Article 1.1(a)(1).<sup>54</sup> Conversely, Canada asserted that the FIT Programme and related contracts can only be legally characterized as financial contributions in the form of government "purchases [of] goods".<sup>55</sup>

1.17. The Panel determined that the appropriate legal characterization of the FIT Programme and the FIT and microFIT Contracts is as a "financial contribution" in the form of government "purchases [of] goods" within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.<sup>56</sup> Furthermore, the Panel disagreed with the complainants' argument that they could also be legally characterized as "direct transfer[s] of funds" for the purposes of the SCM Agreement.<sup>57</sup> The Panel also concluded that the measures at issue cannot be "potential direct transfers of funds" under subparagraph (i) or a form of financial contribution involving government entrustment or direction within the meaning of subparagraph (iv) of Article 1.1(a)(1).<sup>58</sup> Moreover, on the grounds of judicial economy, the Panel decided to make no findings on whether the measures at issue may be legally characterized as "income or price support" under Article 1.1(a)(2) of the SCM Agreement.<sup>59</sup>

1.18. Having determined that the measures constitute a financial contribution, the Panel proceeded to examine whether they confer a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement. The Panel observed, in this regard, that the complainants' main line of argumentation was 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. To substantiate this argument, the complainants advanced a number of proposed competitive wholesale market electricity price benchmarks, or proxies for this benchmark, that they submitted demonstrate that the FIT Programme provides "more than adequate remuneration" for the OPA's purchases of electricity under the FIT and microFIT Contracts.<sup>60</sup>

1.19. The Panel agreed with the complainants that "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."<sup>61</sup> The Panel then examined the complainants' claim that the IESO-administered wholesale electricity market would be the appropriate "market" benchmark to conduct the analysis under Article 1.1(b). In this context, the Panel had found that "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."<sup>62</sup> Therefore, the Panel found that:

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<sup>52</sup> Panel Reports, para. 7.167.

<sup>53</sup> Panel Reports, para. 7.169.

<sup>54</sup> Panel Reports, para. 7.176.

<sup>55</sup> Panel Reports, para. 7.181.

<sup>56</sup> Panel Reports, para. 7.222.

<sup>57</sup> Panel Reports, para. 7.243.

<sup>58</sup> Panel Reports, para. 7.248.

<sup>59</sup> Panel Reports, para. 7.249.

<sup>60</sup> Panel Reports, para. 7.276.

<sup>61</sup> Panel Reports, para. 7.318. (original emphasis)

<sup>62</sup> Panel Reports, para. 7.298.

... 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.<sup>63</sup>

1.20. Accordingly, the Panel found that the "Hourly Ontario Energy Price" (HOEP) and all of the HOEP-derivatives that the complainants had advanced<sup>64</sup> could not serve as appropriate benchmarks for the purpose of the benefit analysis.<sup>65</sup> The Panel also rejected four out-of-province electricity markets – namely, Alberta, in Canada, and New York State, New England, and the Mid-Atlantic region (PJM Interconnection), in the United States – that the complainants had submitted as possible proxies for the wholesale market price in Ontario.<sup>66</sup>

1.21. Next, the Panel found that the application of a competitive wholesale market standard would ignore that a competitive wholesale electricity market would fail to attract the degree of investment to secure a reliable supply of electricity, and that, at present, this goal could only be achieved by means of government intervention in what would otherwise be unacceptable competitive market outcomes. Based on this reasoning, the Panel found that it would not 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.<sup>67</sup> Therefore, the Panel found that Japan and the European Union failed to establish that the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement.<sup>68</sup>

1.22. Having rejected the benchmarks proposed by the complainants and found that the complainants had failed to establish the existence of a benefit, the Panel made its own suggestion as to what it considered could be an appropriate benchmark in the circumstances of this case. The Panel stated that "one way to determine whether the challenged measures confer a benefit ... 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."<sup>69</sup> In the Panel's view, this approach could be used to determine whether the challenged measures confer a benefit by comparing "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".<sup>70</sup> However, the Panel stated that "the record of these disputes does not contain any appropriate information" to conduct this analysis.<sup>71</sup>

1.23. In the light of the above findings, the Panel concluded, in the Japan Panel Report (DS412), that:

- a. Japan had established that the Minimum Required Domestic Content Levels prescribed under the FIT Programme, and implemented through the individual FIT and microFIT Contracts executed since the FIT Programme's inception, placed Canada in breach of its obligations under Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994<sup>72</sup>; and

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<sup>63</sup> Panel Reports, para. 7.308.

<sup>64</sup> Namely, the weighted-average "wholesale rate" during 2010 for generators other than FIT and Renewable Energy Standard Offer Program (RESOP) generators, and the price paid by retail consumers under the "Regulated Price Plan" (RPP) in 2010.

<sup>65</sup> Panel Reports, para. 7.308 and fn 610 thereto.

<sup>66</sup> Panel Reports, para. 7.308.

<sup>67</sup> Panel Reports, para. 7.312.

<sup>68</sup> Panel Reports, para. 7.328(ii).

<sup>69</sup> Panel Reports, para. 7.322. (fn omitted)

<sup>70</sup> Panel Reports, para. 7.323.

<sup>71</sup> Panel Reports, para. 7.326.

<sup>72</sup> Japan Panel Report (DS412), para. 8.2.

- b. Japan had 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, constituted subsidies, or envisaged the granting of subsidies, within the meaning of Article 1.1 of the SCM Agreement, and thereby that Canada had acted inconsistently with Articles 3.1(b) and 3.2 of the SCM Agreement.<sup>73</sup>

1.24. In the EU Panel Report (DS426), the Panel concluded that:

- a. the European Union had established that the Minimum Required Domestic Content Levels prescribed under the FIT Programme, and implemented through the individual FIT and microFIT Contracts executed since the FIT Programme's inception, placed Canada in breach of its obligations under Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994<sup>74</sup>; and
- b. the European Union had 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, constituted subsidies, or envisaged the granting of subsidies, within the meaning of Article 1.1 of the SCM Agreement, and thereby that Canada had acted inconsistently with Articles 3.1(b) and 3.2 of the SCM Agreement.<sup>75</sup>

1.25. The Panel made the following recommendation in both the Japan Panel Report (DS412) and EU Panel Report (DS426):

We recommend that Canada bring its measures into conformity with its obligations under the TRIMs Agreement and the GATT 1994.<sup>76</sup>

1.26. On 5 February 2013, Canada notified the Dispute Settlement Body (DSB), pursuant to Articles 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), of its intention to appeal certain issues of law covered in the Panel Reports and certain legal interpretations developed by the Panel and filed a Notice of Appeal<sup>77</sup> and an appellant's submission pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review<sup>78</sup> (Working Procedures). On 11 February 2013, Japan and the European Union each notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the respective Panel Report and certain legal interpretations developed by the Panel and each filed a Notice of Other Appeal<sup>79</sup> and an other appellant's submission pursuant to Rule 23 of the Working Procedures. On 25 February 2013, Canada, Japan, and the European Union each filed an appellee's submission.<sup>80</sup> On 26 February 2013, Australia filed a third participant's submission and, on 27 February 2013, Brazil, China, Saudi Arabia, and the United States each filed a third participant's submission.<sup>81</sup> On the same day, El Salvador, Honduras<sup>82</sup>, India, Korea, Mexico, Norway, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and Turkey<sup>83</sup> each notified its intention to appear at the oral hearing as a third

<sup>73</sup> Japan Panel Report (DS412), para. 8.3.

<sup>74</sup> EU Panel Report (DS426), para. 8.6.

<sup>75</sup> EU Panel Report (DS426), para. 8.7.

<sup>76</sup> Japan Panel Report (DS412), para. 8.5; EU Panel Report (DS426), para. 8.9.

<sup>77</sup> WT/DS412/10, WT/DS426/9 (attached as Annex 1 to these Reports).

<sup>78</sup> WT/AB/WP/6, 16 August 2010.

<sup>79</sup> WT/DS412/11 (Japan) (attached as Annex 2 to these Reports); WT/DS426/10 (European Union) (attached as Annex 3 to these Reports). On 12 February 2013, the European Union sent a letter to the Appellate Body Secretariat indicating that there was a "clerical mistake" in its Notice of Other Appeal, and requesting authorization to correct it. In accordance with Rule 18(5) of the Working Procedures, the Appellate Body Division hearing this appeal provided Canada, Japan, and the third parties with an opportunity to comment in writing on this request. No objections to the European Union's request were received. On 15 February, the Division authorized the correction to the European Union's Notice of Other Appeal, as requested in its letter of 12 February 2013.

<sup>80</sup> Pursuant to Rules 22 and 23(4) of the Working Procedures.

<sup>81</sup> Pursuant to Rule 24(1) of the Working Procedures.

<sup>82</sup> In DS412 only.

<sup>83</sup> In DS426 only.

participant.<sup>84</sup> Also on 27 February 2013, Japan and the European Union each notified that it intended to appear at the oral hearing as a third participant in the dispute initiated by the other.<sup>85</sup>

1.27. On 12 February 2013, the Appellate Body received letters from Canada, Japan, and the European Union requesting the Appellate Body to allow observation by the public of the oral hearing in these appellate proceedings. Canada requested the Appellate Body to allow public observation of the oral statements and answers to questions of the participants, as well as those of third participants that agree to make their statements and responses to questions public. Canada proposed that public observation be permitted via simultaneous closed-circuit television broadcasting with the option for the transmission to be turned off should the participants find it necessary to discuss confidential information, or if a third participant had indicated its wish to keep its oral statement confidential. In its letter, Japan supported Canada's request, indicating that it also wished to make public its statements and answers to questions by the Appellate Body in the course of the hearing, and that it agreed with Canada's request that the Appellate Body hold an open hearing in this appeal. Japan further agreed that public observation be allowed by means of simultaneous closed-circuit video broadcasting. For its part, the European Union stated that it agreed and associated itself with Canada's request for an open hearing.

1.28. On 13 February 2013, the Appellate Body Division hearing this appeal invited the third parties to comment in writing on the requests of the participants to open the hearing to public observation. On 18 February 2013, the Division received responses from Australia, Brazil, China, El Salvador, India, Mexico, Norway, Saudi Arabia, Turkey, and the United States. In their respective comments, Brazil, China, El Salvador, India, Mexico, Saudi Arabia, and Turkey stated that they did not object to allowing public observation of the oral hearing in the present disputes. Brazil, China, India, Mexico, and Turkey emphasized that this was without prejudice to the systemic views each has on the issue of public observation of panel and Appellate Body hearings. Saudi Arabia stated that it did not object to allowing public observation of the oral hearing in these disputes. Australia, Norway, and the United States stated their support for the participants' request to allow public observation of the oral hearing. China, India, and Saudi Arabia indicated that they wished to maintain the confidentiality of their statements and responses to questions during the hearing.

1.29. On 19 February 2013, the Division issued a Procedural Ruling authorizing the requests of Canada, Japan, and the European Union to open the hearing to public observation and adopting additional procedures for the conduct of the hearing. The Procedural Ruling is attached as Annex 4 to these Reports.

1.30. On 7 and 12 March 2013, the Appellate Body received, respectively, unsolicited *amicus curiae* briefs from an energy company and an academic. The participants and third participants were given an opportunity to express their views on these briefs at the oral hearing. The Division did not find it necessary to rely on these *amicus curiae* briefs in rendering its decision.

1.31. The oral hearing in this appeal was held on 14-15 March 2013.<sup>86</sup> Public observation took place via simultaneous closed-circuit television broadcast to a separate room. Transmission was turned off during statements made by those third participants that had indicated their wish to maintain the confidentiality of their submissions. The participants and eight of the third participants (Australia, Brazil, China, India, Norway, Saudi Arabia, Turkey<sup>87</sup>, and the

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<sup>84</sup> Pursuant to Rule 24(2) of the Working Procedures.

<sup>85</sup> Pursuant to Rule 24(2) of the Working Procedures.

<sup>86</sup> On 5 February 2013, the Appellate Body received a letter from Japan requesting that the oral hearing not be scheduled during the period 11-13 March 2013. Because the Working Schedule for Appeal drawn up by the Division provided for the oral hearing to be held on 14-15 March 2013, it was unnecessary for the Division to consider further Japan's request.

<sup>87</sup> Because Turkey was a third party in the Panel proceedings in DS426 only, it was requested to limit its statement to that dispute. Honduras was a third party in the Panel proceedings in DS412 only, and was therefore requested to limit its statement to that dispute. Honduras, however, did not make an oral statement.



United States) made opening statements.<sup>88</sup> The participants and third participants responded to questions posed by the Members of the Division hearing the appeal.

1.32. On 30 April 2013, Japan and the European Union requested the Appellate Body to issue two reports in one single document with separate sections containing findings and conclusions for each complainant.<sup>89</sup> On 1 May 2013, Canada was afforded an opportunity to comment on Japan's and the European Union's requests, and raised no objection.

## 2 ARGUMENTS OF THE PARTICIPANTS AND THIRD PARTICIPANTS

### 2.1 Claims of error by Canada – Appellant

#### 2.1.1 Article III:8(a) of the GATT 1994

2.1. Canada requests the Appellate Body to reverse the Panel's conclusion that the FIT Programme and related FIT and microFIT Contracts are inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement, and to find instead that the FIT Programme and Contracts satisfy the prerequisites of Article III:8(a) and are therefore not subject to the obligations of Article III:4 of the GATT 1994 or Article 2.1 of the TRIMs Agreement.<sup>90</sup> Canada alleges that the Panel erred in finding that the measures at issue do not fall within the scope of Article III:8(a) of the GATT 1994 because the Government of Ontario's purchases of electricity generated from renewable sources under that programme are "with a view to commercial resale", and raises two allegations of error with respect to the Panel's interpretation of this phrase.

2.2. First, Canada asserts that the Panel erred in its interpretation of Article III:8(a) by focusing on whether there is "commercial resale" of electricity by the Government of Ontario while it neglected to interpret properly the term "with a view to" in Article III:8(a). Canada alleges that the Panel failed to examine the ordinary meaning of the words "with a view to" and thus failed to give effect to this term. Canada notes that the ordinary meaning of "with a view to" is "with the aim or object of attaining, effecting, or accomplishing something".<sup>91</sup> According to Canada, this ordinary meaning was never challenged by the complainants or the Panel. Thus, Canada asserts that a purchase "with a view to commercial resale" is a purchase with an aim to "commercial resale".

2.3. Furthermore, Canada argues that the Panel failed to take into account the term "governmental purposes" as immediate context for the phrase "not with a view to commercial resale". Canada refers to the Panel's statement that the phrase "and not with a view to commercial resale" serves specifically to inform and limit the otherwise relatively broad meaning of the term "governmental purposes", and argues that this phrase can only inform the meaning of the term "governmental purposes" if it is interpreted to require an "inquiry into the 'purpose' and 'view' behind the purchase".<sup>92</sup> Canada contends that, under the FIT Programme and Contracts, the Government of Ontario purchases electricity with a view "to help ensure a sufficient and reliable supply of electricity for Ontarians and to protect the environment"<sup>93</sup>, and that it does not purchase electricity with a view to commercial resale.

<sup>88</sup> On 6 March 2013, Japan sent a letter to the Appellate Body Secretariat in which it indicated that the time-limit of 20 minutes allocated by the Division to Japan for the delivery of its oral statement was not sufficient for it to address the many points raised by Canada in its appellee's submission. The Division decided to grant an additional 5 minutes to Japan, as well as to Canada and to the European Union, for the delivery of their oral statements.

<sup>89</sup> In a letter dated 13 February 2013, Japan indicated that it agreed with the consolidation of the appellate proceedings in these two disputes, in which all third parties were invited to participate. However, Japan said it understood that the Division had invited all third parties in both disputes to participate in these consolidated appellate proceedings on the condition that, in their submissions and oral statements, the third participants would address only the issues appealed in the dispute(s) to which they were third parties in the Panel proceedings.

<sup>90</sup> Canada's appellant's submission, paras. 7, 8, and 83.

<sup>91</sup> Canada's appellant's submission, para. 34 (quoting Oxford English Dictionary online, <<http://www.oed.com/viewdictionaryentry/Entry/223303>>, p. 5, No. III.17.b).

<sup>92</sup> Canada's appellant's submission, para. 32.

<sup>93</sup> Canada's appellant's submission, para. 34.

2.4. Second, Canada alleges that the Panel misinterpreted the words "commercial resale" in Article III:8(a). Canada asserts that the Panel based its assessment solely on interpretations advanced by the parties rather than developing its own analysis. Canada further alleges that, in doing so, the Panel misstated the interpretations advanced by the parties. In particular, while the Panel initially properly acknowledged the complainants' position that the phrase "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"<sup>94</sup>, the Panel subsequently, in its application, focused on whether Hydro One Inc.<sup>95</sup> and "Local Distribution Companies" (LDCs or distributors) compete with retailers. The Panel also misstated Canada's interpretation of the term "commercial resale". While Canada explained that "commercial resale" means resale with an underlying intent to profit, the Panel incorrectly stated that Canada interpreted "commercial resale" as a resale for profit. Canada contends that, had the Panel properly interpreted this term, it would have concluded that "commercial resale" means resale with the underlying intent to profit.

2.5. For Canada, the interpretation of the word "commercial" by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* in the context of Article 14(b) of the SCM Agreement, the interpretation of the term "commercial scale" in Article 61 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) by the panel in *China – Intellectual Property Rights*, and the interpretation of the term "commercial considerations" in Article XVII:1(b) of the GATT 1994 by the panel in *Canada – Wheat Exports and Grain Imports*, confirm that the meaning of "commercial resale" is a resale with the underlying intent to profit.<sup>96</sup> Canada contends that this meaning is also consistent with academic commentary, stating that, in the context of Article III:8(a), a resale is commercial if the activity is carried out as a profit-making activity, and not where only a nominal fee is charged.<sup>97</sup>

2.6. With respect to the FIT Programme and Contracts, Canada submits that there is no suggestion that the Government of Ontario purchases electricity with an aim to resell for profit. Rather, the Government of Ontario purchases electricity under the FIT Programme to help ensure a sufficient and reliable supply of electricity for Ontario consumers and to protect the environment. Canada further submits that the Electricity Act of 1998 prevents the OPA from doing anything with the aim to profit, because it stipulates that the business and affairs of the OPA shall be carried on without the purpose of gain.<sup>98</sup> Accordingly, Canada requests the Appellate Body to reverse the Panel's finding that the Government of Ontario purchases electricity under the FIT Programme "with a view to commercial resale" and to find instead that the Government of Ontario's purchases of electricity are not "with a view to commercial resale".

2.7. Finally, Canada requests the Appellate Body to complete the analysis under Article III:8(a) of the GATT 1994 with respect to the requirement of "not ... with a view to use in the production of goods for commercial sale"; to find that the Government of Ontario purchases electricity "not ... with a view to use in the production of goods for commercial sale"; and to reverse the Panel's conclusion that the FIT Programme and Contracts are inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement. Canada asserts that the Government of Ontario is not using the electricity purchased by the OPA to make any goods, because the Government of Ontario does not make any goods. Moreover, regardless of what is done with the electricity purchased, the Government of Ontario does not purchase that electricity with the aim of producing goods to sell for profit. For Canada, the measures at issue satisfy all elements of

<sup>94</sup> Canada's appellant's submission, para. 37 (quoting Panel Reports, para. 7.146).

<sup>95</sup> We note that Hydro One Inc. is wholly owned and controlled by the Government of Ontario and operates 97% of the transmission system in Ontario. (See Panel Reports, para. 7.34)

<sup>96</sup> Canada's appellant's submission, paras. 40-44 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 465-490; and Panel Reports, *China – Intellectual Property Rights*, paras. 7.534, 7.535, 7.544, and 7.577; and *Canada – Wheat Exports and Grain Imports*, paras. 6.87-6.89, 6.96, 6.123, and 6.129).

<sup>97</sup> Canada's appellant's submission, paras. 44 to 46 (referring to Canada's comments on the European Union's and Japan's responses to Panel questions (second set), para. 108, in turn referring to A. La Chimia and S. Arrowsmith, "Addressing Tied Aid: Towards a More Development-Oriented WTO?", *Journal of International Economic Law*, Vol. 12, No. 3 (2009) (Panel Exhibit CDA-129), p. 719); Canada's first written submission to the Panel (DS412), para. 90; and Canada's comments on the European Union's and Japan's responses to Panel questions (second set), para. 86, in turn referring to S. Arrowsmith, "Government Procurement in the WTO", *Studies in Transnational Economic Law*, Vol. 16 (Kluwer Law International, 2002), p. 51 (Panel Exhibit CDA-128)).

<sup>98</sup> Canada's appellant's submission, para. 47 (referring Electricity Act of 1998, Section 25.2(2)).

Article III:8(a) and therefore fall within the scope of this Article. Consequently, they are not subject to the obligations of Article III of the GATT 1994 or the TRIMs Agreement.

2.8. In response to questioning at the oral hearing, Canada clarified its position regarding the interpretation of the term "governmental purposes" in Article III:8(a). For Canada, the context provided by the words "not with a view to commercial resale" suggests that the inquiry under "governmental purposes" needs to go beyond the stated aim of the government, and must include an assessment of whether a government has traditionally supplied a certain product, whether it has a constitutional mandate to do so, and it must take account of the role of government in a particular country, focusing on the history, constitution, and legislation of a particular government.

2.9. Furthermore, also in response to questioning at the oral hearing, Canada addressed the European Union's objection to Canada's request that the Appellate Body complete the analysis and reverse the Panel's conclusion that the FIT Programme and Contracts are inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement, because Canada did not expressly request this in its Notice of Appeal. Canada argued that such requests relate to the "nature of the decision or ruling sought" and that, pursuant to Rule 22(2)(b)(iv) of the Working Procedures for Appellate Review, they must be included in the appellant's submission but not in the notice of appeal. Canada also argued that its Notice of Appeal and appellant's submission were provided to the European Union simultaneously, and that, when both documents are read together, the errors alleged and relief sought by Canada are clear.

### 2.1.2 Article 11 of the DSU – "Commercial resale"

2.10. Canada claims that the Panel failed to make an objective assessment of the matter before it, contrary to Article 11 of the DSU, when finding 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) of the GATT 1994.

2.11. First, Canada asserts that the Panel failed to "consider evidence before it in its totality" or "'evaluate the relevance and probative force' of all the evidence" when it concluded that Hydro One Inc. and distributors compete with electricity retailers.<sup>99</sup> Canada explains that Hydro One, distributors, and retailers have very different roles in the Ontario electricity system and do not compete with each other. Hydro One and distributors provide the service of physical transmission and distribution of electricity. Conversely, retailers do not transmit or distribute electricity; rather, they sell a financial product – a hedge on electricity prices. Retailers enter into contracts with consumers for a fixed price for the HOEP portion of their electricity bill over a certain period.<sup>100</sup> Canada underscores that it explained to the Panel that "[r]etailers make their profits through their separate financial contracts with end-users" and "guarantee[] some price certainty".<sup>101</sup> Canada further observes that the Panel acknowledged that "retailers 'sell *contracts* to businesses and consumers'".<sup>102</sup> Thus, according to Canada, retailers have a different function from Hydro One and distributors.

<sup>99</sup> Canada's appellant's submission, para. 54 (quoting Appellate Body Reports, *US – COOL*, para. 299 (fn omitted)).

<sup>100</sup> Canada's appellant's submission, para. 50 (referring to the following two retailer websites: Canada Energy webpage, "Mid and Peak Tier Time-of-Use Rate Rises 8% on May 1", news article posting, *The Toronto Star*, 19 April 2012 (Panel Exhibit JPN-229), available at: <<http://www.canadaenergy.ca/>>, p. 2; and My Rate Energy Ontario, Canada webpage, "Price Protection for Electricity" (Panel Exhibit JPN-230), available at: <<http://myrateenergy.ca/electricity-info.php>>, p. 2).

<sup>101</sup> Canada's appellant's submission, para. 51 (quoting, respectively, Canada's opening statement at the second Panel meeting, para. 56; and comments on European Union's and Japan's responses to Panel questions (second set), para. 51).

<sup>102</sup> Canada's appellant's submission, para. 51 (quoting Panel Reports, para. 7.147, in turn quoting Government of Ontario, *Ontario's Long-Term Energy Plan* (Queen's Printer for Ontario, 2010) (Panel Exhibit CDA-6), Appendix One). (emphasis added by Canada)

2.12. In addition, Canada states that Hydro One and distributors continue to perform their services to a consumer regardless of whether that consumer chooses to enter into a contract with a retailer. Hydro One still transmits the electricity and distributors still distribute it to a consumer with a retailer contract.<sup>103</sup> The consumer is still billed by the distributor and must still pay a fee for the transmission (by Hydro One) and for the distribution (by the distributor) of the electricity.<sup>104</sup> Canada argues that, since consumers must still pay Hydro One and distributors for the transmission and delivery of electricity, regardless of whether a consumer chooses to enter a price-hedging contract with a retailer, the revenues of Hydro One and distributors are not affected by this choice. Consequently, Hydro One and distributors are indifferent as to whether a consumer enters into a contract with a retailer, and they do not compete with these retailers.

2.13. Second, Canada asserts that the evidence on which the Panel relied does not support its conclusion that Hydro One and distributors compete with retailers. Furthermore, Canada argues that the Panel failed to provide "reasoned and adequate explanations and coherent reasoning" to support its findings.<sup>105</sup>

2.14. Canada identifies three exhibits on which the Panel allegedly based its conclusion about competition between, on the one hand, Hydro One and distributors and, on the other hand, retailers. Canada has reviewed each exhibit and observes that none mentions Hydro One. Moreover, while the exhibits mention distributors, none suggests that those distributors compete with retailers.

2.15. The first exhibit identified by Canada is Section 29 of the Electricity Act of 1998.<sup>106</sup> Canada notes that Section 29 merely states that distributors must sell electricity to a consumer in the event that a retailer with which a consumer has contracted is unable to do so. In Canada's view, this statement reinforces the role of distributors to ensure a stable supply of electricity and is inconsistent with the conclusion that distributors compete with retailers for business. Canada further notes that the only mention of competition in Section 29 is in paragraph 4, which addresses "competition *among retailers*".<sup>107</sup> This paragraph does not address competition between retailers and distributors.

2.16. The second exhibit is the Ontario Energy Board (OEB) Retail Settlement Code<sup>108</sup>, in particular Sections 1.1, 2.7, 10.1, and 12. Canada recognizes that Section 1.1 does refer to a "competitive retailer". However, Canada asserts that such retailer is not one that competes with distributors. Canada explains that the term "competitive retailer" is defined as "a person who retails electricity to consumers who do not take SSS"<sup>109</sup>; and "SSS", or "Standard Supply Service", is "the service approved by the [OEB] ... which ... establishes the minimum conditions that a distributor must meet in carrying out its obligations to sell electricity under section 29 of the *Electricity Act*."<sup>110</sup> Thus, Canada states that a "competitive retailer" is just a retailer – an entity that offers fixed prices for the HOEP portion of a consumer's electricity bill over a certain period of time (the length of the contract between the consumer and a retailer) instead of the regulated fluctuating prices. As regards Section 2.7, Canada points out that it requires distributors to enter into contracts with retailers when requested by the retailer. This undermines, rather than supports, a conclusion that distributors compete with retailers. Moreover, Canada notes that Section 10.1 identifies the service transaction requests to which the Retail Settlement Code applies. It underlines that consumers can choose to contract with a retailer and pay a fixed price for the HOEP portion of their electricity bill over a fixed period of time instead of paying the

<sup>103</sup> Canada's appellant's submission, para. 52 (referring to Electricity Act of 1998, Section 26(1): "A transmitter or distributor shall provide generators, retailers and consumers with non-discriminatory access to its transmission or distribution systems in Ontario in accordance with its licence"; and Section 29(1): "A distributor shall sell electricity to every person connected to the distributor's distribution system, except a person who advises the distributor in writing that the person does not wish to purchase electricity from the distributor"). Canada also refers to the Canada Energy website (Panel Exhibit JPN-229), *supra*, fn 100, p. 2.

<sup>104</sup> Panel Reports, para. 7.57.

<sup>105</sup> Canada's appellant's submission, para. 55 (quoting Appellate Body Reports, *US – COOL*, para. 299, in turn quoting, with approval, Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, fn 618 to para. 293).

<sup>106</sup> Panel Exhibit JPN-5.

<sup>107</sup> Canada's appellant's submission, para. 60. (emphasis added by Canada)

<sup>108</sup> 1 October 2011 revision (Panel Exhibit JPN-71).

<sup>109</sup> Retail Settlement Code, Section 1.2, p. 7.

<sup>110</sup> Retail Settlement Code, Section 1.2, p. 11.

fluctuating price. Hence, it does not suggest that there is competition between distributors and retailers. Lastly, Canada refers to Section 12 as simply confirming the obligation of distributors to enter into contracts with retailers and as therefore inconsistent with the contention that they are competing.

2.17. The third exhibit identified by Canada is an extract from a page on the IESO's website.<sup>111</sup> According to Canada, this webpage merely confirms that, unlike distributors, retailers sell a price-hedging contract. In sum, Canada asserts that neither the IESO website, nor Sections 1.1, 2.7, 10.1, and 12 of the Retail Settlement Code, nor Section 29 of the Electricity Act of 1998, supports the Panel's statement that distributors compete with retailers. Canada thus considers that, in relying on these exhibits to support its conclusion, the Panel failed to make "an objective assessment of the facts", as required by Article 11 of the DSU, "by failing to 'ensure that its factual findings have a proper basis in [the] evidence'."<sup>112</sup>

2.18. Consequently, Canada asserts that the Panel erred when relying on the findings that Hydro One and distributors compete with retailers and that the Government of Ontario and the municipalities profit from the resale of electricity procured under the FIT Programme to conclude that there is a "commercial resale" of renewable electricity in Ontario.

2.19. Canada also challenges the Panel's finding that the Government of Ontario and municipal governments profit from the resale of electricity that is purchased under the FIT Programme. Canada explains that Hydro One's "core mandate is to ensure 'safe, reliable and cost-effective transmission and distribution of electricity to Ontario electricity users'"<sup>113</sup> and that "it must 'prioritize investments in transmission and distribution capacity to support projects necessary to maintain ongoing grid security and reliability'."<sup>114</sup> It is by maintaining this grid that Hydro One earns its revenue. The OEB, which regulates aspects of the Ontario electricity system<sup>115</sup>, calculates the cost of maintaining the assets and adds a rate of return.<sup>116</sup> This sum is then recovered from consumers through the delivery component on their electricity bills.<sup>117</sup> Thus, Canada argues, Hydro One's profits are unrelated to the amount of electricity that it transmits to the distribution grid or to consumers.

2.20. Canada adds that distributors similarly profit from maintaining their assets. The OEB determines the cost of maintaining the distribution assets and then adds a rate of return.<sup>118</sup> This sum is also recovered from end-users through the delivery charges on their electricity bills. Hence, as in the case of Hydro One and the transmission of electricity, the revenues of distribution companies are unrelated to the amount of electricity that they deliver.<sup>119</sup>

2.21. Canada submits that, even if Hydro One and distributors were to profit from any resale of electricity, they do not profit from any resale of the electricity purchased under the FIT Programme. Hydro One and distributors are paid for maintaining their assets, regardless of the source of the electricity that is transmitted and distributed by those assets. Therefore, according to

<sup>111</sup> IESO webpage, "Retail Contracts" (Panel Exhibit JPN-90), available at: <http://www.ieso.ca/imoweb/siteshared/retailers.asp>.

<sup>112</sup> Canada's appellant's submission, para. 71 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, para. 254 (fn omitted); and referring to Appellate Body Reports, *US – Carbon Steel*, para. 142; and *US – Wheat Gluten*, paras. 161 and 162).

<sup>113</sup> Canada's appellant's submission, para. 74 (quoting 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) (Panel Exhibit CDA-107), p. 1 (also quoted in Canada's response to Panel question No. 13(a) (second set), paras. 41 and 42)).

<sup>114</sup> Canada's appellant's submission, para. 74 (quoting Memorandum of Agreement, p. 2).

<sup>115</sup> Canada's appellant's submission, para. 74 (referring to Canada's first written submission to the Panel (DS412), para. 23).

<sup>116</sup> Canada's appellant's submission, para. 74 (referring to Canada's response to Panel question No. 15 (first set), para. 80; and OEB, EB-2009-0084, Report of the Board on the Cost of Capital for Ontario's Regulated Utilities, 11 December 2009 (Panel Exhibit CDA-64)).

<sup>117</sup> Panel Reports, para. 7.57.

<sup>118</sup> Canada's appellant's submission, para. 75 (referring to Canada's response to Panel question No. 15 (first set), para. 81).

<sup>119</sup> Canada's appellant's submission, para. 75 (referring to Canada's comments on the Interim Panel Reports, p. 3; and Panel Reports, para. 7.149).

Canada, their revenues are unaffected by the FIT Programme and the Government of Ontario's purchase of renewable electricity under the Programme.

2.22. For these reasons, Canada considers that, by finding that Hydro One and distributors profit from the resale of electricity purchased under the FIT Programme, the Panel failed to make "an objective assessment of the facts". Therefore, the Panel failed to comply with Article 11 of the DSU, by failing to "ensure that its factual findings have a proper basis in [the] evidence"<sup>120</sup>, by failing to "consider evidence before it in its totality"<sup>121</sup>, and by failing to "'evaluate the relevance and probative force' of all of the evidence".<sup>122</sup>

## 2.2 Arguments of Japan – Appellee

### 2.2.1 Article III:8(a) of the GATT 1994

2.23. Japan requests the Appellate Body to uphold, albeit under different reasoning, the Panel's finding that the FIT Programme and related FIT and microFIT Contracts involve procurement of electricity "with a view to commercial resale" within the meaning of Article III:8(a) of the GATT 1994. Japan contends that Canada's appeal will be rendered moot if the Appellate Body finds, pursuant to Japan's claims as other appellant, that the FIT Programme and Contracts are not "procurement by governmental agencies of products purchased for governmental purposes" under Article III:8(a). This is so because an assessment of the element "with a view to commercial resale" appealed by Canada presupposes an affirmative finding by the Appellate Body on the existence of "procurement" by the Government of Ontario "for governmental purposes". Japan submits that, therefore, the Appellate Body should, following the fundamental structure and logic of Article III:8(a), commence its analysis by addressing the claims raised by Japan relating to the existence of "procurement" by the Government of Ontario "for governmental purposes". If the Appellate Body were to agree with Japan either that the FIT Programme and Contracts do not involve "procurement by governmental agencies of products purchased" or that such purchases are not "for" governmental purposes, then Canada's entire appeal would be rendered moot.

2.24. In response to Canada's allegations of error, Japan disagrees, first, with Canada's interpretation of the words "with a view to" and, second, with its reading of "commercial resale". First, Japan argues that, under Canada's position that the phrase "with a view to commercial resale" requires intent to make a profit, a WTO Member could exclude from its obligations under Article III of the GATT 1994 any resale of goods previously purchased simply by stating that such resale was not aimed at generating returns or profit. Japan alleges that this approach would ignore the context of Article III because it would allow WTO Members to circumvent the national treatment obligation and thus render Article III:4 meaningless. Moreover, to the extent profit was earned, the Member could argue that it earned such profit from carrying out its assigned governmental purposes, and not from its commercial resale activity. This would give Members an unlimited ability to override the national treatment disciplines in Article III by simply asserting that the measures at issue were not undertaken with the aim to make profit.

2.25. Second, in response to Canada's contention that the Panel misinterpreted the term "commercial resale", Japan submits that the Panel correctly found that "commercial resale" need not necessarily involve profit. Japan asserts that, regardless of whether any profit is earned, the phrase "with a view to commercial resale" means that the product at issue is purchased with a view to being sold or introduced into the stream of commerce, trade, or market. Japan argues that WTO panels have found the term "commercial" to mean "engaged in commerce; of, pertaining to,

<sup>120</sup> Canada's appellant's submission, para. 76 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, para. 254 (fn omitted); and referring, in fn 109, to Appellate Body Reports, *US – Carbon Steel*, para. 142: "[N]or may panels make affirmative findings that lack a basis in the evidence contained in the panel record" (fn omitted); and *US – Wheat Gluten*, paras. 161 and 162).

<sup>121</sup> Canada's appellant's submission, para. 76 (quoting, as an example, Appellate Body Reports, *US – COOL*, para. 299).

<sup>122</sup> Canada's appellant's submission, para. 76 (quoting Appellate Body Reports, *US – COOL*, para. 299 (fn omitted)).

or bearing on commerce"<sup>123</sup>, and that nothing in this meaning entails a requirement of intent to profit. In response to Canada's reliance on the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*, Japan argues that the term "commercial" was considered in the context of the interpretation of the term "commercial loan" in Article 14(b) of the SCM Agreement, and that the context of the present case is very different. What makes the resale of electricity purchased by the Government of Ontario under the FIT Programme and Contracts "commercial" is the fact that this electricity is injected into the transmission grid, comingled with all the other electricity generated within Ontario, and delivered to consumers in Ontario. For Japan, the Panel's observation that "electricity purchased under the FIT Programme is consumed through precisely the same channels as electricity supplied from all other generating sources" is the critical fact that supports the conclusion that electricity is purchased by the Government of Ontario under the FIT Programme and Contracts "with a view to commercial resale".<sup>124</sup>

### 2.2.2 Article 11 of the DSU – "Commercial resale"

2.26. If the Appellate Body considers that competition with other entities is relevant for purposes of assessing whether a "commercial resale" exists, Japan submits that the Panel did not err in finding that Hydro One Inc. and distributors face private-sector competition in the Ontario electricity market.

2.27. Japan argues that the fact that the Panel recognized and took into account that private-sector retailers "sell contracts"<sup>125</sup> does not detract from or make non-objective the Panel's conclusion that such retailers compete with Hydro One and distributors to sell electricity to consumers in Ontario. As the Panel stated in its review of the factual background, "[r]etail consumers either purchase electricity based on use from their LDCs, or they enter into contracts for electricity with an LDC or [a private-sector] licensed electricity retailer".<sup>126</sup> In other words, consumers in Ontario have a choice as from whom they purchase their electricity – either distributors or private-sector retailers. Thus, Japan asserts that distributors and private-sector retailers compete to sell electricity to consumers in Ontario.

2.28. Japan recalls the Panel's finding that four private companies own and operate 3% of the transmission system<sup>127</sup>, and three out of 80 distributors are private companies.<sup>128</sup> Thus, Japan submits that Ontario has established an electricity system in which Hydro One and municipally owned distributors may compete with private transmission and distribution companies in the resale of electricity to consumers. The Panel recognized these facts in its evaluation of whether electricity is purchased under the FIT Programme "with a view to commercial resale".

2.29. Moreover, if the Appellate Body were to agree with Canada that the term "commercial resale" entails a profit element, Japan submits that the Panel correctly found that the Government of Ontario earns financial returns from its "resale" of electricity to consumers in Ontario, thereby making the "resale" a "commercial" one under Canada's own definition of the term. Japan observes that Canada's appeal simply repeats its previous argument that the OPA is intended to carry out its functions without the purpose of gain, which the Panel rejected when it noted that, "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".<sup>129</sup> Moreover, the Panel noted that this was a fact taken from Canada's own responses to the Panel's questions.<sup>130</sup> Japan points out that Canada itself agrees in its appeal with

<sup>123</sup> Japan's appellee's submission (DS412), para. 35 (referring to Panel Reports, *Canada – Wheat Exports and Grain Imports*, para. 6.84; and *China – Intellectual Property Rights*, para. 7.534; both, in turn, quoting *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 451).

<sup>124</sup> Japan's appellee's submission (DS412), para. 35 (quoting Panel Reports, para. 7.147).

<sup>125</sup> Japan's appellee's submission (DS412), para. 37 (quoting Canada's appellant's submission, para. 51, in turn quoting Panel Reports, para. 7.147).

<sup>126</sup> Japan's appellee's submission (DS412), para. 37 (quoting Panel Reports, para. 7.57).

<sup>127</sup> Japan's appellee's submission (DS412), para. 38 (referring to Panel Reports, para. 7.34 and fn 104 thereto).

<sup>128</sup> Japan's appellee's submission (DS412), para. 38 (referring to Panel Reports, para. 7.35).

<sup>129</sup> Japan's appellee's submission (DS412), para. 40 (quoting Panel Reports, para. 7.150).

<sup>130</sup> See Panel Reports, para. 7.149.

this aspect of the Panel's analysis, stating that "Hydro One profits" and that "[d]istributors also profit".<sup>131</sup>

2.30. Japan asserts that the evidence on the record also shows that Hydro One operates as a "commercial" company that makes "commercial profits", even though its only shareholder is the Government of Ontario. For example, Hydro One's financial report for 2010 (which was cited by the Panel) indicates that it had the following key financial results: (i) total revenue of Can\$5,124 million; (ii) net revenue of Can\$232 million; (iii) net income of Can\$591 million; and (iv) dividend payment of Can\$28 million to its shareholder, the Province of Ontario.<sup>132</sup> Any profits made by Hydro One, if not reinvested in the company, will eventually flow back to the government and, therefore, the Panel was correct to conclude that the Government of Ontario profits from the resale of renewable electricity.

2.31. Japan observes that, in its appeal, Canada attempts to exclude Hydro One and local distributors from its own definition of "commercial" by characterizing their profits, not as profits from their transmission or distribution activities (i.e. from the commercial resale of renewable electricity), but as profits derived from the "maintenance of their assets".<sup>133</sup> At the same time, however, Canada admits that such profits are earned through "delivery charges" on the electricity bills paid by consumers. Japan recalls that it primarily argues that these facts indicate that Hydro One does not "purchase" electricity "for governmental purposes". However, if the Appellate Body disagrees with Japan on this argument, it should logically find that those "delivery charges" are assessed on a per-kWh basis, and therefore are deemed to be inextricably linked to the amount of electricity delivered to and consumed by consumers. The sources cited by Canada also specify that these charges or rates are meant to allow distribution utilities to "recover their distribution costs"<sup>134</sup> (i.e. the cost of distributing electricity to consumers). Japan therefore considers that this cannot be reconciled with Canada's assertion that "Hydro One's and LDCs' 'profits do not depend on the amount of electricity that they transmit and distribute and, therefore, [that] they do not profit from any resale of electricity'".<sup>135</sup>

2.32. Therefore, Japan requests the Appellate Body to find that the Panel did not fail to make an objective assessment of the facts as required by Article 11 of the DSU by concluding that Hydro One and distributors face private-sector competition, including from private-sector electricity retailers, in the resale of renewable electricity in Ontario and that the Government of Ontario profits from the resale of electricity allegedly purchased under the FIT Programme and FIT and microFIT Contracts.

## 2.3 Arguments of the European Union – Appellee

### 2.3.1 Article III:8(a) of the GATT 1994

2.33. The European Union requests the Appellate Body to uphold the Panel's finding that the FIT Programme and related FIT and microFIT Contracts involve procurement of electricity "with a view to commercial resale" within the meaning of Article III:8(a) of the GATT 1994. The European Union disagrees, first, with Canada's interpretation of the term "with a view to" and, second, with Canada's reading of "commercial resale". In addition, the European Union objects to Canada's request that the Appellate Body complete the analysis and reverse the Panel's conclusion that the FIT Programme and Contracts are inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement.

<sup>131</sup> Japan's appellee's submission (DS412), para. 40 (quoting, respectively, Canada's appellant's submission, paras. 74 and 75).

<sup>132</sup> Japan's appellee's submission (DS412), para. 41 (quoting Hydro One, News Release, "Hydro One Releases 2010 Year-End Financial Results", 10 February 2011 (Panel Exhibit JPN-41), available at: <[http://www.hydroone.com/OurCompany/MediaCentre/Documents/NewsReleases2011/02\\_10\\_2011\\_Year-End\\_Financials.pdf](http://www.hydroone.com/OurCompany/MediaCentre/Documents/NewsReleases2011/02_10_2011_Year-End_Financials.pdf)>).

<sup>133</sup> Japan's appellee's submission (DS412), para. 42 (referring to Canada's appellant's submission, paras. 74-76).

<sup>134</sup> Japan's appellee's submission (DS412), para. 42 (quoting Canada's appellant's submission, para. 20, in turn quoting OEB webpage, "Electricity Prices: ... OEB's Role in Electricity Prices" (Panel Exhibit CDA-16), available at: <<http://www.ontarioenergyboard.ca/OEB/Consumers/Electricity/Electricity+Prices#role>>).

<sup>135</sup> Japan's appellee's submission (DS412), para. 42 (quoting Canada's appellant's submission, para. 76).



2.34. First, in response to Canada's allegation that the Panel neglected to interpret properly the term "with a view to" in Article III:8(a), the European Union contends that the Panel's analysis demonstrates that the Panel interpreted the terms "commercial resale" and "not with a view to" together, and that the Panel's conclusion relates to purchases "with a view to commercial resale".<sup>136</sup> For the European Union, the Panel's description of the FIT Programme shows that the very purpose of the Programme is the delivery of a certain type of electricity into Ontario's electricity market. In particular, the FIT Programme and the OPA's operations thereunder are specifically intended to ensure that electricity from renewable sources is introduced into the electricity market in order to replace electricity from other generation sources.

2.35. The European Union agrees with the Panel's finding that the stated intention as to why the Government of Ontario purchases electricity could not be dispositive of the question whether such purchase was made "with a view to commercial resale", because this would be a purely subjective, and thus not appropriate, standard. Instead, the interpretation should be based on an objective standard focusing on the actual circumstances of each case. Governments may characterize any given transaction as responding to multiple policy objectives, but, in order to characterize a transaction as "with a view to commercial resale", it is sufficient to establish that the goods are intended for the market at the time of their purchase.

2.36. Furthermore, the European Union disagrees with Canada's contention that the Panel based itself solely on interpretations advanced by the parties rather than developing a proper analysis of the term "with a view to". The Panel agreed with the interpretation suggested by the European Union while explicitly disagreeing with the interpretation proposed by Canada.<sup>137</sup> The European Union acknowledges that the Panel could have developed its reasoning in more detail; nonetheless, it is clear that the Panel did interpret the term "with a view to" in this case.

2.37. Second, the European Union disagrees with Canada's interpretation of the words "commercial resale". The European Union maintains that the clause "not with a view to commercial resale or with a view to use in the production of goods for commercial sale" in Article III:8(a) serves to avoid circumvention of the disciplines of Article III of the GATT 1994 by prohibiting governments to purchase on a discriminatory basis in cases where the purchased product will return to the market either directly or indirectly as an input into another product. The European Union contends that this objective, as well as the French and the Spanish versions of the text of Article III:8(a) – in particular the words "*revendus dans le commerce*" and "*reventa comercial*" – provide support for its proposition that the term "commercial resale" does not necessarily require that the product in question be resold for profit, but that it merely requires that the purchased product be sold or introduced into the market through the ordinary channels of commerce. The European Union adds that sales at a loss are no less commercial than sales for profit, and reselling a product at a price lower than the price at which it was purchased does not make the former transaction "non-commercial".

2.38. Furthermore, the European Union submits that the word "commercial" is used in Article III:8(a) in order to distinguish purchases made for government use from purchases made with a view to be further traded and introduced into commerce. The term "commercial" was not added to the provision in order to include an idea of "profit", but rather to highlight that Article III:8(a) would cover purchases for governmental purposes. Interpreting "commercial resale" as requiring a profit would permit WTO Members to circumvent the disciplines of Article III, because governments could discriminate against imported products and then introduce the purchased domestic product into the market thereby causing results that the national treatment principle is meant to avoid. With regard to Canada's references to the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*, the panel report in *China – Intellectual Property Rights*, and the panel report in *Canada – Wheat Exports and Grain Imports*, the European Union responds that those panel and Appellate Body reports did not interpret the word "commercial" in Article III:8(a), and that the same term can have different meanings depending on its specific context.

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<sup>136</sup> European Union's appellee's submission (DS426), para. 21 (referring to Panel Reports, paras. 7.146 and 7.151).

<sup>137</sup> European Union's appellee's submission (DS426), para. 26 (referring to Panel Reports, paras. 7.148 and 7.151).

2.39. In addition, the European Union requests the Appellate Body to reject Canada's requests for completion of the analysis under Article III:8(a) of the GATT 1994 and reversal of the finding that the FIT Programme and Contracts violate Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994. The reason adduced by the European Union is that Canada's Notice of Appeal does not contain a request that the Appellate Body either reverse the Panel's finding that the FIT Programme and Contracts are inconsistent with Articles 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994 or that the Appellate Body complete the analysis with respect to the two elements "with a view to commercial resale" and "with a view to use in the production of goods for commercial sale" in Article III:8(a).

2.40. The European Union asserts that Canada's failure to include these requests in its Notice of Appeal means that such requests are outside the Appellate Body's jurisdiction. The European Union explains that Canada failed to provide a brief statement of the nature of the appeal, including a reference to paragraph 7.167 of the Panel Reports and paragraph 8.6 of the EU Panel Report, and that it also failed to include the nature of the decision or ruling sought with respect to those paragraphs, contrary to Rule 20(2)(d) of the Working Procedures for Appellate Review. The European Union further asserts that the Appellate Body should refrain from examining Canada's request for completion of the analysis under Article III:8(a), because it is not framed as a request to complete the analysis, but as an allegation of failure by the Panel to have made a particular finding.

2.41. In the event that the Appellate Body decides to complete the analysis pursuant to Canada's request, the European Union asserts that it should find that the Government of Ontario purchases electricity "with a view to use [it] in the production of goods for commercial resale" and that therefore the requirements of Article III:8(a) are not met. The European Union maintains that electricity purchased by the Government of Ontario is injected into the grid to be used by consumers in Ontario. Many of them are industrial consumers, who then also manufacture other products for sale on the market using this electricity. The European Union disagrees with Canada that the phrase "with a view to use in the production of goods for commercial sale" should be understood as referring to the actions of the government, rather than actions of other operators, because the terms of Article III:8(a) of the GATT 1994 do not refer to "use by the government" but rather to "use" without further qualification.

### **2.3.2 Article 11 of the DSU – "Commercial resale"**

2.42. The European Union asserts that Canada's allegations that the Panel failed to make an objective assessment of the matter including the facts, as required by Article 11 of the DSU, when finding that (i) Hydro One Inc. and distributors compete with private retailers and (ii) Hydro One and distributors profit from any resale of renewable electricity are unfounded.

2.43. At the outset, the European Union observes that the Appellate Body would only have to examine Canada's claim under Article 11 of the DSU if, as a consequence of those errors, the Panel's ultimate finding that the Government of Ontario purchases electricity through the FIT Programme "with a view to commercial resale" cannot stand. The European Union considers that the Panel's finding is not dependent on any of the factual findings contested by Canada. The European Union notes, in this regard, that the Panel properly determined that "commercial resale" does not always necessarily involve profit. Under the same interpretation, the Appellate Body may consider it unnecessary to examine the second factual matter raised by Canada, namely, whether Hydro One and distributors profit from any resale of renewable electricity.

2.44. The European Union submits that the same conclusion can be reached regarding the first factual matter challenged by Canada, that is, the finding that Hydro One and distributors are in competition with retailers. The European Union points out that Canada does not contest the Panel's finding that electricity purchased under the FIT Programme is consumed through precisely the same channels as electricity supplied from all other generating sources. Likewise, Canada does not contest the Panel's finding that 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".<sup>138</sup> The Panel agreed that the facts at issue (in particular the fact that the electricity purchased under the FIT Programme is

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<sup>138</sup> European Union's appellee's submission (DS426), para. 44 (quoting Panel Reports, para. 7.148).

consumed through the same channels as electricity supplied from all other generating sources and thus reintroduced into commerce) support the characterization of the measures at issue as undertaken "with a view to commercial resale", thereby not falling under Article III:8(a) of the GATT 1994. Consequently, the European Union argues that the Panel's ultimate finding was not dependent on the factual issues Canada challenges in its appeal.

2.45. Having said that, the European Union recalls that the Appellate Body has clarified that a panel is "entitled, in the exercise of its discretion, to determine that certain elements of evidence should be accorded more weight than other elements".<sup>139</sup> In doing so, the Appellate Body has further noted that a panel "is not required to discuss, in its report, each and every piece of evidence"<sup>140</sup>, and that, "in view of the distinction between the respective roles of the Appellate Body and panels", the Appellate Body will not "interfere lightly" with the panel's fact-finding authority<sup>141</sup> and "cannot base a finding of inconsistency under Article 11 simply on the conclusion that [it] might have reached a different factual finding from the one the panel reached".<sup>142</sup> Thus, the European Union underscores that not every error allegedly committed by a panel amounts to a violation of Article 11 of the DSU.

2.46. The European Union considers that the Panel properly concluded that, as a matter of fact, (i) Hydro One and distributors compete with private retailers and (ii) Hydro One and distributors profit from the resale of renewable electricity.

2.47. The European Union asserts that the Panel's factual finding that Hydro One and distributors compete with private retailers is well supported by the evidence on the record and, consequently, the Appellate Body should not interfere with the Panel's discretion as a trier of facts. First, contrary to what Canada alleges, private-sector licensed electricity retailers do not merely sell hedge-contracts, but also the electricity that comes with them. The European Union observes that, elsewhere, the Panel noted that there was "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".<sup>143</sup> Also, as noted by the IESO, retailers purchase electricity in the market and through contracts with generators. The OEB posts a list on its website of energy providers licensed to sell electricity in the province<sup>144</sup>, and retail contracts are described as another way to purchase the electricity, but they do not cover other charges such as delivery charges.<sup>145</sup> Likewise, Canada itself recognized that "[c]ustomers that contract with competitive electricity retailers have wholesale electricity and related products and services purchased on their behalf by their electricity retailer and are subject to the rates set in their retail contracts".<sup>146</sup> This suggests that private-sector licensed electricity retailers do take title of the electricity they purchase from generators/distributors in order to resell it to final consumers. At any rate, there is resale of electricity (possibly bundled with electricity services) to final consumers.

2.48. Furthermore, the European Union explains that, in the background section of the Panel Reports, the Panel noted that retail consumers that do not fall under the "Regulated Price Plan" (RPP) may enter into a retail contract with a distributor or licensed electricity retailer, paying a contracted price for electricity for a fixed period.<sup>147</sup> Indeed, final consumers in Ontario can choose to pay the RPP of the OEB and purchase their electricity from distributors, or may decide to

<sup>139</sup> European Union's appellee's submission (DS426), para. 45 (quoting Appellate Body Report, *EC – Asbestos*, para. 161).

<sup>140</sup> European Union's appellee's submission (DS426), para. 45 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 202).

<sup>141</sup> European Union's appellee's submission (DS426), para. 45 (quoting Appellate Body Reports, *US – Wheat Gluten*, para. 151; *EC – Sardines*, para. 299; and *US – Carbon Steel*, para. 142).

<sup>142</sup> European Union's appellee's submission (DS426), para. 45 (quoting Appellate Body Report, *US – Wheat Gluten*, para. 151).

<sup>143</sup> European Union's appellee's submission (DS426), para. 49 (quoting Panel Reports, fn 462 to para. 7.239).

<sup>144</sup> IESO webpage, "The Power System" (Panel Exhibit JPN-44), available at: <[http://www.ieso.ca/imoweb/siteShared/power\\_system.asp](http://www.ieso.ca/imoweb/siteShared/power_system.asp)>.

<sup>145</sup> IESO brochure, "What You Need to Know About Changes to Electricity Prices Coming November 1, 2009: A Guide For Ontario's Public Sector" (Panel Exhibit JPN-91).

<sup>146</sup> European Union's appellee's submission (DS426), para. 49 (quoting Professor William W. Hogan, Harvard University, "Overview of the Electricity System in the Province of Ontario", 21 December 2011 (Hogan Report) (Panel Exhibit CDA-2), p. 29).

<sup>147</sup> Panel Reports, para. 7.59.

purchase it from private-sector licensed electricity retailers.<sup>148</sup> In other words, final consumers can choose whether to buy from distributors (and pay the fluctuating regulated prices under the RPP) or from private-sector licensed electricity retailers (and pay fixed hedged prices not dependent of the RPP for a particular period of time). The European Union thus asserts that, in this sense, private-sector licensed electricity retailers compete with Hydro One and other distributors in selling electricity and electricity services to consumers.

2.49. Consequently, the European Union argues that, as a matter of fact, private-sector licensed electricity retailers do not merely sell hedge-contracts to consumers. Indeed, retailers compete with Hydro One and distributors in selling electricity and electricity services to final consumers, who can choose between purchasing such electricity at the fluctuating regulated prices under the RPP or at fixed prices from retailers.

2.50. The European Union additionally asserts that the evidence cited by the Panel in footnote 297 of its Reports – that is, Section 29 of the Electricity Act of 1998<sup>149</sup>, the Retail Settlement Code<sup>150</sup>, and the IESO website page<sup>151</sup> – properly supports its finding that Hydro One and distributors sell electricity in competition with private-sector licensed retailers. Section 29 of Ontario's Electricity Act of 1998 contains the distributor's obligation to sell electricity. Contrary to what Canada alleges, Section 29 does not merely reinforce the role of distributors in ensuring a stable supply of electricity, but also shows that there is actual competition between distributors and private-sector licensed electricity retailers. In particular, Section 29 contemplates the possibility that a consumer does not purchase electricity from the distributor but from private-sector licensed electricity retailers, and yet imposes the obligation on the distributor to sell electricity to the final consumer in case the private-sector licensed electricity retailer is unable to do so for any reason. In other words, Section 29 reflects the fact mentioned before that consumers in Ontario can choose to purchase electricity and electricity services from distributors or from private-sector licensed electricity retailers.

2.51. The European Union adds that Sections 1.1, 2.7, 10.1, and 12 of the Retail Settlement Code, referred to by the Panel, equally support the Panel's conclusion as to the existence of competition between Hydro One and distributors, on the one hand, and private-sector licensed electricity retailers, on the other hand. In those sections, it is made clear that consumers in Ontario can choose between purchasing electricity and electricity services from distributors (under the SSS, and then be subject to the OEB's RPP) and purchasing electricity from private-sector licensed electricity retailers. In particular, Section 10 explains how to deal with consumer requests to switch from electricity supplied to a consumer through the SSS to electricity supplied by a competitive retailer. In this sense, it is evident that Hydro One and distributors compete with private retailers in order to sell electricity and provide electricity services.

2.52. Finally, the European Union states that the IESO website page, referred to by the Panel, explains that consumers in Ontario can also purchase their electricity from private-sector licensed electricity retailers, and provides detailed information as to when such an option could be attractive to final consumers.

2.53. In sum, the European Union considers that the evidence cited by the Panel in footnote 297 of its Reports adequately supports its factual finding that Hydro One and distributors sell electricity in competition with private-sector licensed electricity retailers. Thus, contrary to what Canada alleges, the Panel did not make an error.

2.54. As regards the Panel's second finding challenged by Canada under Article 11 of the DSU – that is, that the Government of Ontario profits from the resale of electricity – the European Union responds that the Panel rejected Canada's argument because "[d]istributors profit from their service of distributing electricity to the end-user, rather than any on-sale of the renewable electricity, itself".<sup>152</sup> According to the Panel, to the extent that the service of electricity

<sup>148</sup> Panel Reports, para. 7.42.

<sup>149</sup> Panel Exhibit JPN-5.

<sup>150</sup> Panel Exhibit JPN-71.

<sup>151</sup> IESO webpage, "Retail Contracts" (Panel Exhibit JPN-90), available at:

<<http://www.ieso.ca/imoweb/siteshared/retailers.asp>>.

<sup>152</sup> European Union's appellee's submission (DS426), para. 59 (quoting Panel Reports, para. 7.150, in turn quoting Canada's opening statement at the second Panel meeting, para. 55).

distribution is necessarily tied to, and inseparable from, the sale of electricity as a "commodity", there was no basis to conclude that the resale activities of Hydro One and almost all of the distributors did not result in making profits. In other words, the Panel concluded that, as a matter of fact, it was not possible to distinguish between remuneration (and profits) generated by electricity distribution services (for which the maintenance of the grid is necessary) and the remuneration (and profits) generated by the sale of electricity itself (flowing through such grid). The European Union observes that Canada has not indicated any factual elements that the Panel would have disregarded or wilfully distorted and that would contradict the Panel's observations in this regard.

2.55. Consequently, in the European Union's view, the Panel did not err in finding that Hydro One and distributors profit from the resale of electricity purchased by the Government of Ontario through the FIT Programme.

2.56. In view of the foregoing, the European Union submits that the Panel did not fail to make an objective assessment of the matter under Article 11 of the DSU, and properly concluded that (i) electricity is sold to consumers by Hydro One and distributors in competition with private retailers and that (ii) the Government of Ontario profits from the resale of renewable electricity. In any event, the European Union submits that these factual findings were not essential for the Panel's ultimate finding that the Government of Ontario's purchases of electricity through the FIT Programme are undertaken "with a view to commercial resale". Even if they were essential, the Panel provided adequate reasoning and supported its conclusion on the basis of the evidence on the record.

## 2.4 Claims of error by Japan – Other appellant

### 2.4.1 The order in which the Panel dealt with Japan's claims under the SCM Agreement and its claims under the TRIMs Agreement and the GATT 1994

2.57. Japan submits that the Panel improperly decided to commence its evaluation with Japan's claims under the TRIMs Agreement and the GATT 1994, instead of Japan's claims under the SCM Agreement.

2.58. Japan recognizes that, in *Chile – Price Band System*, the Appellate Body said that "arguments regarding the order of analysis chosen by the Panel [do not] amount to a separate 'allegation of error'".<sup>153</sup> However, it notes that the Appellate Body suggested in that dispute that an improper order of analysis may result in an improper appreciation by a panel of the factual and legal issues in a particular dispute.

2.59. Japan recalls that it had argued before the Panel that the evaluation should commence with Japan's claims under the SCM Agreement, because that Agreement "deals specifically, and in detail, with" the measures at issue in this dispute.<sup>154</sup> According to Japan, the reason why this is so is because the target of Japan's challenge in this dispute has been the provision of subsidies to FIT generators contingent on their use of renewable energy generation equipment produced in Ontario over such equipment imported from abroad.

2.60. Japan notes that the Panel dismissed Japan's argument because no party had contested that "the measures at issue are trade-related investment measures affecting imports of renewable energy generation equipment".<sup>155</sup> Thus, the Panel concluded that it is the TRIMs Agreement that "deals most directly, specifically and in detail, with"<sup>156</sup> the measures at issue. Japan fails to see how the fact that no party had contested that the measures at issue are TRIMs makes the TRIMs Agreement the agreement that "deals most directly, specifically and in detail, with" those measures. Rather, Japan submits that the Panel conducted no actual analysis of which agreement

<sup>153</sup> Japan's other appellant's submission (DS412), para. 10 (quoting Appellate Body Report, *Chile – Price Band System*, para. 182).

<sup>154</sup> Japan's other appellant's submission (DS412), para. 11 (quoting Appellate Body Report, *EC – Bananas III*, para. 204).

<sup>155</sup> Japan's other appellant's submission (DS412), para. 12 (quoting Panel Reports, para. 7.70).

<sup>156</sup> Panel Reports, para. 7.70. (fn omitted)

deals most specifically, and in detail, with the measures at issue. By failing to conduct such an analysis, the Panel therefore erred.

2.61. Japan points out that the Panel appeared to agree that the SCM Agreement deals most specifically with the measures at issue given that the Panel based the interpretation of government "purchases" in Article III:8(a) of the GATT 1994 on its finding on "the proper legal characterization of the measures at issue under Article 1 of the SCM Agreement".<sup>157</sup> Japan is thus "puzzled"<sup>158</sup> by the Panel's decision not to commence its evaluation with Japan's claims under the SCM Agreement, which would have led the Panel to a correct appreciation of the factual and legal issues in this dispute.

2.62. In addition, Japan argues that the Panel should have commenced with the SCM Agreement, because a remedy under Article 4.7 of that Agreement would resolve this dispute more promptly than the remedy under Article 19.1 of the DSU that would result from a violation of the GATT 1994 or the TRIMs Agreement. Pursuant to Article 3.7 of the DSU, the aim of dispute settlement is "to secure a positive solution to a dispute" and, moreover, Article 3.3 provides that the "prompt settlement" of disputes is "essential to the effective functioning of the WTO". In the present dispute, such "prompt settlement" would be achieved by a remedy under Article 4.7 of the SCM Agreement, which obliges the responding Member to act "without delay" and within a time period specified by the panel, which are not obligations pursuant to Article 19.1 of the DSU, which requires the respondent Member to bring into conformity measures found to be inconsistent.

2.63. For these reasons, Japan requests the Appellate Body to find that the Panel improperly began its evaluation with Japan's claims under the TRIMs Agreement and the GATT 1994. Further, Japan asserts that, instead of following the Panel's approach, the Appellate Body should begin its evaluation with Japan's claims under the SCM Agreement.

2.64. At the oral hearing, Japan acknowledged that it did not consider that the Panel had a legal obligation to commence its evaluation with the SCM Agreement. Japan also confirmed that it is not requesting the Appellate Body to find that the Panel erred, nor is it requesting reversal of a finding of the Panel. Thus, Japan's sole request is that the Appellate Body itself commence the evaluation with its claims under the SCM Agreement.

#### **2.4.2 Claims under Article III:8(a) of the GATT 1994**

2.65. Japan requests the Appellate Body to uphold the Panel's conclusion that the FIT Programme and related FIT and microFIT Contracts are inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement and to modify, reverse, or declare moot and of no legal effect several intermediate findings by the Panel.

##### **2.4.2.1 The Panel's finding that the FIT Programme and Contracts involve "procurement by governmental agencies of products purchased"**

2.66. Japan alleges that the Panel erred in finding that the Government of Ontario "purchases" electricity. Japan also alleges that the Panel erred in finding that the Government of Ontario "purchases" electricity in the context of Japan's claim relating to Article 1.1(a)(1)(iii) of the SCM Agreement. Japan maintains that, if the Appellate Body agrees with Japan's proposition in the context of its claim that the Panel erred in finding that the Government of Ontario "purchases" goods in the sense of Article 1.1(a)(1)(iii) of the SCM Agreement, then it must on the same grounds reverse the Panel's finding under Article III:8(a) of the GATT 1994 that the measures at issue involve "procurement by governmental agencies of products purchased for governmental purposes".

2.67. Japan argues that the structure of the energy system in Ontario – in particular the unbundling of generation, transmission, and distribution of electricity and the allocation of each of these functions together with corresponding regulatory functions to separate entities – suggests that the Government of Ontario does not engage in the physical supply or sale of electricity. In particular, Japan submits that the OPA serves as a financing entity to provide financial support to

<sup>157</sup> Japan's other appellant's submission (DS412), para. 13 (quoting Panel Reports, para. 7.136).

<sup>158</sup> Japan's other appellant's submission (DS412), para. 13.

those generators the government desires to promote. In contrast, issues relating to the stable supply of electricity are addressed by other entities, but not through purchases of electricity by the government.<sup>159</sup> In addition, Japan argues that the fact that the government permits privately owned entities to take a role in the generation, transmission, and distribution of electricity supports the proposition that the Government of Ontario "need not"<sup>160</sup> purchase electricity in order to achieve a stable supply of electricity in the province of Ontario.

#### **2.4.2.2 The Panel's interpretation of the word "for" in term "for governmental purposes"**

2.68. In the event that the Appellate Body does not reverse the Panel's finding that the measures at issue involve "procurement by governmental agencies of products purchased", Japan appeals, conditionally, the Panel's interpretation and application of the term "purchased for governmental purposes", and requests the Appellate Body to complete the analysis and find that the FIT Programme and related FIT and microFIT Contracts do not involve "purchase[s] for governmental purposes". Japan alleges that the Panel failed to interpret the meaning of this phrase because it concluded merely that a purchase of goods by a governmental agency for governmental purposes could not at the same time constitute a government purchase of goods with a view to commercial resale, and applied the provision based on this assumption rather than on a proper interpretation of the term "for governmental purposes".

2.69. Japan contends that, by assuming that a purchase for "governmental purposes" could not at the same time amount to a government purchase of goods "with a view to commercial resale" under Article III:8(a), the Panel neglected to analyze whether purchases under the FIT Programme were made "for" governmental purposes. As a result, the Panel failed to analyze whether there was "a true and genuine connection between the 'purchase' ... and 'governmental purpose[]' at issue" and whether purchases of electricity were in fact made "truly and genuinely" in order to obtain or achieve the securing of a stable electricity supply from clean sources.<sup>161</sup>

2.70. Japan argues that electricity is "purchased for governmental purposes" only if the purchase is made "in order to obtain certain governmental purposes or with the objective of achieving such governmental purposes".<sup>162</sup> Japan refers to Canada's proposition that the governmental purpose behind the FIT Programme and Contracts is "to help secure the supply of adequate and reliable electricity in Ontario from clean sources".<sup>163</sup> Accordingly, Japan contends that, in order for the Government of Ontario's purchases of electricity under the FIT Programme to fall within the scope of Article III:8(a), the Panel would have had to find that those purchases were made truly and genuinely in order to obtain or achieve the securing of a stable electricity supply from clean energy sources. However, Japan argues that, within the framework of the Ontario electricity market, in which generation, transmission, and distribution of electricity are carried out by distinct governmental entities, the Government of Ontario does not have to purchase electricity in order to achieve a stable supply of electricity. For Japan, the purpose of securing a stable electricity supply itself does not require that a governmental entity generate, supply, or sell electricity to consumers. Moreover, Japan contends that the fact that Ontario allows the operation of privately owned entities to distribute electricity to consumers confirms that the Government of Ontario does not need to take possession of electricity in order to achieve its stated purpose of ensuring a stable supply of electricity to Ontario consumers.

2.71. Japan also refers to the Appellate Body reports in *Philippines – Distilled Spirits* and *Korea – Alcoholic Beverages* for the proposition that the object and purpose of the GATT 1994 as reflected in Article III is to "avoid[] protectionism, requiring equality of competitive conditions and protecting expectations of equal competitive relationships".<sup>164</sup> For Japan, an interpretation of Article III:8(a) in line with this object and purpose must ensure that the exclusion from the

<sup>159</sup> Japan's other appellant's submission (DS412), paras. 167, 165, and 40.

<sup>160</sup> Japan's other appellant's submission (DS412), para. 41.

<sup>161</sup> Japan's other appellant's submission (DS412), paras. 171 and 174, respectively.

<sup>162</sup> Japan's other appellant's submission (DS412), para. 174.

<sup>163</sup> Japan's other appellant's submission (DS412), para. 174 (quoting Canada's first written submission to the Panel (DS412), para. 88).

<sup>164</sup> Japan's other appellant's submission (DS412), para. 175 (quoting Appellate Body Reports, *Philippines – Distilled Spirits*, para. 221, in turn quoting Appellate Body Report, *Korea – Alcoholic Beverages*, para. 120).

obligation of Article III for products purchased for governmental purposes is not so expansive that it allows WTO Members to avoid the obligations under Article III simply by assigning a "governmental purpose" to a particular measure. Japan contends that, therefore, Article III:8(a) must be interpreted to require that a government's purchase of products is made "truly and genuinely" in order to obtain or achieve a particular governmental purpose.<sup>165</sup>

2.72. Finally, Japan asserts that the domestic content requirements of the FIT Programme undermine the governmental purpose of securing electricity supply from clean sources, because these requirements have the effect of limiting generators' access to the best available technology from the global marketplace.

#### **2.4.2.3 The Panel's interpretation and application of the term "with a view to commercial resale"**

2.73. In the event that the Appellate Body rejects both Japan's appeal relating to the Panel's finding that the Government of Ontario "purchases" electricity and Japan's appeal that the measures at issue involve "purchase[s] for governmental purposes", Japan requests the Appellate Body to find that the Panel failed to interpret properly the term "commercial resale" by concluding that profit earned by the government as a result of the "resale" was relevant evidence of its "commercial" nature. In place of this erroneous conclusion, the Appellate Body should find that the phrase "with a view to commercial resale" means "with a view to being sold in the stream of commerce or trade"<sup>166</sup> and that, to the extent the FIT Programme and Contracts involve purchases of electricity by the Government of Ontario, such purchases are "with a view to commercial resale" because the electricity is purchased with a view to being sold or introduced into the stream of commerce, trade, or market, without regard to whether the government makes a profit from the resale.

2.74. Japan takes issue with the Panel's consideration of "profit" when it concluded that "the Government of Ontario purchases electricity under the FIT Programme 'with a view to commercial resale' based partly on the fact that 'the Government of Ontario and the municipal governments ... profit from the resale of electricity'."<sup>167</sup> Referring to dictionary definitions of the words "commercial" and "commerce", Japan contends that the definitions of these words do not include any element of profit. Furthermore, Japan refers to the panel reports in *Canada – Wheat Exports and Grain Imports* and *China – Intellectual Property Rights* in support of its proposition that the word "commercial" means "engaged in commerce; of, pertaining to, or bearing on commerce"<sup>168</sup> and that these definitions do not include an element of "profit".

2.75. In addition, Japan makes reference to the Appellate Body report in *Japan – Alcoholic Beverages II* for the proposition that the purpose of Article III of the GATT 1994 is to avoid protectionism in the application of internal tax and regulatory measures, and contends that an interpretation of "not with a view to commercial resale" as not aiming to resell for profit would allow Members to adopt protectionist measures contrary to the objective of Article III.<sup>169</sup> Under this interpretation, a Member that wished to exclude a particular foreign product from its domestic market could declare an aim to secure a stable supply of that product for the benefit of its consumers' welfare, establish a non-profit government agency to purchase quantities of that product subject to the requirement that the product be produced domestically, and then resell that product to consumers without earning profit from the resale.

<sup>165</sup> Japan's other appellant's submission (DS412), para. 175.

<sup>166</sup> Japan's other appellant's submission (DS412), para. 188. (emphasis omitted)

<sup>167</sup> Japan's other appellant's submission (DS412), para. 184 (quoting Panel Reports, para. 7.151).

<sup>168</sup> Japan's other appellant's submission (DS412), para. 186 (quoting Panel Reports, *Canada – Wheat Exports and Grain Imports*, para. 6.84; and *China – Intellectual Property Rights*, para. 7.534; both, in turn, quoting *The New Shorter Oxford English Dictionary*, Lesley Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 451).

<sup>169</sup> Japan's other appellant's submission (DS412), para. 187 (referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16, DSR 1996:I, p. 109).



#### 2.4.3 The Panel's decision to exercise judicial economy with respect to Japan's "stand-alone" claim under Article III:4 of the GATT 1994

2.76. Japan submits that the Panel failed to make an objective assessment under Article 11 of the DSU and exercised false judicial economy by failing to examine separately Japan's claim that the FIT Programme and related FIT and microFIT Contracts are inconsistent with Article III:4 of the GATT 1994. Japan notes that the Panel found that the challenged measures are TRIMs falling within the scope of paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement, and are therefore inconsistent with the national treatment obligation of Article III:4 of the GATT 1994. Having made this finding, the Panel declined Japan's request to undertake a separate analysis of the elements of Article III:4. Japan argues that the Panel's exercise of judicial economy was improper and contrary to the Panel's duty under Article 11 of the DSU in two respects.

2.77. First, Japan asserts that the Panel was not entitled to exercise judicial economy, because a separate finding under Article III:4 of the GATT 1994 was required for securing the prompt settlement of this dispute in accordance with Article 3.3 of the DSU, in the case that the Appellate Body were to disagree with the Panel's characterization of the FIT Programme and Contracts as TRIMs, or as TRIMs falling within the scope of paragraph 1(a) of the Illustrative List.

2.78. Second, Japan points out that the terms of paragraph 1(a) of the Illustrative List of the TRIMs Agreement and Article III:4 of the GATT 1994 are different, such that the Panel did not examine Japan's primary claim that the incentive to use domestic parts and components in preference to imported ones resulting from the domestic content requirements of the FIT Programme and Contracts provides less favourable treatment to imported products than that accorded to domestic like products, which is inconsistent with Article III:4. Japan explains that the Panel analyzed whether, in all situations, the operation of the Minimum Required Domestic Content Levels under the FIT Programme and Contracts require that at least some Ontario-sourced goods must be used, and concluded that such a requirement does indeed exist.<sup>170</sup> While Japan agrees with this conclusion, it notes that the standard under Article III:4 is different and, in fact, broader. Japan submits, in this regard, that the incentive to use domestic supplies resulting from a domestic content requirement that may be satisfied by using goods or services, as it exists under the FIT Programme and Contracts, is sufficient to meet the broader "less favourable treatment" standard of Article III:4. According to Japan, the Panel's failure to reach a conclusion under Article III:4 affects the implementation that may be required, and thus may "provide only a partial resolution of the matter at issue".<sup>171</sup>

2.79. Japan requests the Appellate Body to complete the analysis and reach the finding under Article III:4 that the Panel erroneously failed to make. To assist the Appellate Body in reaching a separate finding under Article III:4, Japan briefly reviews the arguments it put forward during the Panel proceedings, while noting that Canada did not contest that, should Article III:8(a) of the GATT 1994 not apply, the FIT Programme and Contracts are inconsistent with Canada's obligations under Article III:4.

2.80. As regards whether renewable energy generation equipment manufactured domestically in Ontario and imported from Japan are "like products", Japan argues that these products are in a directly competitive relationship in the market. Japan submits that there is no substantial difference between such 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".<sup>172</sup>

2.81. Next, Japan submits that the domestic content rules of the FIT Programme and Contracts are "requirements". Japan explains that a renewable energy generator that wishes to obtain the subsidized rates offered by the FIT Programme voluntarily accepts, through the application for and execution of a FIT or microFIT Contract, the obligation to comply with a variety of conditions,

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<sup>170</sup> Japan's other appellant's submission (DS412), para. 149 (referring to Panel Reports, paras. 7.158-7.163).

<sup>171</sup> Japan's other appellant's submission (DS412), para. 143 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, para. 403).

<sup>172</sup> See Appellate Body Report, *EC – Asbestos*, paras. 99 and 101.

including the Minimum Required Domestic Content Level relevant to its solar PV (FIT and microFIT) or wind (FIT) project.

2.82. Japan further asserts that the domestic content requirements of the FIT Programme and Contracts "affect[]" the "internal" "sale", "purchase", or "use" of renewable energy generation equipment.<sup>173</sup> This is because the domestic content requirements incentivize Ontario-based wind and solar PV energy generators to choose renewable energy generation equipment manufactured in Ontario over such equipment produced abroad. These requirements thereby modify the conditions of competition in favour of such goods made in Ontario and have "an effect on"<sup>174</sup> the sale, purchase, or use of those goods in Ontario.

2.83. Finally, Japan argues that the domestic content requirements 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. Japan observes that the focus of this analysis is on whether the FIT Programme and Contracts modify the conditions of competition in the relevant market to the detriment of imported products.<sup>175</sup> It then explains that, by requiring the use of goods or services of Ontario origin in order to obtain above-market electricity rates, the FIT Programme necessarily creates incentives, or a purchasing preference, among Ontario-based wind and solar PV electricity generators to use renewable energy generation equipment produced in Ontario, which in turn stimulates domestic production of such equipment. The "Domestic Content Grids" require that any such generator use at least some Ontario-origin goods to achieve the Minimum Required Domestic Content Levels, thereby confirming the preference for locally produced goods over goods of foreign origin. Japan notes that the Panel itself concurred on this latter point in its analysis under paragraph 1(a) of the Illustrative List of the TRIMs Agreement.<sup>176</sup>

2.84. Therefore, Japan requests the Appellate Body to find that the Panel's exercise of judicial economy with respect to Japan's claim under Article III:4 of the GATT 1994 was improper and contrary to Article 11 of the DSU. Japan additionally requests the Appellate Body to complete the analysis and find that, because the FIT Programme and 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, resulting in less favourable treatment to like products of Japanese origin, they are inconsistent with Article III:4 of the GATT 1994, independent of any conclusion under the TRIMs Agreement.

2.85. At the oral hearing, Japan clarified how Canada's implementation obligations could be different if the Panel had made a finding of violation under Japan's "stand-alone" claim under Article III:4. According to Japan, Canada could lower the FIT Programme's domestic content requirements to a point where such requirements could be met exclusively through the use of local services. Japan was of the view that such a situation would not be addressed by the Panel's finding under Article III:4 and the TRIMs Agreement, but that such situation would have been covered had the Panel made a "stand-alone" finding under Article III:4 of the GATT 1994.

## 2.4.4 Claims under the SCM Agreement

### 2.4.4.1 Article 1.1(a) – "Financial contribution" or "income or price support"

2.86. Japan argues that the Panel erred in its interpretation and application of Article 1.1(a) of the SCM Agreement in characterizing the FIT Programme and related FIT and microFIT Contracts as government "purchases [of] goods". Japan does not dispute the Panel's findings that: (i) the OPA pays for "delivered electricity"; (ii) the Government of Ontario (through its agent Hydro One Inc., which operates 97% of the transmission lines in Ontario) takes possession of the electricity during its transmission to end-consumers; and (iii) Ontario laws, regulations, and contracts characterize

<sup>173</sup> Japan's other appellant's submission (DS412), para. 147.

<sup>174</sup> Japan's other appellant's submission (DS412), para. 147 (referring to Panel Reports, *Turkey – Rice*, paras. 7.221 and 7.222; and *Canada – Autos*, para. 10.80; and Appellate Body Report, *Canada – Autos*, para. 158).

<sup>175</sup> Japan's other appellant's submission (DS412), para. 148 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 135; and Panel Reports, *Turkey – Rice*, para. 7.232; and *China – Publications and Audiovisual Products*, para. 7.1532).

<sup>176</sup> Japan's other appellant's submission (DS412), para. 148 (referring to Panel Reports, para. 7.163).

the challenged measures as "procurements" or "purchases [of] electricity".<sup>177</sup> However, Japan submits that the Panel failed to determine the proper legal characterization of the challenged measures on the basis of an evaluation of their most principal and relevant characteristics. To identify and elucidate the true nature or principal characteristics of a measure, a panel must fully appreciate all relevant facts and surrounding circumstances, which may include whether and to what extent such measure would serve to achieve a stated policy goal. In particular, Japan claims that the Panel overlooked the Government of Ontario's policy decision to unbundle the generation, transmission, and distribution of electricity to achieve its goal of ensuring a stable supply of electricity in Ontario, as well as the design and operation of the FIT Programme and Contracts within the framework of the Ontario electricity market. Japan adds that neither the OPA nor the Government of Ontario makes payments for electricity generated under the FIT Programme for the government's own consumption or for use in providing public services to Ontario residents.

2.87. Japan argues that the measures at issue are not appropriately characterized as government "purchases [of] goods" for three reasons. First, the OPA serves as a financing entity, instead of a purchasing entity, because it never takes possession of electricity. Hydro One, a different governmental entity, is the one receiving the delivered electricity. Second, the Government of Ontario's goals regarding its electricity system are addressed through the roles allocated to the different entities in the Ontario electricity system and programmes and not through purchases of electricity by the government. In this regard, the promotion of environmentally friendly generation is achieved through financing provided under the Renewable Energy Standard Offer Program (RESOP) and the FIT Programme. Third, the fact that the Government of Ontario permits privately owned entities to carry out the role of supplying electricity to consumers in Ontario reveals that the Government of Ontario need not take possession over (i.e. purchase) electricity in order to achieve its objective of ensuring the stable supply of electricity to Ontario consumers.

2.88. Japan contends that the measures at issue are properly characterized as "direct transfer[s] of funds" and "potential direct transfers of funds" under Article 1.1(a)(1)(i) of the SCM Agreement. In the first place, Japan elaborates that the measures constitute "direct transfer[s] of funds" because the OPA collects the "Contract Payments" it owes under FIT and microFIT Contracts from consumers through the "Global Adjustment" (GA) and distributes them to FIT generators. In the second place, Japan specifies that the measures are "potential direct transfers of funds" since FIT generators are entitled to guaranteed payments for delivered electricity for the entire duration of a FIT or microFIT Contract. In the alternative, Japan argues that the FIT Programme and Contracts may also be characterized as "income or price support" under Article 1.1(a)(2) of the SCM Agreement because the Government of Ontario contributes to the prices and income enjoyed by FIT generators and incentivizes the domestic production of equipment used to produce energy from FIT generators.

2.89. Consequently, Japan argues that the Panel committed legal error under Article 1.1(a) of the SCM Agreement in determining that the appropriate legal characterization of the FIT Programme and Contracts was as government "purchases [of] goods" under Article 1.1(a)(1)(iii). Japan requests the Appellate Body to reverse the Panel's finding and that it conclude instead that the FIT Programme and Contracts are appropriately characterized as "a government practice [that] involves a direct transfer of funds ... [or] potential direct transfers of funds" or "any form of income or price support".<sup>178</sup> In the alternative, if the Appellate Body agrees with the Panel that these measures are properly characterized as "purchases [of] goods", Japan requests the Appellate Body to modify the Panel's finding in this regard to find that these measures may be characterized in addition as "direct transfer[s] of funds", "potential direct transfers of funds", or "income or price support" under Article 1.1(a) of the SCM Agreement.

2.90. Furthermore, Japan argues that, in rejecting the complainants' arguments that the measures at issue may also be characterized as "direct transfer[s] of funds" or "potential direct transfers of funds", the Panel in effect found subparagraphs (i) and (iii) of Article 1.1(a)(1) of the SCM Agreement to be mutually exclusive. In Japan's view, this finding derives from the Panel's observation that: "[w]e 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

<sup>177</sup> Japan's other appellant's submission (DS412), paras. 30 and 31.

<sup>178</sup> Japan's other appellant's submission (DS412), para. 48.

transfer[s] of funds".<sup>179</sup> Japan asserts that nothing precludes a panel from determining that a measure may be characterized in multiple ways under Article 1.1(a)(1) of the SCM Agreement, as long as the panel's findings are based on a proper understanding of the measure's relevant characteristics and an objective assessment of the facts. Japan alleges that this conclusion follows from the Appellate Body report in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, where the Appellate Body stated that "Article 1.1(a)(1) ... does not explicitly spell out the intended relationship between the constituent subparagraphs" and that the structure of this provision "does not expressly preclude that a *transaction* could be covered by more than one subparagraph".<sup>180</sup> Japan argues that, despite these findings by the Appellate Body, the Panel's finding in this dispute amounts to a conclusion that Article 1.1(a)(1) does expressly preclude government "purchases [of] goods" from also being characterized as "direct transfer[s] of funds" or "potential direct transfers of funds".

2.91. Moreover, Japan rejects the Panel's reliance on the principle of effective treaty interpretation for precluding the possibility that government "purchases [of] goods" could also be characterized as "direct transfer[s] of funds" or "potential direct transfers of funds". In Japan's view, the Panel itself recognized that "there exist distinct situations where a purchase of goods may not also be a direct transfer of funds, namely the situation where the payment for the purchase is not monetary in nature."<sup>181</sup> Japan further contends that the principle of effective treaty interpretation does not preclude the use of treaty text in a confirmatory manner. Indeed, had the drafters omitted the term "purchases goods" from Article 1.1(a)(1)(iii), "it would have left open the possibility for some Members to argue that the omission of 'purchases [of] goods', particularly in an exhaustive list such as Article 1.1(a)(1), should be interpreted to mean that government transfers of funds in exchange for the receipt of goods should *not* be considered financial contributions."<sup>182</sup>

2.92. According to Japan, the Panel's finding that it could not conclude that government "purchases [of] goods" could also be legally characterized as "direct transfer[s] of funds" is a legal error, and Japan requests the Appellate Body to declare it moot and of no legal effect. Thus, Japan requests the Appellate Body to find that the FIT Programme and Contracts may be characterized as "direct transfer[s] of funds" or "potential direct transfers of funds", regardless of whether they may also be characterized as government "purchases [of] goods".

2.93. Finally, Japan argues that the Panel improperly exercised judicial economy with respect to Japan's claim that the FIT Programme and Contracts constitute "income or price support" under Article 1.1(a)(2) of the SCM Agreement, and thereby failed to make an objective assessment of the matter as required by Article 11 of the DSU. In particular, Japan argues that the Panel's exercise of judicial economy was improper because it failed to explain why its findings (i.e. reasoning and conclusion) with respect to Japan's benefit argument in connection with its "financial contribution" claims are exactly applicable to Japan's benefit argument in connection with its "income or price support" claim. Japan requests the Appellate Body to find that the challenged measures may be characterized as "income or price support", and to find that a benefit exists with respect to this characterization of the FIT Programme and FIT and microFIT Contracts.

#### **2.4.4.2 Article 1.1(b) – "Benefit"**

2.94. Japan claims on appeal that the Panel erred in its interpretation and application of Article 1.1(b) of the SCM Agreement, and failed to make an objective assessment as required by Article 11 of the DSU, in finding that the complainants did not establish an appropriate benchmark or counterfactual against which to assess "benefit", and in dismissing various benchmarks proposed by Japan and a further alternative described by the Panel.

<sup>179</sup> Japan's other appellant's submission (DS412), para. 49 (quoting Panel Reports, para. 7.246).

<sup>180</sup> Japan's other appellant's submission (DS412), para. 50 (quoting, respectively, Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 613 and fn 1287 thereto). (emphasis added by Japan)

<sup>181</sup> Japan's other appellant's submission (DS412), para. 53 (referring to Panel Reports, para. 7.246).

<sup>182</sup> Japan's other appellant's submission (DS412), para. 54. (original emphasis; fn omitted)

2.95. Japan asserts that the Panel concluded that various proposed alternatives were not appropriate benchmarks because the relevant market "must be 'a market where there is effective competition' in which prices are 'established through the operation of unconstrained forces of supply and demand, and not by means of government intervention'"<sup>183</sup> and that certain objectives – namely, securing a reliable electricity system and pursuing health and environmental objectives – could only be achieved in a market with "government intervention", which, in turn, makes competitive markets unsuitable for use as a benchmark. Japan contends that, in addition to being an erroneous interpretation and application of Article 1.1(b), this results in a prejudiced (i.e. non-objective) examination of the issue of benefit, which is inconsistent with Article 11 of the DSU.

2.96. Japan considers that the proper counterfactual is simply one that reflects a situation "but for" the policy in question. For Japan, the history of the Ontario electricity market and the design, structure, and operation of the FIT Programme allow for only one conclusion: the FIT Programme allows wind and solar PV electricity generators to operate in the Ontario market that would otherwise not do so. This alone constitutes a benefit. Japan states that the Panel majority failed to address why this was not so.

2.97. For Japan, whether or not the measures are contributing to certain policy goals should have no relevance in determining the appropriate benchmark. Japan considers that, as suggested by the dissenting member of the Panel, a subsidy may allow a government to achieve certain policy goals that would not be achieved under market conditions prevailing in the absence of that subsidy. Japan notes that "governments regularly use subsidies or other forms of benefits in order to achieve outcomes that 'the market' alone cannot fulfil."<sup>184</sup> Japan agrees with the dissenting opinion that the necessity of the measures at issue for producers to operate at all confirms the fact that such measures constitute a benefit under prevailing market conditions. Japan argues that the Panel majority's approach would leave unregulated subsidies granted to achieve a governmental purpose, thus creating a "large loophole"<sup>185</sup> in the SCM Agreement. Japan also notes that obligations such as the prohibition against subsidies contingent on the use of local goods in Article 3 of the SCM Agreement do not limit Members in their ability to provide subsidies for environmental or health purposes.

2.98. Japan asserts that in finding that no benefit had been established, solely in the light of the guidelines set by Article 14(d) of the SCM Agreement, the Panel erroneously focused on the degree or amount of benefit, rather than on the existence of a benefit. Japan notes that Article 14(d) does not preclude a finding of the existence of a benefit, but provides a particular methodology for calculating the amount of benefit that Members must specify in their own domestic law for the purpose of the imposition of countervailing duty measures. According to Japan, the Panel majority appeared to recognize the limits of Article 14(d) and that there may be more than one way to demonstrate the existence of a benefit.<sup>186</sup> Japan considers that, even relying on the framework of Article 14(d), a comparison of the FIT rates with the weighted-average wholesale rate or the RPP commodity charge would itself establish the existence of a benefit.

2.99. Japan argues that the Panel failed to appreciate the significant difference between what non-renewable energy producers expect to receive and what FIT producers receive. For example, Japan contends that FIT producers currently receive two to eleven times higher rates than the weighted-average wholesale rate. In Japan's view, the magnitude of the difference between the rates received by FIT and non-FIT producers leaves no doubt as to the existence of a benefit. According to Japan, there is no reason to believe that in a less-regulated, "competitive" market, the non-FIT rates would be anywhere close to the FIT rates.

2.100. Additionally, Japan claims that, after improperly deciding to rely exclusively on the framework of Article 14(d) of the SCM Agreement, the Panel chose an improper market benchmark. Japan contends that this resulted in a prejudiced examination of the issue of benefit, inconsistent with Article 1.1(b) of the SCM Agreement and Article 11 of the DSU.

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<sup>183</sup> Japan's other appellant's submission (DS412), para. 65 (quoting Panel Reports, para. 7.275).

<sup>184</sup> Japan's other appellant's submission (DS412), para. 84.

<sup>185</sup> Japan's other appellant's submission (DS412), para. 72.

<sup>186</sup> Japan's other appellant's submission (DS412), para. 99 (referring to Panel Reports, paras. 7.271 and 7.272).

2.101. First, Japan submits that the proper counterfactual or market benchmark would be Ontario's current electricity market except for wind and solar PV FIT producers, as these "would not exist" absent the FIT Programme.<sup>187</sup> Japan submits that the Panel's rejection of this possible benchmark as distorted by government regulation is based on an incorrect understanding of the Appellate Body's finding in *US – Softwood Lumber IV*. In that dispute, Japan notes, the main question was about the size of a benefit, not its existence. Japan observes that, to measure the size of a benefit, it clearly matters if the market price with which the current price is compared is itself influenced by government policies. To show the existence of a benefit, however, it is sufficient that the alternative sales price is lower than the current price. Japan considers that the comparison would be "circular" only if the market price were distorted solely because of the FIT Programme or any other government intervention targeted at FIT generators. In Japan's view, that is "clearly not the case" in this dispute.<sup>188</sup>

2.102. Turning to the Panel majority's alternative benchmark, Japan argues that such a benchmark would also require that a subsidy had been granted. Japan contends that the Panel majority's "erroneous view of the appropriate benchmark" led it to suggest an alternative approach to benefit based on "an artificial market for wind and solar PV energy", that is, one in which commercial distributors would act under a government-imposed obligation to acquire electricity from generators operating solar PV and windpower plants.<sup>189</sup> While Japan considers that this methodology would nevertheless lead to the conclusion that a benefit exists, Japan objects to the use of such an artificial market. In Japan's view, this simply replaces the current government intervention with another: an obligation for commercial distributors to purchase wind- and solar PV-generated electricity.

2.103. Japan also argues that there is no textual basis in Article 1.1(b) for the consideration of environmental protection in a benefit analysis. Japan states that there is no legal basis in the SCM Agreement to justify an otherwise prohibited subsidy under Article 3.1 on grounds such as environmental protection, which, according to Japan, "is understandable because domestic content requirements are irrelevant for purposes such as protection of the environment or promotion of human health".<sup>190</sup> Japan clarifies that it has "no objection whatsoever to Canada promoting renewable energy, which can be a crucial tool to reduce greenhouse gas and other emissions", but that "the promotion of renewable energy must be consistent with Members' WTO obligations."<sup>191</sup> Japan considers that the Panel majority's consideration of environmental protection in its assessment of the appropriate benchmark was a legal error under Article 1.1(b) of the SCM Agreement.

2.104. Moreover, according to Japan, the Panel's approach is essentially based on costs, and erroneously ignores the demand-side of the electricity market. Japan contends that the Panel majority erroneously ignored the "market reality" that "demand does not necessarily exist for every good or service at a price higher than, or even equal to, its *cost*."<sup>192</sup> Japan considers that, under this approach, commercial distributors would have to pay a price that covers generators' production costs plus a reasonable rate of return, but the Panel majority ignored whether the demand-side in Ontario would actually support a price that fully covers these costs. In Japan's view, no rational consumer would in fact ever buy electricity at prices above the costs of solar PV and wind energy producers. Japan further argues that a "cost-based" interpretation of "benefit" "would subvert the central idea of how subsidies are regulated in the SCM Agreement and lead to absurd results".<sup>193</sup>

2.105. Japan also notes that the Panel's alternative counterfactual approach relies on artificially created separate markets, in contradiction to its own finding regarding the existence of only one market for electricity in Ontario. Japan considers this contradiction to amount to a breach of Article 11 of the DSU.

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<sup>187</sup> Japan's other appellant's submission (DS412), para. 104.

<sup>188</sup> Japan's other appellant's submission (DS412), para. 104 (quoting and referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 93).

<sup>189</sup> Japan's other appellant's submission (DS412), para. 108.

<sup>190</sup> Japan's other appellant's submission (DS412), para. 107.

<sup>191</sup> Japan's other appellant's submission (DS412), para. 107.

<sup>192</sup> Japan's other appellant's submission (DS412), para. 109. (original emphasis)

<sup>193</sup> Japan's other appellant's submission (DS412), para. 113.

2.106. Finally, Japan submits that the Panel made contradictory findings under the SCM Agreement and the TRIMs Agreement. On the one hand, the Panel stated that mere participation in the FIT Programme may be viewed as an "advantage" within the meaning of the Illustrative List of the TRIMs Agreement.<sup>194</sup> On the other hand, it did not find that participation in the FIT Programme alone would ensure economically viable operations and constitute a "benefit" for the purposes of the SCM Agreement. Japan submits that this contradiction evidences that the Panel majority failed to make an objective assessment of the facts under Article 11 of the DSU.

#### 2.4.4.3 Article 11 of the DSU – "Benefit"

2.107. Japan presents an additional conditional appeal under Article 11 of the DSU in the event that the Appellate Body rejects its principal benefit argument under Article 1.1(b) of the SCM Agreement. Japan requests the Appellate Body to find that the Panel failed to make an objective assessment under Article 11 of the DSU when it concluded that it could not resolve the question of benefit under its suggested alternative approach to the issue.<sup>195</sup>

2.108. Although Japan considers that the Panel majority's alternative benchmark is flawed because it effectively results in a benefit analysis based on costs, Japan submits that the Panel could have found the existence of benefit by conducting an analysis under its proposed alternative benchmark. In this respect, Japan contends that the Panel record does contain sufficient evidence for the Panel to have completed its proposed analysis. Japan argues that the Panel determined that, under the terms of the FIT and microFIT Contracts, solar PV and wind projects will receive a steady stream of income over a 20-year period, provided that the Government of Ontario does not default on the payments required under the Contracts. Japan submits that the "principal risk"<sup>196</sup> under which FIT generators operate is the sovereign risk of default by the Government of Ontario, which would allow a comparison with the Ontario Government long-term bond yield. While the Panel recognized that the pre-tax rate of return on equity used to develop the FIT Price Schedule in 2009 was 15.8%, it failed to compare the 15.8% with the Ontario Government long-term bond yield that was 4.25% in 2009.<sup>197</sup>

2.109. Japan observes that, instead, the Panel's analysis focused on a comparison of the target rates of return for FIT generators and Ontario's regulated utilities (base-load nuclear and hydro facilities). Japan submits that, even under this analysis, the Panel should have found a benefit to exist. First, Japan notes that the Panel stated that the rate of return on other regulated utilities "could be as high as 12.96%", which Japan notes is "below OPA's 15.8% pre-tax target rate of return" of FIT generators.<sup>198</sup> Second, "the 12.96% figure is based on the *most extreme* estimate of an appropriate risk premium for electricity utilities".<sup>199</sup> Japan considers that 9.75% – the OEB's calculation of an average risk premium for all energy generation technologies – would be the appropriate benchmark. Japan notes that this is even lower than the OPA's 11% after-tax rate of return on equity for FIT generators.<sup>200</sup> Third, Japan objects to the Panel's conclusion that a comparison of rates of return for wind and solar PV electricity generators with Ontario's regulated electricity utilities "is not appropriate because of the 'major technical differences' between the operations".<sup>201</sup> Japan submits that the Panel found that: solar PV and windpower facilities "resemble base-load generation"<sup>202</sup>; Ontario's regulated utilities have a higher risk than wind and solar PV FIT projects because they do not receive government-backed guaranteed prices for 20 years; and the regulated utilities receive lower rates of return than wind and solar PV FIT projects. For Japan, the existence of a benefit in this case is undeniable. In Japan's view, the Panel's failure to conclude that a benefit exists under its alternative approach constitutes a failure by the Panel to make an objective assessment of the matter as required by Article 11 of the

<sup>194</sup> Japan's other appellant's submission (DS412), para. 117.

<sup>195</sup> Japan's other appellant's submission (DS412), para. 119 (referring to panel Reports, paras. 7.322-7.327).

<sup>196</sup> Japan's other appellant's submission (DS412), para. 122.

<sup>197</sup> Japan's other appellant's submission (DS412), para. 123 (referring to Panel Reports, paras. 7.325 and 7.326 and fns 636 and 641 thereto).

<sup>198</sup> Japan's other appellant's submission (DS412), para. 124 (referring to Panel Reports, para. 7.326 and fn 641 thereto).

<sup>199</sup> Japan's other appellant's submission (DS412), para. 124. (original emphasis)

<sup>200</sup> Japan's other appellant's submission (DS412), para. 124 (referring to OEB, EB-2009-0084, Report on the Cost of Capital for Ontario's Regulated Utilities (Panel Exhibit CDA-64), Table 1, p. 38).

<sup>201</sup> Japan's other appellant's submission (DS412), para. 124 (quoting Panel Reports, para. 7.326).

<sup>202</sup> Japan's other appellant's submission (DS412), para. 124 (quoting Panel Reports, para. 7.19).

DSU.<sup>203</sup> Japan requests the Appellate Body to complete the analysis if it rejects Japan's main benefit argument under Article 1.1(b) of the SCM Agreement.

2.110. Should the Appellate Body find that the challenged measures constitute subsidies within the meaning of Article 1.1 of the SCM Agreement, Japan requests the Appellate Body to complete the analysis and find that the challenged measures are inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement.

2.111. Japan states that Canada has never disputed that, if the FIT Programme and Contracts are "subsidies", they are inconsistent with Articles 3.1(b) and 3.2. Nonetheless, Japan recalls its arguments before the Panel that, as the challenged measures are prohibited subsidies under Article 3 of the SCM Agreement, they are "deemed to be specific" pursuant to Article 2.3 of the SCM Agreement. Japan submits that the FIT subsidies are "contingent ... upon the use of domestic over imported goods", both in law and in fact, because they are conditional or dependent upon satisfying the domestic content requirements of the FIT Programme (specifically, the Minimum Required Domestic Content Levels).<sup>204</sup>

## 2.5 Claims of error by the European Union – Other appellant

### 2.5.1 The relationship between the TRIMs Agreement and Article III:4 of the GATT 1994

2.112. The European Union submits that the Panel erred in the interpretation and application of Articles 2.1 and 2.2 of the TRIMs Agreement, read in conjunction with paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement, when finding that these provisions do not preclude the application of Article III:8(a) of the GATT 1994 to the challenged measures.

2.113. The European Union considers that the GATT 1994 and the TRIMs Agreement must be read harmoniously and in a holistic manner in order to give meaning and effect to all of their provisions. As the Panel noted<sup>205</sup>, Article III:8 of the GATT 1994 is a "scope" provision. Article III:8(a) excludes certain measures adopted by governments from the national treatment obligation contained in Article III of the GATT 1994. In other words, measures falling under Article III:8(a) can never be said to be inconsistent with any part of Article III (including Article III:4), because Article III does not apply to such measures.

2.114. According to the European Union, the characterization of Article III:8(a) of the GATT 1994 as a "scope" provision has significant consequences when examining the text of Article 2 of the TRIMs Agreement. In this regard, the European Union draws a contrast between the text of Article 2.1 and Article 2.2 of the TRIMs Agreement. Article 2.1 refers to Article III of the GATT 1994, and in doing so includes Article III "as a whole".<sup>206</sup> For its part, Article 2.2 of the TRIMs Agreement sets out an illustrative list of measures that are necessarily inconsistent with Article III:4 of the GATT 1994. Article 2.2 of the TRIMs Agreement does not refer to Article III of the GATT 1994 "as a whole", nor does it qualify in any way the plain language "are inconsistent with" (e.g. it does not say "inconsistent with the terms of Article III:4"). The European Union understands this difference in language to mean that the Panel's reasoning holds only in relation to TRIMs other than the specific measures defined through the Illustrative List. For those measures that fall within the scope of the Illustrative List, the question whether they could escape a violation through the applicability of Article III:8(a) of the GATT 1994 no longer presents itself because the TRIMs Agreement has conclusively settled the issue. In the European Union's view, paragraph 1 of the Illustrative List contains the understanding of Members that the type of measures listed therein would under no circumstances escape a violation under Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement.

<sup>203</sup> Japan's other appellant's submission (DS412), para. 124 (referring to Panel Reports, paras. 7.19 and 7.326 and fn 641 thereto; and OEB, EB-2009-0084, Report of the Board on the Cost of Capital for Ontario's Regulated Utilities, 11 December 2009 (Panel Exhibit CDA-64), Table 1, p. 38).

<sup>204</sup> Japan notes that this is expressly stated in, *inter alia*, the Green Energy and Green Economy Act of 2009, the Minister's 2009 FIT Direction, and every version of the FIT and microFIT Rules and FIT and microFIT Contracts. (Japan's other appellant's submission (DS412), paras. 128-130)

<sup>205</sup> Panel Reports, fn 263 to para. 7.113.

<sup>206</sup> European Union's other appellant's submission (DS426), para. 31 (referring to Panel Report, *Indonesia – Autos*, para. 14.61).



2.115. The European Union alleges that the Panel's interpretation "alters the nature and function"<sup>207</sup> of Articles 2.1 and 2.2 and the Illustrative List of the TRIMs Agreement. This is because the Panel's approach largely nullifies the effects of Article 2.2 and the Illustrative List in relation to the general obligation in Article 2.1. The European Union explains that Article 2.2 and the Illustrative List aim at introducing detail and specificity to the general obligation in Article 2.1. Being more specific and precise, Article 2.2 and the Illustrative List inform the application of Article 2.1 (and not the other way around, as contended by the Panel). By contrast, the European Union observes that its proposed interpretation is not "inconsistent with the clear terms of Article 2.1"<sup>208</sup>, because the application of a specific rule, aimed at identifying explicitly a subset of measures that are inconsistent with Article III of the GATT 1994 (in particular, in relation to the fourth paragraph of Article III), is not contradictory in any way to the nature of Article 2.1 of the TRIMs Agreement as a horizontal obligation that applies to all TRIMs.

2.116. In addition, the European Union asserts that the Panel's interpretation "ignores" the object and purpose of the TRIMs Agreement, which is "to 'elaborate' 'further' or 'additional' provisions to the already existing ones".<sup>209</sup> The European Union notes that, if Article 2.2 and the Illustrative List were to be read "as merely stating the obvious"<sup>210</sup> – that is, that the types of measures listed in the Annex discriminate against imported goods – with no other implications, they would largely be redundant.

2.117. In sum, the European Union argues that a proper interpretation of Articles 2.1 and 2.2, read in conjunction with paragraph 1(a) of the Illustrative List, should lead to the conclusion that the TRIMs listed in the Annex to the TRIMs Agreement are inconsistent with Article III:4 of the GATT 1994. In those cases, Article III:8(a) of the GATT 1994 does not apply.

2.118. Based on the foregoing, the European Union submits that the Panel wrongly interpreted and applied Articles 2.1 and 2.2, read in conjunction with paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement, when finding that these provisions do not preclude the application of Article III:8(a) of the GATT 1994 to the challenged measures. Accordingly, the European Union requests the Appellate Body to reverse that Panel finding.

2.119. The European Union additionally requests the Appellate Body to complete the analysis and correctly apply the legal interpretation set out above to the Panel's factual findings and uncontested facts on the record. The European Union asserts that the measures at issue in the present dispute match exactly the description set out in paragraph 1(a) of the Illustrative List, namely, that these are measures "compliance with which is necessary to obtain an advantage, and which require ... the purchase of or use by an enterprise of products of domestic origin or from any domestic source".<sup>211</sup> The European Union observes that the Panel reached the same conclusion. Consequently, the European Union requests the Appellate Body to find that Article III:8(a) of the GATT 1994 is not applicable in the present case. Furthermore, as a consequence of this finding, the European Union requests the Appellate Body to uphold, although modifying the reasoning, the Panel's ultimate finding 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 in the Annex to the TRIMs Agreement, they are inconsistent with Article III:4 of the GATT 1994, and thereby also inconsistent with Article 2.1 of the TRIMs Agreement.

## 2.5.2 Claims under Article III:8(a) of the GATT 1994

2.120. The European Union requests the Appellate Body to uphold the Panel's conclusion that the FIT Programme and related FIT and microFIT Contracts are inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement, but also to modify, reverse, or declare moot and of no legal effect several intermediate findings by the Panel.

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<sup>207</sup> European Union's other appellant's submission (DS426), para. 33.

<sup>208</sup> Panel Reports, para. 7.119.

<sup>209</sup> European Union's other appellant's submission (DS426), para. 35. (fn omitted)

<sup>210</sup> European Union's other appellant's submission (DS426), para. 35.

<sup>211</sup> European Union's other appellant's submission (DS426), para. 38 (referring to European Union's first written submission to the Panel (DS426), paras. 148-153).

### 2.5.2.1 The Panel's finding that the domestic content requirements "govern" procurement of electricity

2.121. The European Union requests the Appellate Body to reverse the Panel's finding that the domestic content requirements with respect to windpower and solar PV generation equipment under the FIT and microFIT Contracts "govern" the alleged procurement of electricity for the purpose of Article III:8(a) of the GATT 1994. The European Union alleges that the Panel erred in the interpretation and application of Article III:8(a) in making this finding. The European Union further requests the Appellate Body to complete the analysis and to find instead that the domestic content requirements do not "govern" procurement of electricity. For the European Union, the Panel failed properly to consider the link between the words "procurement" and "products purchased". In the European Union's view, "laws, regulations or requirements" in the sense of Article III:8(a) must be related to the subject matter of the procurement – that is, the "products purchased for governmental purposes" – in order to "govern" such procurement. Article III:8(a) does not cover requirements or conditions that are not connected with "intrinsic characteristics" or the nature of the product purchased.<sup>212</sup> Otherwise, Article III:8(a) would allow discriminatory requirements extending far beyond the actual object of the procurement at stake and affecting broad areas of economic activity, thereby circumventing the objective of Article III of the GATT 1994.

2.122. The European Union contends that the domestic content requirements of the measures at issue are not covered by Article III:8(a) because they relate to generation equipment, a product that is different and "completely disconnected" from the product purchased by the government, which is electricity.<sup>213</sup> The European Union alleges that the Panel erred in finding that there is a close relationship between the domestic content requirements and the electricity purchased by the government because the domestic content requirements relate to "the very same equipment that is needed and used" to produce the energy purchased by the government and because compliance with the domestic content requirements is a "necessary prerequisite" for the alleged procurement of electricity by the Government of Ontario.<sup>214</sup> The Panel ignored that domestic content requirements imposed in relation to generation equipment have nothing to do with the intrinsic characteristics or the nature of the final products.

2.123. In its opening statement at the oral hearing, the European Union submitted that not every condition relating to procurement automatically falls under the terms of Article III:8(a) of the GATT 1994. The European Union argued that rules governing procurement activity, such as rules imposing deadlines or thresholds, or determining the type of procedure to follow in the context of a bidding process, are covered by Article III:8(a). In addition, conditions regulating the product and its characteristics, such as "technical specifications", are also covered. However, the European Union argues that conditions exogenous to the subject matter of the contract, such as the requirements relating to the origin of equipment used to generate electricity procured under the FIT Programme, do not fall under Article III:8(a) because they have "no rational link" with the attributes of the electricity procured.<sup>215</sup> In response to questioning at the oral hearing, the European Union responded to Canada's argument based on Article XVI of the Agreement on Government Procurement (GPA) that, because the signatories to the GPA are all bound by the obligations in the GATT, they would not have needed to prohibit domestic content requirements on inputs into products that are purchased by governments if those requirements fall outside the scope of Article III:8(a) and therefore are, in any event, prohibited by Article III:4 of the GATT 1994. The European Union responded that Canada's reference to "inputs" is inapposite, because the FIT Programme and related Contracts do not involve inputs incorporated into the final product (electricity). Instead, the domestic content requirements at issue relate to equipment and components used to generate electricity. The European Union added that the scope of Article III:8(a) of the GATT 1994 and Article XVI of the GPA are different, because the latter provision covers not only goods and suppliers, but also services, and because it extends beyond the issue of domestic content.

<sup>212</sup> European Union's other appellant's submission (DS426), para. 51.

<sup>213</sup> European Union's other appellant's submission (DS426), para. 53.

<sup>214</sup> European Union's other appellant's submission (DS426), para. 56 (quoting Panel Reports, para. 7.127).

<sup>215</sup> European Union's other appellant's submission (DS426), para. 53.

### 2.5.2.2 The Panel's interpretation of the term "governmental purposes"

2.124. The European Union requests the Appellate Body to reverse or to declare moot and of no legal effect the Panel's statement that the term "governmental purposes" in Article III:8(a) may be read to encompass any government purchase "for a stated aim of the government".<sup>216</sup> In the event that the Appellate Body, in response to Canada's appeal, reverses the Panel's finding that the Government of Ontario's purchases of electricity under the FIT Programme are undertaken "with a view to commercial resale", the European Union requests the Appellate Body to reverse or modify the Panel's reasoning as to the meaning of "governmental purposes", to complete the analysis, and to find that the Government of Ontario's procurement of electricity under the FIT Programme is not undertaken for "governmental purposes".<sup>217</sup>

2.125. The European Union maintains that the term "purchased for governmental purposes" in Article III:8(a) refers only to "government purchases of goods that are needed to sustain the work and functions of the government".<sup>218</sup> Thus, they will have to "be actually used or consumed by the government in the context of its administrative tasks or in the context of the exercise of its public functions".<sup>219</sup> The European Union notes that the word "purposes" in the English version of Article III:8(a) corresponds to the word "*necesidades*" and "*besoins*" in the Spanish and French versions of the covered agreements. The meanings of these terms are not entirely identical and, therefore, in order to interpret the provision in a manner honouring Article 33(3) of the Vienna Convention on the Law of Treaties<sup>220</sup> (Vienna Convention), Article III:8(a) of the GATT 1994 must be understood as referring to purchases for "purposes" or "needs" of the government, or for purchases of goods that will be used by a government for its own consumption or used in the performance of its functions.<sup>221</sup>

2.126. For the European Union, the decisive factor is whether or not the purchased goods will be utilized in some way by the government. The word "purposes" in Article III:8(a) should be understood as referring to a situation in which different government bodies and structures would be unable to perform their functions without the actual use of the good purchased. Such purposes or needs may include government purchases of goods in order to be able to provide government services to citizens. The European Union contends that the functions a government typically performs are delimited by its own constitutional powers. Different governments may have different purposes or needs depending on the different roles that governments may play in different societies. While the scope of the governmental functions covered under Article III:8(a) should not be defined in the abstract, it may be useful to consider typical governmental functions in the Member concerned. The European Union submits that the Appellate Body took a similar approach in *US – Anti-Dumping and Countervailing Duties (China)* with respect to the question of whether an entity is vested with governmental authority in interpreting Article 1.1(a)(1) of the SCM Agreement.<sup>222</sup>

2.127. The purposes or needs of the government cannot include purchases aimed at complying with any stated public policy objective, regardless of whether the goods will be used by the government, because otherwise government purchases aimed at "protecting local producers against imports" as a stated policy would escape the national treatment obligation in Article III of the GATT 1994.<sup>223</sup> The European Union contends that Article XVII:2 of the GATT 1994 provides relevant context and that the negotiating history suggests that Article III:8(a) and Article XVII:2 should be interpreted in a harmonious manner, in the sense that the terms "for governmental purposes" and "government needs" are coterminous with the phrase "products for immediate or ultimate consumption in governmental use".<sup>224</sup>

<sup>216</sup> European Union's other appellant's submission (DS426), para. 60 (quoting Panel Reports, para. 7.138 (fn omitted)).

<sup>217</sup> European Union's other appellant's submission (DS426), para. 61.

<sup>218</sup> European Union's other appellant's submission (DS426), para. 60.

<sup>219</sup> European Union's other appellant's submission (DS426), para. 60.

<sup>220</sup> Done at Vienna, 23 May 1969, UN Treaty Series, Vol. 1155, p. 331.

<sup>221</sup> European Union's other appellant's submission (DS426), paras. 74 and 75.

<sup>222</sup> European Union's other appellant's submission (DS426), para. 77 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 297).

<sup>223</sup> European Union's other appellant's submission (DS426), para. 80.

<sup>224</sup> European Union's other appellant's submission (DS426), para. 85.

2.128. Finally, in the event that the Appellate Body reverses the Panel's finding that the Government of Ontario's purchases of electricity under the FIT Programme are "with a view to commercial resale" as requested by Canada, the European Union requests the Appellate Body to complete the analysis and find that the Government of Ontario's purchases of electricity under the FIT Programme are not undertaken "for governmental purposes". In this regard, the European Union argues that the Government of Ontario's purchases of electricity are not undertaken "for governmental purposes" because the electricity is not used by the Government of Ontario. If the electricity purchased by the government is not used for its own consumption, or in the performance of governmental functions such as the provision of public services, such purchases do not fall under Article III:8(a) of the GATT 1994. The European Union contends that the creation of an electricity system with a stable, reliable, and sufficient supply of electricity from renewable sources is a legitimate policy objective, but it is not in itself a provision of a public service.

### 2.5.3 Claims under the SCM Agreement

2.129. The European Union did not appeal the Panel's finding that the challenged measures amount to government "purchases [of] goods" within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.

#### 2.5.3.1 Article 1.1(b) – "Benefit"

2.130. The European Union claims that the Panel erred in applying Article 1.1(b) of the SCM Agreement. In particular, the European Union calls into question the Panel's analysis of whether there was a "benefit" relative to a market benchmark. The European Union requests the Appellate Body to reverse the Panel's findings that the European Union failed to establish the existence of a benefit and to declare moot and of no legal effect the Panel's findings and observations in paragraphs 7.276-7.327 of the Panel Reports. The European Union also requests that the Appellate Body complete the analysis to find that, as the FIT generators would not obtain remuneration on the market absent the FIT Programme, the challenged measures confer a benefit under Article 1.1(b) of the SCM Agreement. The European Union submits that, as the Panel's findings of benefit are in error, so too is the Panel's ultimate conclusion that the European Union failed to establish that the FIT Programme and Contracts constitute subsidies or envisage the granting of subsidies inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement. The European Union requests the Appellate Body to reverse the Panel's finding and to complete the analysis to find that the challenged measures amount to subsidies prohibited under Articles 3.1(b) and 3.2 of the SCM Agreement, and to recommend that Canada withdraw its prohibited subsidies without delay, as required by Article 4.7 of the SCM Agreement.

2.131. The European Union takes issue with the Panel's finding that the European Union could not establish whether the remuneration provided to FIT generators was "adequate" in relation to a "market standard" – that is, a competitive wholesale market for electricity. The Panel found that the actual prices found in Ontario could not be used as a relevant market benchmark as they were distorted by government intervention. Thus, a hypothetical "market" counterfactual based on a competitive wholesale market for electricity could not be used either as it would not achieve the government objectives established in Ontario.<sup>225</sup> The European Union submits that the Panel wrongly engaged in examining market counterfactuals in order to make a comparison to determine the adequacy of remuneration where, in reality, the determination of benefit was much simpler.

2.132. According to the European Union, the Panel ignored the actual "prevailing market conditions" in Ontario that already showed that, absent the FIT Programme, the remuneration provided by the FIT Programme to FIT generators was not, and could not be, available. The European Union contends that the "mere justification for the existence" of the FIT Programme "manifestly showed" that such government incentives were necessary in a marketplace like Ontario where the supply of electricity generated from windpower and solar PV technologies cannot be achieved by market forces alone and thus necessitates government support.<sup>226</sup> Thus,

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<sup>225</sup> European Union's other appellant's submission (DS426), paras. 146 and 147 (referring to Panel Reports, para. 7.313(b) and (c)).

<sup>226</sup> European Union's other appellant's submission (DS426), para. 147.

according to the European Union, the Panel wrongly found that the European Union did not establish whether the remuneration provided to FIT generators was "adequate".

2.133. The European Union recalls that Article 14(d) of the SCM Agreement, which may be relevant in instances where the challenged measures amount to a financial contribution in the form of a government "purchase[] [of] goods", provides that the "purchase[] [of] goods" by a government shall not be considered as conferring a benefit unless the purchase is made for more than adequate remuneration. The European Union argues that, in making a comparison under Article 14(d), there may be no need to have recourse to hypothetical market counterfactuals or proxies in cases where it is uncontested that, absent the government purchase, the "prevailing market conditions" show that such a product could not be sold since, for instance, there are identical or similar substitutable products being sold at much lower prices.

2.134. Turning to the facts of the present dispute, the European Union argues that the Panel failed to apply the relevant standard correctly when examining the "prevailing market conditions" in Ontario. The European Union observes that the Panel found that the relevant product market for the purposes of determining the existence of a benefit should be the market for electricity, rather than the segment corresponding to electricity generated from windpower and solar PV technologies. The European Union states that "'what the recipient would have obtained from the market' in Ontario was, simply, no remuneration at all (hence the need for government support through the FIT Programme)", and that this was "unambiguously clear from the record of the case".<sup>227</sup> The European Union argues that, where the same or substitutable goods produced by other generating technologies were much less remunerated, the Panel should have arrived at a conclusion as to the existence of a benefit "with little difficulty".<sup>228</sup>

2.135. For the European Union, the mere nature of the FIT Programme indicates that it was introduced to achieve a policy objective of a particular energy supply-mix including renewable generation sources that the "prevailing market conditions" in Ontario could not accomplish. According to the European Union, Canada's submissions indicate that the FIT Programme was created to induce new renewable energy generation, since Ontario's established market structure did not invite sufficient entry of new generators, particularly generators using alternative and renewable energy sources. The European Union notes that the stated objectives of the FIT Programme 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 to "[e]nable new green industries through new investment and job creation", as well as to "facilitate the increased development of Renewable Generating Facilities of varying sizes, technologies and configurations".<sup>229</sup> The European Union notes that the Panel recognized 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".<sup>230</sup>

2.136. The European Union states that, as regards Article 14(d), what the recipient would have obtained from the market is not limited to only the price level but includes all the terms and conditions of the transaction as part of such "remuneration". The European Union states that, on the one hand, the FIT Programme provides remuneration to FIT generators in the form of "guaranteed rates at a certain level and ... for a period of 20 years, including generous price escalation conditions, thereby shielding the FIT generators from any market risks".<sup>231</sup> The European Union highlights that these conditions are provided regardless of the scale or generation capacity of the project, noting that there is a guarantee to purchase as much as the FIT generators can produce. On the other hand, the European Union argues, such remuneration was not available in the relevant marketplace of Ontario in view of the fact that there are other competing generation technologies with lower operating costs also producing electricity. The European Union

<sup>227</sup> European Union's other appellant's submission (DS426), para. 160.

<sup>228</sup> European Union's other appellant's submission (DS426), para. 162. (fn omitted)

<sup>229</sup> European Union's other appellant's submission (DS426), para. 161 (quoting, respectively, Minister's 2009 FIT Direction, p 1; and FIT Rules (version 1.5.1), Section 1.1).

<sup>230</sup> European Union's other appellant's submission (DS426), para. 161 (referring to Panel Reports, para. 7.312).

<sup>231</sup> European Union's other appellant's submission (DS426), para. 163.

argues that the elements included in the FIT remuneration would not be available to FIT generators in the market, absent the FIT Programme. The European Union considers that the dissenting opinion seemingly agreed with this proposition.

2.137. Further, the European Union notes that, in cases involving prohibited subsidies under Article 3 of the SCM Agreement, there is no need to quantify the amount of benefit. The European Union observes that the Appellate Body does not need to identify the relevant benchmark to establish the amount of benefit conferred by the FIT Programme, but rather it suffices to conduct an analysis that permits a determination of the existence of a benefit under Article 1.1(b) of the SCM Agreement, regardless of its amount.

2.138. The European Union considers that the dissenting opinion agreed with the European Union's view that the fact that the market in Ontario alone cannot achieve all policy objectives (such as positive environmental externalities that the market does not capture) does not mean that such "market" should be dismissed as the relevant point of comparison to determine the existence of a benefit. According to the European Union, it is precisely such a "marketplace" that is relevant in determining the existence of a benefit.<sup>232</sup> The European Union points to Article 8.2(c) of the SCM Agreement as reflecting the intention of the drafters of the Agreement that financial contributions provided by the government to achieve a particular policy objective that cannot be achieved by market forces alone may constitute subsidies within the meaning of the SCM Agreement.

2.139. Finally, the European Union points to the Panel's finding in the context of the claims under the TRIMs Agreement that "*mere participation* in [the] FIT Programme may be viewed as obtaining an 'advantage'".<sup>233</sup> The European Union fails to understand on what basis the Panel found that the remunerating conditions provided by the FIT Programme *per se* amount to an "advantage" under the *chapeau* of paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement, but not a "benefit" under the SCM Agreement, considering that the Appellate Body has stated that the term "benefit" encompasses some form of "advantage".<sup>234</sup> In the European Union's view, the same analysis that had permitted the Panel to find that the FIT Programme provided an advantage under the TRIMs Agreement should have led the Panel to conclude that the FIT Programme confers a benefit under Article 1.1(b) of the SCM Agreement.

2.140. The European Union requests the Appellate Body to complete the analysis on the basis of the fact that, absent the FIT Programme, under the "prevailing market conditions" in Ontario, FIT generators would not obtain the remuneration provided by the FIT Programme.

### 2.5.3.2 Article 11 of the DSU – "Benefit"

2.141. In the alternative, the European Union submits that the Panel did not make an objective assessment of the matter in accordance with Article 11 of the DSU. The European Union submits that the Panel failed to consider the totality of the evidence, as presented and argued by the European Union, when finding that, even on the basis of its alternative counterfactual, the European Union failed to establish the existence of "benefit". According to the European Union, the Panel's refusal to consider the European Union's arguments and evidence that would have allowed it to complete its analysis under its own hypothetical "market" counterfactual was based on incoherent reasoning and the exercise of false judicial economy.

2.142. The European Union recalls that, in its observations about a possible alternative approach to the determination of benefit under Article 1.1(b) of the SCM Agreement, the Panel "relied on a hypothetical 'market' counterfactual where the policy objective of securing an adequate supply-mix was achieved under a government-imposed obligation on distributors to purchase electricity from

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<sup>232</sup> European Union's other appellant's submission (DS426), para. 166.

<sup>233</sup> European Union's other appellant's submission (DS426), para. 168 (quoting Panel Reports, para. 7.165). (original emphasis)

<sup>234</sup> European Union's other appellant's submission (DS426), para. 169 (referring to Appellate Body Report, *Canada – Aircraft*, para. 153).

generators operating solar PV and windpower technologies"<sup>235</sup>, but where regulation would not prevent effective competition among generators of wind and solar PV electricity.

2.143. The European Union considers that there is sufficient evidence on the record for the Panel to have found the existence of a benefit, even under the hypothetical market counterfactual suggested by the Panel, or another counterfactual based on price negotiations between potential generators and the government. The European Union points to its submissions before the Panel that, where the State can select producers, it can "obtain the lowest possible price from each producer through direct negotiation or through a bidding process that will ensure purchases at no more than the specific costs plus profit expectation by each bidder"<sup>236</sup>, and that "the predecessors of the FIT Program were administered based on the best prices offered by generators through a bidding process".<sup>237</sup>

2.144. According to the European Union, this, and other evidence on the record, shows that remuneration provided as a result of a bidding process in Ontario led to much lower rates. In particular, the European Union observes how the predecessor of the FIT Programme (the Renewable Energy Supply (RES) Initiatives) in 2004-2008 followed a competitive procurement process. The highest competitive prices proposed in the context of those tenders (a disclosed average of 8.4 cents per kWh and an estimated highest bid of 9.4 cents per kWh) were "way below any of the rates guaranteed under the FIT Programme".<sup>238</sup>

2.145. The European Union highlights that the FIT Programme "guarantees a minimum of profits to the FIT Generators regardless of the market, unlike the case of any producer, which has to compete on price".<sup>239</sup> The European Union considers that an analysis of the "structural elements" of the FIT Programme (namely, the standard rate and guarantee conditions) should have allowed the Panel to complete the analysis and find "benefit" under the Panel's own alternative counterfactual. The European Union recalls that at the Interim Review stage it raised the point that, even under the approach suggested by the Panel, there was sufficient information on the record to determine the existence of a benefit, and requested the Panel to complete its analysis on the basis suggested by the European Union, "or on any other alternative" basis, "in view of the information already available on the record".<sup>240</sup>

2.146. In addition, the European Union alleges that the Panel's failure to consider the totality of the evidence was based on incoherent reasoning and the exercise of false judicial economy. The European Union states that the Panel's only reasoning as to why it did not consider the European Union's evidence was that, having rejected Canada's argument that there was a separate market for wind- and solar PV-generated electricity, it was not necessary 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 amounted to financial contributions that confer a benefit.<sup>241</sup>

2.147. Moreover, the European Union argues that, on the one hand, the Panel found that a separate wholesale market for electricity generated by windpower and solar PV technologies "would not be the appropriate focus" of the benefit analysis in the present dispute, while, on the other hand, it applied a standard that would require a comparison between the remuneration under the FIT Programme and the remuneration that specifically solar PV and windpower generators would obtain within a hypothetical "market" counterfactual.<sup>242</sup> The European Union

<sup>235</sup> European Union's other appellant's submission (DS426), para. 182.

<sup>236</sup> European Union's other appellant's submission (DS426), para. 186 (referring to European Union's closing statement at the second Panel meeting (DS426), para. 11).

<sup>237</sup> European Union's other appellant's submission (DS426), para. 185 (referring to European Union's second written submission to the Panel (DS426), para. 85).

<sup>238</sup> European Union's other appellant's submission (DS426), paras. 189 and 190 (quoting OPA, Joint Report to the Minister of Energy: Recommendations on a Standard Offer Program for Small Generators connected to a Distribution System, 17 March 2006 (Panel Exhibit CDA-55), pp. 17 and 20; and Hogan Report, p. 34).

<sup>239</sup> European Union's other appellant's submission (DS426), para. 187 (referring to European Union's comments on Canada's response to Panel question No. 17 (second set), para. 19).

<sup>240</sup> European Union's other appellant's submission (DS426), paras. 191 and 192 (referring to European Union's comments on Interim Panel Report, pp. 6-7).

<sup>241</sup> European Union's other appellant's submission (DS426), para. 197.

<sup>242</sup> European Union's other appellant's submission (DS426), paras. 198 and 199.

considers that this constitutes incoherent reasoning and false judicial economy contrary to the Panel's obligations under Article 11 of the DSU. The European Union requests the Appellate Body to reverse the Panel's finding that the European Union failed to establish the existence of a benefit, to complete the analysis on the basis of the uncontested arguments and evidence submitted by the European Union, and to find that the challenged measures confer a benefit under Article 1.1(b) of the SCM Agreement.<sup>243</sup>

2.148. The European Union claims that, as a consequence of the Panel's errors regarding "benefit", the Panel's ultimate conclusion that the European Union failed to establish that the challenged measures constitute subsidies or envisage the granting of subsidies inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement is also in error. The European Union requests the Appellate Body to reverse this finding, to complete the analysis, and to find that the measures amount to prohibited subsidies. Moreover, the European Union requests the Appellate Body to recommend that Canada withdraw its prohibited subsidies without delay as required by Article 4.7 of the SCM Agreement. Should the Appellate Body be unable to complete the analysis under any of the requests made by the European Union, the European Union requests the Appellate Body to declare moot and of no legal effect the Panel's findings and conclusions in paragraph 7.328(ii) of its Reports, and in paragraph 8.7 of the EU Panel Report (DS426).<sup>244</sup>

## **2.6 Arguments of Canada – Appellee**

### **2.6.1 The order in which the Panel dealt with Japan's claims under the SCM Agreement and its claims under the TRIMs Agreement and the GATT 1994**

2.149. Canada did not address in its appellee's submission Japan's claim that the Panel erred by commencing its evaluation with Japan's claims under the TRIMs Agreement and the GATT 1994, rather than with its claims under the SCM Agreement.

### **2.6.2 The relationship between the TRIMs Agreement and Article III:4 of the GATT 1994**

2.150. Canada asserts that the Panel correctly found that the TRIMs Agreement does not preclude the application of Article III:8(a) of the GATT 1994 to the FIT Programme's domestic content requirements.

2.151. Canada notes the European Union's argument that the Panel "ignored" the difference in the terms used in paragraphs 1 and 2 of Article 2 of the TRIMs Agreement.<sup>245</sup> According to Canada, rather than support the European Union's interpretation, the reference to Article III:4 of the GATT 1994 in Article 2.2 of the TRIMs Agreement undermines it. Canada explains that, by characterizing the measures in the Illustrative List of TRIMs in the Annex to the TRIMs Agreement as inconsistent with "the obligation of national treatment provided for in paragraph 4 of Article III" of the GATT 1994, instead of "Article III", Article 2.2 does not address the consistency of the measures listed in the Annex to the TRIMs Agreement with Article III of the GATT 1994, as a whole, including Article III:8(a).

2.152. Canada also rejects the European Union's argument that the Panel's interpretation renders Article 2.2 of the TRIMs Agreement and the Illustrative List "essentially redundant".<sup>246</sup> Canada submits that "just because a measure obviously discriminates against imported goods does not mean that the measure satisfies all the elements of Article III:4."<sup>247</sup> Canada adds that Article 2.2 of the TRIMs Agreement not only identifies measures that are inconsistent with Article III:4 of the GATT 1994 but, more specifically, measures that are inconsistent with that Article and that can also be characterized as TRIMs. Furthermore, it notes that the list is "illustrative" and, therefore, apart from any other function, provides an illustration of the types of measures that are both TRIMs and inconsistent with the national treatment obligation in Article III:4 of the GATT 1994.

<sup>243</sup> European Union's other appellant's submission (DS426), para. 204.

<sup>244</sup> European Union's other appellant's submission (DS426), para. 206.

<sup>245</sup> Canada's appellee's submission, para. 28 (referring to European Union's other appellant's submission (DS426), paras. 31 and 32).

<sup>246</sup> Canada's appellee's submission, para. 30 (quoting European Union's other appellant's submission (DS426), para. 27).

<sup>247</sup> Canada's appellee's submission, para. 30.



2.153. In addition, Canada argues that the European Union "overlooks"<sup>248</sup> that the context to paragraph 1 of the Illustrative List undermines its interpretation of that paragraph. Canada points out that the Illustrative List also contains, in paragraph 2, examples of TRIMs that are inconsistent with Article XI:1 of the GATT 1994. It further notes that Article XI:2 contains a "scope" provision similar to Article III:8(a) of the GATT 1994. Canada draws an analogy between Articles XI:2 and III:8(a) in their relation to the Illustrative List of the TRIMs Agreement. Consequently, Canada submits that, if the European Union's interpretation of the effect of the Illustrative List of TRIMs that are inconsistent with Article III:4 is correct, then this must also be the effect of the Illustrative List of TRIMs that are inconsistent with Article XI:1 of the GATT 1994. In other words, under the European Union's reasoning, the TRIMs that are listed in the Illustrative List as inconsistent with Article XI:1 must fall outside the scope of Article XI:2. Yet, Canada submits that a comparison between Article XI:2 and the TRIMs listed in the Illustrative List as inconsistent with Article XI:1 of the GATT 1994 reveals that this proposition "is untenable".<sup>249</sup> Canada emphasizes that the Illustrative List contains measures that "clearly"<sup>250</sup> could fall within the scope of Article XI:2 of the GATT 1994. As an example, Canada refers to measures that "restrict the importation by an enterprise of products used in or related to its local production". Canada argues that such measures can "clearly"<sup>251</sup> fall within the scope of Article XI:2(c)(ii), which states that "[t]he provisions of paragraph 1 of this Article shall not extend to ... [i]mport restrictions on any agricultural or fisheries product ... necessary to the enforcement of government measures which operate ... to remove a temporary surplus of the like domestic product".

2.154. Therefore, Canada asserts that the European Union's interpretation of Article 2.2 and paragraph 1 of the Illustrative List in the Annex to the TRIMs Agreement is inconsistent with the text and its context. Canada thus submits that the European Union has failed to provide grounds to overturn the Panel's decision that the TRIMs Agreement does not preclude the application of Article III:8(a) of the GATT 1994 to the FIT Programme's domestic content requirements.

### **2.6.3 Claims under Article III:8(a) of the GATT 1994**

2.155. Canada requests the Appellate Body to uphold the Panel's findings with respect to the issues raised under Article III:8(a) of the GATT 1994 in the other appeals by the European Union and Japan.

#### **2.6.3.1 The Panel's finding that the FIT Programme and Contracts involve "procurement by governmental agencies of products purchased"**

2.156. Canada maintains that the Panel correctly found that the Government of Ontario "purchases" electricity under the FIT Programme. For Canada, the Panel properly considered the facts that the funds transferred to suppliers are intended to pay for the electricity that is delivered into Ontario's electricity grid; that the Government of Ontario takes "possession" of the electricity because it directs the movement of that electricity to and throughout the grid by means of IESO instructions; and that the Electricity Act of 1998, the Minister's 2009 FIT Direction, the FIT and microFIT Contracts, and other related documents all characterize the challenged measures as a "procurement" or "purchase" of electricity.

2.157. In response to Japan's argument that the allocation of the generation, transmission, and distribution of electricity to different entities in Ontario suggests that the Government of Ontario does not "purchase" electricity, Canada argues that it is irrelevant which specific agency within the Government of Ontario takes physical possession of the electricity, as long as the Government of Ontario takes possession. Canada further submits that Japan overlooks that the Panel found that an entity can purchase a product even if it does not take "physical possession" of it. According to the Panel, even if there is no transfer of physical possession of a product, there can be a "purchase" if the purchaser obtains "an entitlement"<sup>252</sup> to the product, and Canada asserts that the Panel effectively found that the OPA has an entitlement to electricity delivered under the FIT and microFIT Contracts.

<sup>248</sup> Canada's appellee's submission, para. 32.

<sup>249</sup> Canada's appellee's submission, para. 33.

<sup>250</sup> Canada's appellee's submission, para. 33.

<sup>251</sup> Canada's appellee's submission, para. 33.

<sup>252</sup> Canada's appellee's submission, para. 38 (referring to Panel Reports, paras. 7.228 and 7.229).

### 2.6.3.2 The Panel's finding that the domestic content requirements "govern" the procurement of electricity

2.158. Canada contends that the Panel correctly found that the domestic content requirements "govern" the procurement of electricity. For Canada, the Panel correctly considered that, because the domestic content requirements must be satisfied by generators wanting to participate in the FIT Programme, these requirements "govern" procurement of electricity by the Government of Ontario under the FIT Programme. The European Union argues that the Panel's interpretation allows discriminatory requirements to extend far beyond the actual object of the procurement at stake, affecting broad areas of economic activity that would be irreconcilable with the objective of Article III of the GATT 1994. In response to this argument, Canada asserts that the European Union overlooks the objective of paragraph 8(a) of Article III, which supports the inclusion of domestic content requirements on the inputs into products that are purchased by the government. Canada maintains that this provision was included in Article III in order to enable Members to pursue public policy through government procurement.

2.159. Furthermore, Canada refers to Article XVI:1 of the GPA, which prohibits conditions on the inputs into the product that is purchased. Canada argues that, since the signatories to the GPA are all bound by the obligations in the GATT, they would not have needed to prohibit domestic content requirements on inputs into products that are purchased by governments if those requirements fall outside the scope of Article III:8(a) and, therefore, are in any event prohibited by Article III:4 of the GATT 1994. Furthermore, Canada refers to Article XVI:2 of the GPA, which allows developing countries to negotiate exemptions from the disciplines on domestic content requirements on inputs into products that are purchased by the government. Canada argues that there would have been no need to include this exemption if developing countries nevertheless faced such disciplines under the GATT 1994. In addition, Canada alleges that the European Union overlooks academic commentary, suggesting that "it is clear"<sup>253</sup> that requirements imposed on the inputs into products purchased by the government fall within the scope of Article III:8(a) of the GATT 1994.

### 2.6.3.3 The Panel's interpretation of the term "governmental purposes"

2.160. Canada submits that the Panel correctly interpreted the term "governmental purposes". In particular, Canada supports the Panel's statement that the ordinary meaning of "governmental purposes" is relatively "broad"<sup>254</sup> and may encompass all three of the meanings advanced by the parties, including the meaning proposed by Canada that a purchase for "governmental purposes" is a purchase for a stated aim of the government. Canada maintains that the European Union's interpretation of the word "purposes" as "needs" is not supported by dictionary definitions of the word "purpose". For Canada, the term "governmental purposes" must be interpreted in context with the phrase "and not with a view to commercial resale or with a view to use in the production of goods for commercial sale", and that this phrase confirms that the term "governmental purposes" also refers to the "view" or "aim" behind the purchase. Thus, Canada argues that the inquiry must be into the "purpose", "view", or "aim" behind the purchase and whether it is governmental or commercial.

2.161. Canada further submits that, even if the term "governmental purposes" refers to "needs" of the government, as the European Union argues, it is not clear why purchases for the "needs" of the government are only those for consumption or physical use by the government. With respect to the European Union's reference to the negotiating history of Article III:8(a) and its argument that the provision originally referred to purchases for "governmental use", Canada asserts that the European Union has failed to explain why the negotiators of the provision ultimately chose the word "purposes" instead of "use".

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<sup>253</sup> Canada's appellee's submission, para. 54 (quoting S. Arrowsmith, "Government Procurement in the WTO", *Studies in Transnational Economic Law*, Vol. 16 (Kluwer Law International, 2002), p. 53 (Panel Exhibit CDA-85)).

<sup>254</sup> Canada's appellee's submission, para. 59 (quoting Panel Reports, para. 7.140).

2.162. Moreover, in response to the European Union's argument that the context of Article XVII:2 of the GATT 1994 lends support to its reading of the term "governmental purposes", Canada argues that the inclusion of the word "use" in Article XVII:2 highlights that negotiators chose not to include this word when describing the purchases falling within the scope of Article III:8(a) of the GATT 1994.

#### **2.6.3.4 The Panel's interpretation of the word "for" in the term "for governmental purposes"**

2.163. Canada contends that the Panel correctly interpreted the word "for" in the term "for governmental purposes". In response to Japan's argument that the Panel neglected to analyze whether there was a "true and genuine connection between the 'purchase' ... and 'governmental purpose[]' at issue"<sup>255</sup>, Canada maintains that Japan is raising a new argument and that it is therefore challenging neither an "issue[] of law covered in the panel report" nor a "legal interpretation[] developed by the panel" as required under Article 17 of the DSU. Canada asserts that this issue is outside the scope of the Appellate Body's mandate under Article 17.6 of the DSU, because the Panel was never asked to define the word "for" in the manner now advanced by Japan. Canada submits that the appeal of this issue is also outside the scope of Article 17.6 because there are insufficient facts on the Panel record for the Appellate Body to assess it, given that the issue was not pleaded before the Panel.

2.164. Alternatively, if the Appellate Body finds this issue to be properly before it, Canada asserts that the dictionary definition of the word "for" provided by Japan does not support its interpretation of this word in Article III:8(a) of the GATT 1994. In response to Japan's argument that the object and purpose of the GATT 1994 suggests that an interpretation of Article III:8(a) should "ensure that the exclusion for products 'purchased for governmental purposes' is not so expansive that it allows WTO Members to avoid their obligations under Article III simply by assigning a 'governmental purpose' to a particular trade-restrictive measure"<sup>256</sup>, Canada agrees. In Canada's view, "Article III:8(a) should be interpreted 'to require that a government's purchase of products is made truly and genuinely *in order to obtain or achieve* a particular governmental purpose,' as argued by Japan."<sup>257</sup> For Canada, however, this does not mean that only those purchases that are necessary to achieve a particular governmental purpose fall within the scope of Article III:8(a). Canada submits that the decision of the negotiators of the GATT not to include a necessity test in Article III:8(a) was a deliberate choice.

#### **2.6.3.5 The Panel's interpretation of the term "with a view to commercial resale"**

2.165. Canada alleges that both Japan and the Panel misinterpreted the term "commercial resale". Canada refers to the arguments set out in its appeal of the Panel's interpretation of the phrase "with a view to commercial resale", where it submits that "commercial resale" is a resale with the underlying intent to profit. Canada argues that the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*<sup>258</sup> supports its interpretation of the term "commercial resale". In response to Japan's challenge of the Panel's interpretation of this term, Canada argues that Japan's interpretation of "commercial resale" as resale "into the stream of commerce, trade or market"<sup>259</sup> is incorrect, because dictionary definitions of "commerce" include transactions with intent to realize a profit.

2.166. In addition, Canada asserts that Japan's interpretation "overlooks"<sup>260</sup> that the word "commercial" qualifies the word "resale" in Article III:8(a). A "resale" of a product necessarily means that the product will be "sold into the stream of commerce or trade". Hence, a "commercial resale" cannot mean the same thing. The addition of the word "commercial" must qualify the "resale" in some way. For Canada, the word "commercial" qualifies the "resale" in that it stipulates

<sup>255</sup> Japan's other appellant's submission (DS412), para. 171.

<sup>256</sup> Canada's appellee's submission, para. 71 (quoting Japan's other appellant's submission (DS412), para. 175).

<sup>257</sup> Canada's appellee's submission, para. 71 (quoting Japan's other appellant's submission (DS412), para. 175 (original emphasis)).

<sup>258</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 478. (fn omitted)

<sup>259</sup> Canada's appellee's submission, para. 10 (referring to Japan's other appellant's submission (DS412), paras. 182-188).

<sup>260</sup> Canada's appellee's submission, para. 77.

that it must be for an underlying intent to profit. Furthermore, Canada alleges that Japan's interpretation ignores relevant context provided by the term "governmental purposes". Intent to introduce a product "into the stream of commerce or trade" can still be "governmental". Canada presents the example of a government purchasing books for community libraries and medical vaccines. That the government recovers some of the cost for the purchase of those products does not diminish the governmental nature of that purchase. In Canada's view, the purchase only loses its governmental character and becomes commercial if the government seeks to profit from it.

2.167. Canada argues that both Japan and the Panel misinterpreted the term "with a view to" in Article III:8(a) of the GATT 1994. Canada refers to the arguments set out in its appeal of the Panel's interpretation of the phrase "with a view to commercial resale". Canada maintains that both Japan and the Panel failed to examine the meaning or effect of the term "with a view to" and instead focused solely on the meaning of the term "commercial resale". As a result, Japan and the Panel incorrectly focused on whether there is commercial resale of the electricity that is purchased under the FIT Programme, rather than the view to which that electricity is purchased.

2.168. Canada refers to Japan's argument that Canada's interpretation is contrary to the object and purpose of the GATT 1994 because it would allow a Member that wished to exclude a particular foreign product from its domestic market to declare an aim to secure a stable supply of that product for the benefit of its consumers' welfare, establish a non-profit government agency to purchase quantities of that product subject to the requirement that the product be produced domestically, and then resell that product to consumers without earning profit from that resale. Canada contends that this is not correct, because Japan overlooks that a purchase must be for "governmental purposes and not with a view to commercial resale", and that the purpose of excluding a foreign product from a domestic market cannot be a governmental purpose.

2.169. Canada further submits that the governmental nature of a purchase will partly depend on the role that a government plays in a particular country and the government's role in supplying the product at issue. Canada maintains that, if the government has not traditionally supplied the product and has no constitutional mandate to do so, then this will indicate that the purchase of the product for the alleged benefit of consumers is not actually for a governmental purpose.

#### **2.6.3.6 Canada's request for completion of the analysis**

2.170. In the event that the Appellate Body completes the analysis under Article III:8(a) of the GATT 1994, Canada submits that the evidence on the record demonstrates that the Government of Ontario purchases solar PV- and wind-generated electricity under the FIT Programme "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". Canada maintains that the relevant factors for characterizing the aim behind the purchase are the role of the government within a particular country (including its constitutional and legislative mandate), the stated aims of the government behind the purchase, and whether the government has an intention to profit from the resale or use of the product. For Canada, the application of these three elements demonstrates that the Government of Ontario's purchases of electricity under the FIT Programme are "for [a] governmental purpose[]" and not with a view to commercial resale or ... use in the production of goods for commercial sale".

2.171. Regarding the first element, Canada maintains that the aim behind the purchase of electricity under the FIT Programme is the governmental aim of helping to ensure a sufficient and reliable supply of electricity from clean sources for Ontarians. With respect to the second element, Canada argues that the Government of Ontario plays a significant role in ensuring the provision of a sufficient and reliable supply of electricity from clean sources. Canada submits that the Canadian Constitution Act of 1982<sup>261</sup> gives Canadian provinces, including Ontario, the power to "make laws in relation to ... development, conservation and management of sites and facilities in the province for the generation and production of electrical energy"<sup>262</sup>, and asserts that the Government of Ontario has relied on this power expressly to commit in legislation to pursue for Ontarians a

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<sup>261</sup> The Constitution Act, 1982 was enacted as Schedule B to the Canada Act, 1982 (UK) 1982, Chapter 11, which came into force on 17 April 1982.

<sup>262</sup> Canada's appellee's submission, para. 90 (referring to Department of Justice Canada, Constitution Acts, 1867 to 1982, Part VI – Distribution of Legislative Powers (Panel Exhibit JPN-48), Section 92A(1)(c)).

reliable and sufficient supply of electricity from clean sources. Canada argues that the Government of Ontario plays a significant role in all aspects of the province's electricity system. The Ontario Government, along with local municipal governments, owns the vast majority of the transmission and distribution network that physically supplies electricity to Ontario consumers. It controls the flow of electricity through its agent, the IESO, and regulates the price of electricity and the cost of physically supplying electricity through its agent, the OEB. Canada further submits that the Government of Ontario owns the majority of electricity-generating assets in Ontario through its agent, Ontario Power Generation (OPG), and that the Government also supplements its generation of electricity by purchasing electricity through its agent, the OPA.

2.172. As to the third element, Canada submits that the OPA is prevented from profiting from any aspect of its operations, including the purchase of electricity under the FIT Programme. In that respect, Canada notes that Section 25.2(2) of the Electricity Act of 1998, entitled "Not for profit", states that "[t]he business and affairs of the OPA shall be carried on without the purpose of gain". In sum, for Canada, the role of the Government of Ontario, the stated aims of the government when purchasing renewable electricity, and the government's "not for profit" mandate with regard to the purchase and any resale or use of the electricity, all confirm that the aim of the Government of Ontario behind the purchase of electricity under the FIT Programme is governmental and not commercial.

2.173. Canada maintains that this conclusion is supported by findings of the Panel. Canada submits that the Panel did not directly address the purpose behind the Government of Ontario's purchase of electricity under the FIT Programme, but that it did acknowledge that the FIT Programme serves two fundamental objectives, namely, encouraging the participation of new generation facilities using renewable sources of energy into the Ontario electricity system, and stimulating local investment in the production of renewable energy generation equipment. In addition, Canada refers to the Panel's findings that the objectives of the FIT Programme "are pursued through the execution of the FIT and microFIT Contracts"<sup>263</sup> and to the Panel's finding 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."<sup>264</sup>

#### **2.6.4 The Panel's decision to exercise judicial economy with respect to Japan's "stand-alone" claim under Article III:4 of the GATT 1994**

2.174. Canada did not address in its appellee's submission Japan's claim that the Panel erred by failing to make a finding with respect to Japan's "stand-alone" claim under Article III:4 of the GATT 1994. At the oral hearing, Canada noted that the Panel did make a finding under Article III:4 of the GATT 1994 and said that it did not see why it would have been necessary for the Panel to have made an additional finding under Japan's "stand-alone" claim under Article III:4.

#### **2.6.5 Claims under the SCM Agreement**

##### **2.6.5.1 Article 1.1(a) – "Financial contribution" or "income or price support"**

2.175. With respect to Japan's challenge to the Panel's finding that the measures at issue constitute government "purchases [of] goods", Canada submits that the Panel was correct in finding that the FIT Programme and related FIT and microFIT Contracts constitute a "financial contribution" in the form of government "purchases [of] goods". Canada submits that this finding by the Panel is in accordance with the relevant legal standard, which requires a factual assessment of the transaction at issue to determine its "inherent or essential quality".<sup>265</sup> In this regard, Canada points to the Panel's "extensive analysis of the FIT Program, its legal basis, the mandate and powers of the OPA, the FIT and microFIT Contracts, the intangible nature of electricity, and the role of Hydro One Inc. and the IESO to find that the OPA pays for 'delivered electricity' into Ontario's electricity system".<sup>266</sup> Canada emphasizes that the Panel found that "fundamental" to the FIT and microFIT Contracts was an "exchange" of certain core obligations between generators and

<sup>263</sup> Canada's appellee's submission, para. 96 (quoting Panel Reports, para. 7.216).

<sup>264</sup> Canada's appellee's submission, para. 96 (quoting Panel Reports, para. 7.223 (original emphasis)).

<sup>265</sup> Canada's appellee's submission, para. 108.

<sup>266</sup> Canada's appellee's submission, para. 111 (referring to Panel Reports, paras. 7.223 and 7.224).

the OPA.<sup>267</sup> In particular, FIT and microFIT suppliers must deliver electricity into the Ontario electricity system and, in return, the OPA agrees to make the payments called for under the FIT and microFIT Contracts.

2.176. Canada disagrees with Japan's arguments that the Panel erred in characterizing the measures at issue as government "purchases [of] goods". In response to Japan's claim that "it is other government entities and not the OPA that actually takes possession of the FIT-generated electricity"<sup>268</sup>, Canada submits that the Panel correctly found that possession by the actual purchasing entity was not necessary for a finding of government "purchases [of] goods". According to the Panel, there can be a purchase even if there is no transfer of physical possession of a product if the purchaser obtains "an entitlement"<sup>269</sup> to the product. In Canada's view, the Panel effectively found that the OPA has an entitlement to electricity pursuant to the FIT and microFIT Contracts that it directs be fed into the system. It is not important which government entity takes physical possession of the electricity, because physical possession is not necessary for a purchase to be made.

2.177. With respect to Japan's arguments that "Ontario's stated objective of ensuring a stable supply of electricity does not require that the government purchase the electricity"<sup>270</sup>, and that the presence of private parties in Ontario's electricity system "demonstrates that Ontario does not need to take possession of or purchase electricity to meet the need of ensuring a stable supply"<sup>271</sup>, Canada argues that whether a government purchase is necessary or whether private entities supply electricity is irrelevant for purposes of the proper legal characterization of the FIT Programme and Contracts under Article 1.1(a)(1) of the SCM Agreement.<sup>272</sup>

2.178. With respect to Japan's assertion that the Panel erred in finding subparagraphs (i) and (iii) of Article 1.1(a)(1) to be mutually exclusive, Canada submits that the Panel correctly found that the FIT Programme could not properly be characterized as both "direct transfer[s] of funds" and government "purchases [of] goods". In Canada's view, the customary rules of interpretation do not permit a blurring of the distinction between "direct transfer[s] of funds" and government "purchase[s] [of] goods" as this would make the explicit reference to government "purchase[s] [of] goods" in subparagraph (iii) meaningless. Canada recalls the Panel's conclusion that the Appellate Body's statement in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* does not amount to a finding that "transactions properly characterized as 'purchases [of] goods' can also constitute 'direct transfer[s] of funds'".<sup>273</sup> In Canada's view, the Panel's finding is entirely consistent with the Appellate Body's statement. In particular, while, in a general sense, "[t]he structure of [Article 1.1(a)(1)] does not preclude that a transaction could be covered by more than one subparagraph"<sup>274</sup>, Canada points out that, in the present case, where the same aspects of the same measure are at issue, one cannot properly characterize them both as government "purchases [of] goods" and "direct transfer[s] of funds".

2.179. Canada submits that the Panel properly exercised judicial economy with respect to Japan's characterization of the measures at issue as "income or price support". Canada notes that the Appellate Body has clarified that panels are not required to examine each legal claim made by a complainant. The exercise of judicial economy is proper where a finding is not necessary to resolve fully the matter at issue. Canada argues that Japan's appeal of this issue should be rejected because the complainants' "benefit" arguments with respect to "income or price support" were "essentially the same" as those related to "financial contribution". In this regard, Canada points out that Japan's "benefit" argument with respect to "income or price support" is entirely based on the alleged "market" benchmarks proposed in the context of establishing whether a "benefit" was

<sup>267</sup> Canada's appellee's submission, paras. 103 and 104.

<sup>268</sup> Canada's appellee's submission, para. 113 (referring to Japan's other appellant's submission (DS412), para. 39).

<sup>269</sup> Panel Reports, paras. 7.228 and 7.229.

<sup>270</sup> Canada's appellee's submission, para. 113 (referring to Japan's other appellant's submission (DS412), para. 40).

<sup>271</sup> Canada's appellee's submission, para. 113 (referring to Japan's other appellant's submission (DS412), para. 41).

<sup>272</sup> Canada's appellee's submission, paras. 39 and 114.

<sup>273</sup> Canada's appellee's submission, para. 116 (quoting Panel Reports, para. 7.247).

<sup>274</sup> Canada's appellee's submission, para. 117.

conferred by a "financial contribution".<sup>275</sup> Given that the Panel majority rejected the entirety of Japan's "benefit" claim with respect to "financial contribution", including all of the alleged "market" benchmarks, the entire basis on which Japan's "income or price support" "benefit" allegation rests was rejected by the Panel. Therefore, the outcome of the dispute would have been no different if the Panel had not exercised judicial economy with respect to Japan's "income or price support" claim.

2.180. In the alternative, if the Appellate Body decides to reverse the Panel's exercise of judicial economy, Canada argues that Japan has failed to establish that the FIT Programme constitutes a form of "income or price support". In Canada's view, the term "income or price support" not only means that incomes or prices must be maintained through government measures, but also implies that income or price levels were determined by supply and demand (i.e. by a market) prior to the government's intervention. Canada highlights that the OPA is not responding to some market signal indicating when it must intervene in the market to purchase enough renewable electricity to maintain a certain price level under the FIT Programme.<sup>276</sup> Finally, in the context of the requirement in Article XVI of the GATT 1994 that income or price support "operates directly or indirectly to increase exports of any product ... or to reduce imports", Canada argues that Japan has provided no evidence suggesting that imports of wind or solar electricity into Ontario have declined as a result of the FIT Programme or that exports of wind or solar electricity have increased. Consequently, the conditions to find that the challenged measures are "income or price support" within the meaning of Article 1.1(a)(2) have not been met by Japan.

#### 2.6.5.2 Article 1.1(b) – "Benefit"

2.181. Canada states that both the European Union and Japan adopt the dissenting member of the Panel's "but for" conclusion with regard to "benefit": that is, a "benefit" may be found because, absent the FIT Programme, windpower and solar generators under the FIT Programme "would not otherwise be present".<sup>277</sup> Canada submits that the question of whether a benefit is conferred must, instead, turn on whether the terms of the transaction reveal that the government has paid more than an "adequate" price, for that specific form of electricity, with its specific inherent qualities.

2.182. Canada alleges that a proper approach to assessing whether a benefit is conferred should reflect the ordinary meaning of Article 1.1(b) of the SCM Agreement, in the relevant context of Article 14 and the related jurisprudence. Canada refers to the Appellate Body's jurisprudence regarding the relevance of Article 14(d) of the SCM Agreement as a guideline in interpreting Article 1.1(b). It recalls that, in *EC and certain member States – Large Civil Aircraft*, the Appellate Body stated that Article 14(d) "highlights that a proper market benchmark is derived from an examination of the conditions pursuant to which the goods ... at issue would under market conditions, be exchanged".<sup>278</sup> Canada further recalls that, in respect of the term "adequate remuneration", "[r]emuneration" is defined as 'reward, recompense; payment, pay'. Thus, a benefit is conferred when a government provides goods to a recipient and, in return, receives insufficient payment.<sup>279</sup> Canada submits that, in a case of a government "purchase[]" [of] goods", a benefit is conferred only when a government purchases goods from a recipient and makes more than sufficient payment or compensation for those goods.

2.183. With respect to the question of whether Article 14(d) of the SCM Agreement is concerned with the existence or with the amount of benefit, Canada stresses that Article 14(d) begins with the phrase "purchase of goods by a government *shall not* be considered as conferring a benefit *unless* the ... purchase is made for more than adequate remuneration".<sup>280</sup> Canada considers that Article 14(d) demonstrates that whether a benefit is being conferred depends on the price paid by

<sup>275</sup> Canada's appellee's submission, para. 125.

<sup>276</sup> In addition, Canada points out that price support should also alter the market price for the good in question for other sellers in that market and that Japan has made no such allegation. (Canada's appellee's submission, para. 132)

<sup>277</sup> Canada's appellee's submission, para. 138 (quoting Panel Reports, para. 9.23).

<sup>278</sup> Canada's appellee's submission, para. 163 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 975).

<sup>279</sup> Canada's appellee's submission, para. 164 (quoting Appellate Body Report, *US – Softwood Lumber IV*, para. 84 (fn omitted)).

<sup>280</sup> Canada's appellee's submission, para. 179. (emphasis added by Canada)

the government and that this provision deals with the existence of a benefit in the context of a government "purchase[] [of] goods" and not merely how to calculate the amount of benefit.

2.184. Canada agrees that, in a general sense, the Appellate Body has found that a benefit is an "advantage" conferred on a recipient and is determined by a comparison based on whether the recipient is "better off" than it would be absent the contribution. However, the actual comparison required in a specific benefit analysis is to be conducted by comparing the terms of a government's "financial contribution" to terms available in the market for a comparable transaction. In Canada's view, a proper benefit analysis assumes a counterfactual market purchase and the central question is whether the terms of a financial contribution are more beneficial than a similar transaction between two arm's-length private entities on the market. In Canada's view, the most appropriate benchmark to test "adequacy of remuneration" of the FIT rates would be rates for both wind and solar electricity established through an arm's-length transaction between private entities in Ontario. At the oral hearing, Canada stated that the Panel record contains no such evidence.

2.185. Canada alleges that the complainants' approach ignores the distinction between a "financial contribution" and a "benefit ... conferred". Canada states that the architecture of Article 1.1 is clear and that there are two discrete components to the definition of a "subsidy". Canada submits that, under the approach advocated by the complainants, the mere provision of a "financial contribution" by a government becomes the "benefit". Every time a government purchases a good for which there is no private-sector demand, the fact of that purchase itself would demonstrate a benefit conferred regardless of the price at which that purchase is made. Canada gives the example of the government purchase of armoured vehicles or vaccines, noting that, under the complainant's approach, if these goods would not be purchased on the market absent the government's purchase, then there would be a benefit conferred regardless of the purchase price. To Canada, this would render Article 1.1(b) meaningless.

2.186. Canada disagrees with the European Union's contention that, where the "prevailing market conditions" show that such a product could not be sold, the comparison is between "something" and "nothing", and there is a benefit. According to Canada, the standard to find "benefit" is quite clear – "more than adequate remuneration". Hence, Japan and the European Union have failed to prove that Ontario's purchase of wind and solar electricity under the FIT Programme "is made for more than adequate remuneration".<sup>281</sup>

2.187. Canada reiterates its view that, in limited circumstances where prices are distorted by a government's predominant position as a purchaser of goods, alternative benchmarks may be used. However, such proxies must nevertheless relate to the "prevailing market conditions" in the country of purchase. Canada contends that the European Union ignores that it was a finding of distortion in *US – Softwood Lumber IV* that led the Appellate Body to recognize that prices from such a market could not be used in a proper comparison. Canada states that the dissenting opinion agreed "with the majority that all of the complainants' proposed benchmarks are inappropriate", and that "the price outcomes of the IESO-administered wholesale market (the HOEP) are significantly distorted by the actions and policies of the Government of Ontario".<sup>282</sup> Canada highlights also that the dissenting member of the Panel stated that the proposed benchmarks do not represent prices established on a competitive wholesale electricity market in Ontario.

2.188. Canada alleges that the approach advocated by the complainants ignores factual findings made by the entire Panel (including the dissenting member of the Panel) on the nature of the Ontario electricity system. In particular, the complainants' "benefit" arguments (that are premised on the dissenting conclusions) assume that the FIT Programme brings into the market generators that would be otherwise excluded due to competition. In this respect, Canada disagrees with the European Union and Japan that it is an uncontested fact that, absent the FIT Programme, FIT generators would not have entered the market. According to Canada, this ignores the Panel's findings of fact that absent the FIT Programme new entrants would probably negotiate a price for wind and solar electricity with Ontario and that the IESO-administered "market" based mechanism is not a "market" appropriate for the purposes of a "benefit" analysis. Canada points out that, in Ontario, the government represents the demand-side of the relevant purchase transaction and

<sup>281</sup> Canada's appellee's submission, para. 180.

<sup>282</sup> Canada's appellee's submission, para. 149 (referring to Panel Reports, para. 9.10).



determines which generators can participate in the Ontario electricity system and that generators, regardless of the form of generation, do not compete with each other.

2.189. With respect to the European Union's claim that the existence of a benefit should have been made "with little difficulty"<sup>283</sup> and its reference to the panel's decision in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, Canada distinguishes that situation from the present one. Canada notes that the panel in that dispute dealt with "revenue foregone" pursuant to Article 1.1(a)(1)(ii) of the SCM Agreement. Canada recognizes that certain forms of government "financial contribution" do not have terms that require any comparison to market terms. They "do not have terms *per se* in the same sense that equity capital, loans, loan guarantees, provision of goods and services and the purchase of goods do."<sup>284</sup> According to Canada, in the case of grants and revenue forgone, "the fact of the government action (i.e. the 'financial contribution' itself) may very well demonstrate the conferral of a benefit."<sup>285</sup> However, Canada considers that, consistent with the Appellate Body's treatment of such "financial contributions" as "purchases [of] goods", that is not the case with "financial contributions" that have terms.

### 2.6.5.3 Article 11 of the DSU – "Benefit"

2.190. In response to the European Union's and Japan's arguments that there was sufficient evidence on the record for the Panel to find "benefit" on the basis of the Panel majority's observations on how an appropriate benefit analysis might have been conducted, Canada responds that, while the Panel offered "observations" in response to specific requests from the complainants, it is clear that these "observations" were not findings. Canada considers that the Panel recognized that the complainants bear the burden of making their case and that this is not the Panel's role. Moreover, Canada observes that these observations are simply the Panel majority's views on an alternative approach to "benefit" made at the complainants' urging.

2.191. Responding to the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU by not making a finding as to the existence of a benefit on the basis of the European Union's arguments, Canada states that the Panel majority was correct in stating that the "observations" raise "a number of important questions and factual issues [that] would [have] need[ed] to be explored and resolved in order for any such analysis to be undertaken".<sup>286</sup> Considering that these observations are not findings, Canada argues that the European Union's claim under Article 11 of the DSU "is of no effect".<sup>287</sup>

2.192. Canada also rejects Japan's claims made before the Panel that the weighted-average wholesale rate and the RPP commodity charge could support the finding of a benefit because, absent the FIT Programme, the generators in question would not be in Ontario's wholesale electricity "market".<sup>288</sup> Canada contends that Japan's statement that the unaffected rates are significantly lower than the FIT rates, given the magnitude of difference between Japan's original benchmarks and the FIT rates, "ignores the fact that the entire Panel, including the dissent, comprehensively rejected all these benchmarks because they do not represent prices determined by market forces".<sup>289</sup> In this regard, Canada recalls that the Panel found that price offers by generators in this "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 ...)".<sup>290</sup> Rather, the primary motivation for generators is to ensure they are dispatched in order to receive their regulated or contract-based rates of remuneration. Canada argues that, "[o]n this basis, the Panel rejected the HOEP and HOEP derivative benchmarks proposed by Japan and the European Union", finding that the IESO-administered wholesale market clearing mechanism that generates the HOEP was actually "best characterized as a tool for the IESO to make the dispatch decisions needed to

<sup>283</sup> Canada's appellee's submission, para. 185 (quoting European Union's other appellant's submission (DS426), para. 162 (fn omitted)).

<sup>284</sup> Canada's appellee's submission, para. 186.

<sup>285</sup> Canada's appellee's submission, para. 186.

<sup>286</sup> Canada's appellee's submission, para. 206 (quoting Panel Reports, para. 7.327).

<sup>287</sup> Canada's appellee's submission, para. 206.

<sup>288</sup> Canada's appellee's submission, para. 208 (referring to Japan's other appellant submission (DS412), para. 85).

<sup>289</sup> Canada's appellee's submission, para. 210 (referring to Panel Reports, paras. 7.293-7.298 and 9.8-9.10).

<sup>290</sup> Canada's appellee's submission, para. 211 (quoting Panel Reports, para. 7.298).

balance *physical* supply and demand for electricity".<sup>291</sup> Canada states that the dissenting member of the Panel agreed that the HOEP is "directly related to the electricity pricing policy and supply-mix decisions of ... Ontario"<sup>292</sup> and concluded that the HOEP, its derivatives, and the proposed out-of-province benchmarks "do not represent a price established on a competitive wholesale electricity market in Ontario".<sup>293</sup>

2.193. For these reasons, Canada requests the Appellate Body to reject the complainants' other appeals and uphold the Panel's finding that they have failed to demonstrate that Ontario's purchase of wind and solar electricity under the FIT Programme constitutes a "subsidy" that is inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement.

## 2.7 Arguments of the third participants

### 2.7.1 Australia

2.194. With respect to the claims raised under Article III:8(a) of the GATT 1994, Australia shares the concerns raised by the European Union regarding the Panel's interpretation of the term "governmental purposes". Australia supports the European Union's request that the Appellate Body reverse or declare moot and of no legal effect the Panel's statement that the term "governmental purposes" is relatively broad and may encompass the meaning proposed by Canada – that is, that a purchase for "governmental purposes" may exist whenever a government purchases a product for a stated aim of the government.<sup>294</sup> In Australia's view, the Panel's interpretation of the term "for governmental purposes" is not consistent with the ordinary meaning of the word "purposes", the French and Spanish versions of Article III:8(a), or the negotiating history of Article XVII:2 of GATT 1994, all of which denote the concept of practical advantage or use by the government, rather than a purchase for an aim of the government. Australia agrees with Japan that, if any purchase by a governmental agency for a stated aim of the government were to be covered by Article III:8(a), as Canada suggests, then a WTO Member could circumvent the disciplines of Article III simply by inserting itself as an intermediary in any given market.

2.195. As to the determination of "benefit" under Article 1.1(b) of the SCM Agreement, Australia stated at the oral hearing that it considered that the relevant inquiry is whether the financial contribution is provided on terms that confer an advantage on the recipient. Australia emphasized that there is nothing inherently wrong with a subsidy; the SCM Agreement simply requires that Members avoid recourse to subsidies that are prohibited or cause adverse trade effects. Australia submitted, however, that, if the burden of establishing the existence of a subsidy is too high, many government programmes that were intended to be disciplined by the SCM Agreement would escape scrutiny. Australia submitted that, if the decision of the Panel majority stands, then it could be difficult for any government support programme to be captured by the SCM Agreement. Indeed, the determination of a market benchmark would become difficult and the evaluation of whether there is a subsidy could be unduly constrained in any market where the government intervenes with regard to price.

2.196. At the oral hearing, Australia added that the guidance in Article 14(d) of the SCM Agreement does not provide an exclusive standard for determining whether a benefit is conferred. Australia recalled that, in *Canada – Aircraft*, the Appellate Body found that the ordinary meaning of "benefit" clearly encompasses some form of advantage, and that, in *EC and certain member States – Large Civil Aircraft*, the Appellate Body explained that, in identifying such advantage, a comparison is required to determine whether the recipient of the financial contribution is made "better off"<sup>295</sup> than it would otherwise have been, absent the government action. In Australia's view, this jurisprudence provides the appropriate legal standard and should have provided the basis for the Panel's inquiry, rather than seeking to determine whether FIT generators were given more than adequate remuneration under Article 14(d) of the SCM Agreement. Australia submitted that, given the Panel's finding of an advantage under the

<sup>291</sup> Canada's appellee's submission, para. 211 (quoting Panel Reports, para. 7.298 (original emphasis)).

<sup>292</sup> Canada's appellee's submission, para. 212 (referring to Panel Reports, para. 9.10).

<sup>293</sup> Canada's appellee's submission, para. 212 (referring to Panel Reports, para. 9.10).

<sup>294</sup> Australia's third participant's submission, para. 6 (referring to Panel Reports, para. 7.139).

<sup>295</sup> Australia's opening statement at the oral hearing.

TRIMs Agreement, a finding of "benefit" under the SCM Agreement should have been made with little difficulty.

2.197. Finally, Australia indicated at the oral hearing that it agreed with the approach of the dissenting member of the Panel to determining "benefit". In particular, Australia stated that the FIT Programme confers a benefit because electricity generators supplying wind- or solar PV-sourced electricity would not be able to enter the market unless the Government of Ontario purchased this electricity at elevated prices through FIT and microFIT Contracts. Thus, the FIT Programme accords an advantage on FIT generators and thereby confers a benefit under Article 1.1(b) of the SCM Agreement.

### 2.7.2 Brazil

2.198. Brazil alleges that the Panel's interpretation of the terms "governmental purposes" and "not with a view to commercial resale" in Article III:8(a) of the GATT 1994 conflates two different legal requirements into a single one and thereby renders part of the text of this provision redundant and without legal effect. For Brazil, the Panel's failure to consider the use of the word "and" joining these two terms in Article III:8(a) amounts to establishing that the simple existence of a "commercial resale" is enough to set aside the applicability of this provision altogether, regardless of its rationale or its relation with the first requirement of this provision, that is, the purchase of goods for "governmental purposes". Brazil considers that, should this interpretation prevail, the term "governmental purposes" would be rendered inutile. In the present case, the Panel never arrived at a conclusion with regard to the question of whether purchases of electricity under the FIT Programme were made for "governmental purposes". In Brazil's view, in order to assess if a measure falls outside the purview of Article III:8(a), it would be necessary to analyze both requirements separately.

2.199. Moreover, Brazil considers that the purpose of any governmental action can only be assessed on a case-by-case basis, and should be informed by the functions performed by a given government in each sector of its economy. Brazil submits that most governments have the constitutional or legal responsibility to provide certain services to their citizens – such as health, education, water, electricity, transportation, and public security – and that providing these services constitutes a "governmental purpose" within the meaning of Article III:8(a).

2.200. Brazil further submits that, if the negotiators had intended to restrict the meaning of the term "governmental purposes" to purchases made by governmental agencies for their own use or consumption, they would have done so expressly, as they did in Article XVII:2 of the GATT 1994. Brazil contends that not all purchases of goods made by the government qualify as purchases for "governmental purposes" within the meaning of Article III:8(a), because this would allow the government of a WTO Member to circumvent the disciplines of Article III by inserting itself as an intermediary in any given market. Rather, Brazil submits that the appropriate analysis under Article III:8(a) requires comparing the overall design, structure, and architecture of a procurement programme with the legal and regulatory framework of the responding Member to determine "whether the purchase of goods under scrutiny genuinely pertains to a governmental function in the specific sector of that Member's economy, in light of the legitimate policy objectives within that State's society".<sup>296</sup>

2.201. At the oral hearing, Brazil further stated that the jurisprudence developed in the context of Article XX of the GATT 1994 provides useful guidance for assessing whether a government procurement programme pursues a governmental purpose. For Brazil, this guidance calls for an examination of whether the measure makes a contribution to its objective. Brazil argued that the other two elements of the "necessity test" – i.e. the "restrictiveness" of the measure and the importance of the objective pursued – are not as relevant in the context of Article III:8(a), given that a discriminatory government procurement programme will necessarily be restrictive, and that there seems to be no criteria to establish a hierarchy between different governmental purposes in the context of this provision.

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<sup>296</sup> Brazil's third participant's submission, para. 27.

2.202. With respect to the determination of "benefit" under Article 1.1(b) of the SCM Agreement, Brazil argues that the conclusion reached by the Panel majority that the FIT Programme does not confer a benefit was based on a flawed analysis of the Ontario electricity market. In particular, Brazil contends that the Panel majority's conclusion that none of the benchmarks presented by the complainants were appropriate to evaluate the existence of a benefit is "at odds" with prior decisions of the Appellate Body.<sup>297</sup> Brazil agrees with the dissenting opinion that 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 set by a government, does not mean that it cannot be used as a benchmark for the benefit analysis.

2.203. According to Brazil, it "seems rather obvious" that, "if a producer that increases its market share as a result of a financial contribution is 'better off' in relation to the 'prevailing market conditions', then a producer that did not have an economically viable enterprise [that] enters the market through a financial contribution will also be 'better off' in relation to 'prevailing market conditions'."<sup>298</sup> For Brazil, it is "clear" that, in this case, the producers of solar PV and windpower electricity are "better off" in relation to the "prevailing market conditions" for the simple fact that they became market participants with a long-term, guaranteed participation in the market.<sup>299</sup> This provides a strong indication that the FIT and microFIT Contracts confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement.

2.204. Brazil emphasizes that subsidies are not, in and of themselves, inconsistent with the covered agreements, provided they are not prohibited under Article 3.1(b) of the SCM Agreement, and may be appropriate to promote legitimate objectives.

### 2.7.3 China

2.205. With respect to the claims raised under Article III:8(a) of the GATT 1994, China supports the European Union's appeal of the Panel's finding that the Minimum Required Domestic Content Levels are "requirements governing" the procurement of electricity within the meaning of this provision. China argues that, because the word "procurement" in Article III:8(a) is linked to the words "products purchased", the provision does not apply to procurement of any product, but only to the procurement of products falling within the scope of Article III. China maintains that the Minimum Required Domestic Content Levels with respect to generation equipment under the FIT Programme are only remotely related to the procurement of electricity by the Government of Ontario, and that the Government of Ontario may purchase electricity without such Minimum Required Domestic Content Levels. China submits that it is therefore difficult to justify the application of Article III:8(a) with respect to the local content requirements concerning generation equipment.

2.206. Moreover, China disagrees with Canada's proposition that the phrase "with a view to commercial resale" in Article III:8(a) must be interpreted as referring to the intention behind a purchase. For China, this requirement requires an examination of evidence, rather than of the intention asserted by a governmental agency. China contends that Canada's interpretation may lead to the "absurd situation"<sup>300</sup> that a transaction would fall within the scope of Article III:8(a) as long as a governmental agency claims not to have an intention of commercial resale, even if that agency actually conducts commercial resale. China also disagrees with Canada's interpretation of the term "commercial resale" as referring to resale with the underlying intent to profit. China submits that a resale may be considered "commercial" under Article III:8(a) even if it does not involve a profit. In addition, China alleges that Canada's interpretation of the phrase "with a view to commercial resale" renders the words "with a view to" redundant, because, for Canada, both the term "commercial resale" and the term "with a view to" refer to the aim or intent of the government. China submits that, when determining whether a resale is "commercial" within the meaning of Article III:8(a), the existence of profit should not be the legal standard that resolves the issue, but only one factor to be taken into account.

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<sup>297</sup> Brazil's third participant's submission, para. 36 (referring to Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, paras. 982 and 1122 (the latter para. referring in turn to Appellate Body Report, *US – Upland Cotton*, para. 480); and *Japan – DRAMS (Korea)*, para. 172).

<sup>298</sup> Brazil's third participant's submission, para. 46.

<sup>299</sup> Brazil's third participant's submission, para. 44.

<sup>300</sup> China's third participant's submission, para. 15.

#### 2.7.4 India

2.207. Pursuant to Rule 24(2) of the Working Procedures, India chose not to submit a third participant's submission. At the oral hearing, India stated that the Panel was correct in finding that, under Article III:8(a) of the GATT 1994, a purchase for "governmental purposes" may exist whenever a government purchases goods for a stated aim of the government. India considered that Japan's contention that the scope of the term "government purpose" is limited to purchases for the government's own use unduly limits the scope of this term. With respect to the interpretation of the term "commercial resale" in Article III:8(a), India indicated that the focus should be on the nature of the sale, that is, whether it is an action that is in pursuance of a government policy objective.

2.208. Moreover, India expressed its disagreement with Japan's claim that the measures at issue constitute "income or price support" within the meaning of Article 1.1(a)(2) of the SCM Agreement. For India, acceptance of Japan's interpretation would mean that any price regulation of public utilities or services could be susceptible to challenge as a subsidy, irrespective of the nature and intent of such price intervention. In India's view, regulatory oversight that simply ensures pricing based on market principles cannot be characterized as a subsidy.

2.209. With respect to the determination of "benefit" under Article 1.1(b), India contested Japan's and the European Union's argument that the FIT Programme confers a benefit because, in India's view, absent the FIT Programme, there would be no demand for renewable energy. India urged the Appellate Body to reject this claim since, under this reasoning, there would be no marketplace for renewable energy. For India, the alternative benchmark proposed by the Panel majority was appropriate and should be upheld by the Appellate Body. India observed that, while it may have been possible to determine whether a benefit is conferred by examining whether rates of return are significantly above average cost of capital in Canada for projects having a comparable risk profile, the facts on the record do not support such a finding.

#### 2.7.5 Norway

2.210. Pursuant to Rule 24(2) of the Working Procedures, Norway chose not to submit a third participant's submission. At the oral hearing, Norway expressed its concern with the Panel's interpretation that the term "governmental purposes" in Article III:8(a) of the GATT 1994 is relatively broad and may encompass all situations where a government purchases a product for a stated aim of the government. In Norway's view, this interpretation would allow every single purchase made by a government to constitute a purchase for "governmental purposes", as every such purchase will have some sort of aim.

2.211. Norway agreed with the Panel that a purchase "with a view to commercial resale" cannot, at the same time, be considered a "product purchased for governmental purposes". However, as the term "governmental purposes" has independent meaning, Norway considered that the Panel erred by basing its joint assessment of the two requirements only on its conclusion of the meaning of the phrase "with a view to commercial resale", and thereby not concluding on the interpretation of the term "governmental purposes".<sup>301</sup>

#### 2.7.6 Saudi Arabia

2.212. With respect to the determination of "benefit" under Article 1.1(b) of the SCM Agreement, Saudi Arabia asserts that the Panel correctly considered Article 14(d) of the SCM Agreement to be relevant in these disputes. Saudi Arabia points out that Article 14(d) describes how the adequacy of remuneration is to be determined in relation to "prevailing market conditions" for the goods in question in the country of purchase. Saudi Arabia submits that the word "market" in Article 14(d) is intended to refer to the in-country market in which the government measure in question has been adopted and that the word "prevailing" means "existing" market conditions.<sup>302</sup>

<sup>301</sup> Norway's opening statement at the oral hearing.

<sup>302</sup> Saudi Arabia's third participant's submission, para. 9.

2.213. Saudi Arabia submits that the term "adequate remuneration" does not mean profit maximization, nor does it require that a transaction seek the highest price for the seller or the lowest price for the purchaser. Saudi Arabia agrees with the Panel that "[t]he relevant 'market' need not be a 'pure' marketplace that is devoid of any degree of government intervention".<sup>303</sup> At the oral hearing, Saudi Arabia requested the Appellate Body to affirm that government intervention does not preclude the use of a domestic price benchmark.

2.214. Moreover, Saudi Arabia states that the Panel's rejection of external benchmarks was sound because such benchmarks are appropriate only in "very limited"<sup>304</sup> situations. Saudi Arabia cautions that an external benchmark that does not reflect domestic market conditions is an arbitrary measure that could negate the comparative advantages of the country under investigation. According to Saudi Arabia, in-country cost-based benchmarks have distinct advantages as alternatives to in-country price benchmarks, especially in contrast with external benchmarks. For instance, in-country cost-based benchmarks can be tailored to the unique circumstances of the country, industry, and enterprises concerned to reflect the prevailing market conditions in the country of purchase. Thus, Saudi Arabia requests the Appellate Body to affirm, as a general rule, and consistent with the text of Article 14(d), that in-country cost-based benchmarks are to be preferred over external benchmarks because the latter inevitably require speculative adjustments to reflect prevailing in-country market conditions.

### 2.7.7 Turkey

2.215. Pursuant to Rule 24(2) of the Working Procedures, Turkey chose not to submit a third participant's submission. At the oral hearing, with respect to Article III:8(a) of the GATT 1994, Turkey argued that the measures that are excepted from the obligations of Article III by virtue of the application of Article III:8(a) also include measures that breach Article III:4, such as those set forth in the Illustrative List in the Annex to the TRIMs Agreement. Moreover, Turkey stated that, although they constitute a single requirement, the terms "governmental purposes" and "not with a view to commercial resale or with a view to use in the production of goods for commercial sale" need to be analyzed separately. Therefore, Turkey does not agree with the Panel that a purchase of goods for "governmental purposes" cannot at the same time amount to a governmental purchase of goods "with a view to commercial resale".<sup>305</sup>

### 2.7.8 United States

2.216. The United States addresses five aspects of the Panel's interpretation and application of Article III:8(a) of the GATT 1994. First, the United States disagrees with the Panel's finding that there was a "close relationship"<sup>306</sup> between the product procured by the government (i.e. electricity) and the products affected by the domestic content requirements (i.e. generation equipment) under the FIT Programme. For the United States, the use of the word "governs" in Article III:8(a) indicates that the "laws, regulations or requirements" must directly pertain to the procurement by a government of a specific product.

2.217. Second, the United States agrees with the European Union that the products purchased by the government must be for use in pursuit of its functions, including consumption by the government, or in the provision of goods or services to its citizens. Third, the United States contends that the Panel correctly interpreted and applied the term "with a view to" in Article III:8(a) of the GATT 1994. The United States argues that the Panel considered the "aim" or "purpose" of the purchase and correctly concluded that the Government of Ontario purchases electricity with an aim to commercial resale, because it purchases electricity in the full knowledge and intent that the electricity will be resold on the market to private consumers rather than put to a governmental purpose.

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<sup>303</sup> Saudi Arabia's third participant's submission, para. 15 (quoting Panel Reports, para. 7.274 (fn omitted)).

<sup>304</sup> Saudi Arabia's third participant's submission, para. 19 (quoting Appellate Body Report, *US – Softwood Lumber IV*, para. 102).

<sup>305</sup> Turkey's opening statement at the oral hearing (DS426).

<sup>306</sup> United States' third participant's submission, para. 18 (quoting Panel Reports, para. 7.127).

2.218. Fourth, the United States argues that the words "commercial resale" should be interpreted to mean "to be sold into the market".<sup>307</sup> By including in its ambit government purchases made "for governmental purposes" and excluding those made for "commercial resale", Article III:8(a) seeks to distinguish between purchases made for "governmental" reasons and those made for "commercial" reasons, and thus clarifies that "a purchase leading to a commercial resale is not a purchase for governmental purposes, and *vice versa*."<sup>308</sup> Fifth, regarding the phrase "use in the production of goods for commercial sale", the United States argues that this provision is not limited to use in the government's production of goods for commercial sale, but that it applies equally to goods purchased by a government for use in private production of goods for commercial sale.

2.219. With respect to the relationship between the TRIMs Agreement and Article III:4 of the GATT 1994, the United States agrees with the Panel that a measure excepted from the obligations of Article III of the GATT 1994 by paragraph 8(a) would not breach the national treatment obligation in paragraph 4 by virtue of being included in the Illustrative List in the Annex to the TRIMs Agreement. The United States observes that Article 2.2 of the TRIMs Agreement and the Illustrative List do not establish independent obligations. Rather, a national treatment breach under Article 2 of the TRIMs Agreement only occurs in the event of a breach of Article III of the GATT 1994, which will not arise if one of its exceptions applies.

2.220. With respect to the determination of whether the measures at issue confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement, the United States considers that the Panel majority erred in several respects. First, the United States considers that the Panel majority's finding that the FIT generators would be "unable to conduct viable operations"<sup>309</sup> in a competitive wholesale market in Ontario in the absence of the FIT Programme should have led the Panel to find that the FIT Programme and FIT and microFIT Contracts are financial contributions with terms "more favourable to what is available to the recipient on the market"<sup>310</sup> and thus confer a benefit. Moreover, like the European Union and Japan, the United States notes that the Panel found the price guarantee to be an "advantage"<sup>311</sup> in relation to the TRIMs Agreement, and considers that this should have informed the question of whether the guarantee of those rates conferred a benefit for the purposes of the SCM Agreement.

2.221. Second, the United States submits that there is no requirement in Article 1.1(b) that "benefit" be demonstrated on the basis of such a purely competitive market, nor is there any context provided by Article 14 that would lead to that conclusion. The United States recalls that the Panel majority concluded that the word "market" in Article 14(d) refers to "a market where there is effective competition"<sup>312</sup> solely on the basis of the Appellate Body's findings in *US – Softwood Lumber IV* concerning the acceptable use by an investigating authority of benchmarks other than in-country private prices. The United States emphasizes that the task of a panel under Article 1.1(b) is to determine the existence of a benefit, not to calculate its amount. The United States also notes that, in *US – Softwood Lumber IV*, the Appellate Body used the phrase "may use a benchmark other than private prices"<sup>313</sup>, and that the Appellate Body did not find that an investigating authority must rely on a benchmark solely based on a theoretical competitive market or resort to an actual competitive market outside the market at issue. Further, the United States points out that, even if the HOEP alone is an inappropriate basis for a benchmark, it may still play a role as part of a benchmark. Thus, the Panel majority erred in rejecting any benchmarks that derived from the HOEP.

<sup>307</sup> United States' third participant's submission, para. 10.

<sup>308</sup> United States' third participant's submission, para. 12.

<sup>309</sup> United States' third participant's submission, para. 24 (quoting Panel Reports, para. 7.311).

<sup>310</sup> United States' third participant's submission, para. 24 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 974).

<sup>311</sup> United States' third participant's submission, fn 28 to para. 23 (referring to Panel Reports, paras. 7.165 and 7.166).

<sup>312</sup> United States' third participant's submission, para. 31 (quoting Panel Reports, para. 7.275).

<sup>313</sup> United States' third participant's submission, fn 53 to para. 34 (quoting Appellate Body Report, *US – Softwood Lumber IV*, para. 103). (underlining added by the United States)

2.222. The United States argues that a benefit benchmark is not required to include a government's policy choices. In particular, the United States objects to the position expressed by the Panel majority that a suitable benefit benchmark must "reflect 'the particular situation in Ontario', namely policy decisions ... with regard to the level of supply and sources of energy"<sup>314</sup>, as this amounts to a requirement that a suitable benchmark must "reflect certain policy choices made by a government".<sup>315</sup> The United States sees no textual basis for such an interpretation and observes that every subsidy reflects a policy decision. The United States thus agrees with Japan that "[t]o require that the applicable benchmark be adjusted to reflect the government's policy would ... threaten to make the finding of a subsidy impossible."<sup>316</sup>

2.223. The United States observes that, where a government mandate to purchase a given level of green-sourced electricity is enough by itself for green-sourced electricity to enter the market, there will not necessarily be an impact on electricity prices. This would be so, for instance, in cases where the cost of producing green-sourced electricity – albeit higher – is close to the cost of producing electricity from traditional sources. The United States considers that the hypothetical benchmark proposed by the Panel majority involving a government-imposed mandate to acquire solar PV and windpower energy in fact illustrates the error in its approach. Even with such a mandate, if the cost is significantly higher than the cost of producing electricity from traditional sources, a rational producer will not enter the green energy sector unless the prices are sufficiently high to cover the cost of producing green-sourced electricity (including a return on investment).

2.224. Moreover, recalling that the Panel rejected the benchmarks put forth by the complainants based on the HOEP, the United States contends that the Panel majority erred when it rejected wholesale and retail prices because they were "derived" from the HOEP.<sup>317</sup> The United States points out that the wholesale and retail prices are derived not just from the HOEP but also from the Global Adjustment (GA).<sup>318</sup> The United States considers that the Panel majority should have considered these benchmarks rather than simply dismissing them on the basis that they are "HOEP-derivative".<sup>319</sup>

2.225. At the oral hearing, the United States argued that, by purchasing electricity produced from solar PV and windpower sources, the Government of Ontario is creating demand that would otherwise not exist. This is supported by the fact that solar PV- and wind-powered generators would not enter the market "but for" the FIT Programme, due to their higher costs. The United States pointed out that, by making a financial contribution that allows otherwise unviable producers to enter the market, the FIT Programme confers a benefit within the meaning of Article 1.1(b) of the SCM Agreement.

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<sup>314</sup> United States' third participant's submission, para. 38 (quoting Panel Reports, para. 7.312).

<sup>315</sup> United States' third participant's submission, para. 38.

<sup>316</sup> United States' third participant's submission, para. 40 (referring to Japan's other appellant's submission (DS412), para. 97).

<sup>317</sup> United States' third participant's submission, para. 47.

<sup>318</sup> United States' third participant's submission, para. 47 (referring to Panel Reports, para. 7.55).

<sup>319</sup> United States' third participant's submission, para. 48.



### 3 ISSUES RAISED IN THIS APPEAL

3.1. The following issues are raised in this appeal:

- a. Whether the analysis of Japan's claims in this appeal should commence with Japan's claims under the SCM Agreement (raised by Japan);
- b. With respect to the relationship between Article III of the GATT 1994 and the TRIMs Agreement, whether the Panel erred in the interpretation and application of Articles 2.1 and 2.2 of the TRIMs Agreement, read in conjunction with paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement, when finding that these provisions do not preclude the application of Article III:8(a) of the GATT 1994 to the challenged measures (raised by the European Union);
- c. With respect to the Panel's interpretation and application of Article III:8(a) of the GATT 1994, whether the Panel:
  - i. erred in finding that the domestic content requirements at issue "govern" the procurement of electricity (raised by the European Union);
  - ii. erred in finding that the FIT Programme and related FIT and microFIT Contracts involve "procurement by governmental agencies of products purchased" (raised by Japan);
  - iii. erred in the interpretation and application of the terms "for governmental purposes" (conditional appeals raised by Japan and the European Union);
  - iv. erred by considering evidence of profit as a relevant factor in assessing whether the Government of Ontario's purchases of electricity under the FIT Programme are undertaken "with the view to commercial resale" (conditionally raised by Japan);
  - v. erred in finding that the Government of Ontario's purchases of electricity under the FIT Programme are undertaken "with the view to commercial resale" (raised by Canada); and
  - vi. failed to make an objective assessment of the matter before it, contrary to Article 11 of the DSU, when finding that the measures at issue involve purchases "with a view to commercial resale". More specifically, whether the Panel acted inconsistently with Article 11 of the DSU in finding that:
    - Hydro One Inc. and Local Distribution Companies sell electricity in competition with private-sector licensed retailers (raised by Canada); and
    - the Government of Ontario and the municipal governments profit from the resale of electricity purchased under the FIT Programme to consumers (raised by Canada);
- d. Whether the Panel failed to comply with its duties under Article 11 of the DSU and exercised false judicial economy by failing to make a finding of inconsistency with Article III:4 of the GATT 1994 independent of its findings relating to the TRIMs Agreement (raised by Japan);
- e. With respect to Article 1.1(a) of the SCM Agreement, whether:
  - i. the Panel erred in finding that it could not conclude that government "purchases [of] goods" could also be legally characterized as "direct transfer[s] of funds" (raised by Japan);

- ii. the Panel erred in finding that the FIT Programme and related FIT and microFIT Contracts are government "purchases [of] goods" (raised by Japan); and
- iii. even if the FIT Programme and related FIT and microFIT Contracts are characterized as government "purchases [of] goods", then whether they may also be characterized as "direct transfer[s] of funds", "potential direct transfers of funds", or "income or price support" (raised by Japan);
- f. Whether the Panel erred in exercising judicial economy with respect to the Japan's claim that the measures at issue may be legally characterized as "income or price support" under Article 1.1(a)(2) of the SCM Agreement, and thereby acted inconsistently with its obligations under Article 11 of the DSU (raised by Japan); and
- g. With respect to the Panel's interpretation and application of Article 1.1(b) of the SCM Agreement, whether the Panel:
  - i. erred in finding that the European Union and Japan failed to establish that the challenged measures confer a benefit (raised by Japan and by the European Union); and
  - ii. failed to make an objective assessment of the matter under Article 11 of the DSU in finding that the European Union and Japan failed to establish that the challenged measures confer a benefit (raised by Japan and by the European Union).

## 4 BACKGROUND AND OVERVIEW OF THE MEASURES AT ISSUE

### 4.1 Electricity networks

4.1. Before addressing the claims raised by the participants on appeal, we provide an overview of the measures at issue and outline certain relevant facts identified by the Panel. For additional details in this regard, recourse should be had to the Panel Reports.<sup>320</sup> We note that some of the Panel's factual findings seem to refer generally to electricity markets, while others seem to refer to the Ontario electricity market in particular. To the extent we reproduce the Panel's statements that seem to relate generally to electricity markets, we do so because we consider them to be of particular application to the circumstances of these disputes and not necessarily because we are of the view that they necessarily reflect the characteristics of all electricity markets.

4.2. Electricity is delivered to consumers through high-voltage transmission lines, which connect generators to distributors and large consumers, and through lower-voltage distribution lines, which deliver electricity to individual consumers. In order to ensure the integrity of the electricity system as a whole, it is necessary to maintain a continuous supply-demand balance between generators and consumers. Electricity delivery networks may fail if the quantity of electricity demanded (known as "load") is greater or less than the quantity of electricity supplied for any length of time. In particular, when important imbalances occur, electricity networks may be destabilized, leading to brownouts, blackouts or, in extreme cases, the interruption of power to all consumers.<sup>321</sup> Due to the need to maintain a continuous supply-demand balance across an entire electricity system, uncoordinated bilateral trades between buyers and sellers of electricity cannot take place.<sup>322</sup> As a consequence, "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".<sup>323</sup>

<sup>320</sup> See, in particular, Panel Reports, paras. 7.9-7.68 and 7.195-7.219.

<sup>321</sup> Panel Reports, para. 7.11.

<sup>322</sup> Panel Reports, para. 7.12.

<sup>323</sup> Panel Reports, para. 7.12 (referring to Professor William W. Hogan, Harvard University, "Overview of the Electricity System in the Province of Ontario", 21 December 2011 (Hogan Report) (Panel Exhibit CDA-2), p. 13).

4.3. Given that electricity cannot be stored in large quantities and that demand for electricity fluctuates over any given day<sup>324</sup>, electricity systems generally satisfy demand by utilizing a mix of generation technologies, each with different cost structures and operational requirements. The Panel found that electricity "facilities may be described as 'base-load', 'intermediate' or 'peaking', 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."<sup>325</sup> In particular, the Panel found that base-load generation is that portion of an electricity system's supply-mix that is expected to be able to operate during both low- and high-demand periods.<sup>326</sup> Typical examples of base-load generation are hydroelectric<sup>327</sup> and nuclear stations.<sup>328</sup> This function, however, 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.<sup>329</sup> In turn, intermediate-load generation supplies power when system demand is above its minimum level but still below its maximum level.<sup>330</sup> Coal and natural gas plants are frequently used for intermediate-load generation.<sup>331</sup> Finally, peak-load generators tend to have a high degree of dispatchability and may only run infrequently, usually at times when demand is near the system-wide capacity limit.<sup>332</sup> Single-cycle gas-combustion turbines are an example of peak-load generators. The ability of generators to adjust their level of output quickly (i.e. their dispatchability) tends to be lowest for base-load generators and highest for peak-load generators.<sup>333</sup> Furthermore, the Panel found that electricity generation produced from solar photovoltaic (PV) and windpower technologies resemble base-load generation in that most of their costs are capital costs, but they differ in that their capacity utilization is lower due to intermittent output.<sup>334</sup>

4.4. The Panel noted that "[n]on-dispatchable loads account for most of the energy consumed in Ontario".<sup>335</sup> It further explained that electricity demand is largely unresponsive to prices in the short run (i.e. it is relatively inelastic).<sup>336</sup> Thus, the demand curve can be represented by a (nearly) vertical line in a traditional supply/demand diagram.<sup>337</sup> In addition, the Panel found that plotting the bids submitted by generators in a wholesale electricity market where there is effective competition against their output defines the electricity supply curve.<sup>338</sup> The Panel described the supply curve of a typical mix of generators "as an upward sloping step function that rises sharply as output approaches the market's capacity limit".<sup>339</sup> The Panel further explained that the intersection of supply and demand determines the market clearing price (MCP) and quantity of electricity.<sup>340</sup> Due to the steepness of the supply and demand curves in typical electricity markets, prices may be extremely volatile, rising or falling sharply in response to small changes in demand

<sup>324</sup> The Panel found that, as there are no close substitutes for electricity, electricity demand is largely unresponsive to prices in the short run (i.e. it is relatively price inelastic). Thus, electricity demand fluctuates over the course of a day, week, month, or year when factors other than price (e.g. air temperature and hours of daylight) cause the demand for electricity to change. (Panel Reports, para. 7.13)

<sup>325</sup> Panel Reports, para. 7.14.

<sup>326</sup> Panel Reports, para. 7.15.

<sup>327</sup> Base-load generators tend to have limited dispatchability. However, hydroelectric plants are an exception in that their output can be raised or lowered on relatively short notice. (Panel Reports, para. 7.15)

<sup>328</sup> Panel Reports, para. 7.15.

<sup>329</sup> Panel Reports, para. 7.15.

<sup>330</sup> Panel Reports, para. 7.16.

<sup>331</sup> Panel Reports, para. 7.16.

<sup>332</sup> Panel Reports, para. 7.17.

<sup>333</sup> Panel Reports, para. 7.280. The Panel noted, however, that "[a]lthough hydroelectricity is usually classified as base load power, certain types of hydroelectric facilities can be dispatched". (Ibid. (referring to Hogan Report, p. 5))

<sup>334</sup> Panel Reports, paras. 7.19 and 7.280. The Panel found that generation facilities utilizing solar PV and windpower technologies are considered intermittent generators because power is produced only during certain times of the day and/or night. In particular, wind turbines only produce electricity when the wind is blowing, and electricity from solar PV sources is only produced during the day. (Ibid.)

<sup>335</sup> Panel Reports, fn 526 to para. 7.279 (quoting IESO, Introduction to Ontario's Physical Markets: IESO Training (October 2011) (Panel Exhibit JPN-80), p. 4).

<sup>336</sup> Panel Reports, para. 7.279 (referring to IESO, Introduction to Ontario's Physical Markets: IESO Training (October 2011) (Panel Exhibit JPN-80), p. 4). In particular, the Panel explained that electricity demand is relatively inelastic because there are no close substitutes for electricity and there is a lack of easily observable price signals on the demand-side. (Ibid.)

<sup>337</sup> Panel Reports, para. 7.279.

<sup>338</sup> Panel Reports, para. 7.281 (referring to Hogan Report, p. 16).

<sup>339</sup> Panel Reports, para. 7.281.

<sup>340</sup> Panel Reports, para. 7.282.

and/or supply.<sup>341</sup> According to the Panel, "[t]his is not necessarily an undesirable feature in an electricity market."<sup>342</sup> The Panel cited as an example a situation where high prices encourage households and businesses to consume less of the scarce commodity, as well as provide incentives for incumbent generators to increase their output and for new firms to enter the market by investing in new generation.<sup>343</sup> Therefore, the Panel found that, although a "well-designed" electricity market would provide adequate incentives for investment in new electricity generation, "this theoretical market ideal has not yet been achieved in many electricity systems, including in Ontario".<sup>344</sup> The Panel stated that "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".<sup>345</sup>

4.5. The Panel explained that, partly because of the absence of a more responsive demand in electricity markets, many governments have sought to control price volatility by intervening in the market. Consequently, many countries have experienced insufficient investment in generation because the prices set in their "organized" wholesale market are 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).<sup>346</sup> In such situation, referred to in the Hogan Report and by the Panel as the "missing money" problem, "[p]rivate 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."<sup>347</sup> The Panel found that the "missing money" problem affects both conventional generation technologies and the more expensive solar PV and windpower generation technologies.<sup>348</sup>

## 4.2 Ontario's electricity market

4.6. The Government of Ontario established the Hydro-Electric Power Commission of Ontario (HEPCO) in 1906.<sup>349</sup> HEPCO, which was renamed Ontario Hydro in 1974, was organized as "a vertically integrated public utility with generation, transmission and distribution functions".<sup>350</sup> The Energy Competition Act of 1998, which enacted the Electricity Act of 1998<sup>351</sup>, authorized the "unbundling"<sup>352</sup> of Ontario Hydro into five successor entities: (i) the Independent Market Operator, later renamed the Independent Electricity System Operator (IESO), which is an "agency" of the Government of Ontario<sup>353</sup> that "administers Ontario's electricity markets and operates and maintains the IESO-controlled grid to ensure real-time coordination between electricity supply and demand"<sup>354</sup>; (ii) Ontario Power Generation (OPG), which inherited Ontario Hydro's generation assets; (iii) Hydro One Inc., which received Ontario Hydro's transmission network and rural local distribution businesses; (iv) the Ontario Electricity Financial Corporation (OEFC), which inherited other Ontario Hydro assets and liabilities, including contracts with "Non-Utility Generators"

<sup>341</sup> Panel Reports, para. 7.282.

<sup>342</sup> Panel Reports, para. 7.282.

<sup>343</sup> Panel Reports, para. 7.282.

<sup>344</sup> Panel Reports, para. 7.282 (quoting Hogan Report, pp. 16 and 17, respectively).

<sup>345</sup> Panel Reports, para. 7.282 (referring to Hogan Report, p. 16).

<sup>346</sup> Panel Reports, para. 7.283 (referring to Hogan Report, pp. 13 and 15-19).

<sup>347</sup> Panel Reports, para. 7.283 (referring to Hogan Report, pp. 17-19).

<sup>348</sup> Panel Reports, para. 7.283 (referring to Hogan Report, p. 17).

<sup>349</sup> Panel Reports, para. 7.21.

<sup>350</sup> Panel Reports, para. 7.22.

<sup>351</sup> *Service Ontario 1998*, Chapter 15, Schedule A, as amended (Panel Exhibit JPN-5).

<sup>352</sup> Panel Reports, para. 7.22 (referring to Government of Ontario, *Ontario's Long-Term Energy Plan* (Queen's Printer for Ontario, 2010) (Panel Exhibit CDA-6), p. 5).

<sup>353</sup> As an "agency" of the Government of Ontario, the IESO falls under the "legislative responsibility" of the Government of Ontario's Ministry of Energy. (Panel Reports, para. 7.39 (referring to Government of Ontario webpages, "All Agencies List" (Panel Exhibit JPN-49), available at: <<http://www.pas.gov.on.ca/scripts/en/BoardsList.asp>>; "About the Ministry of Energy" (Panel Exhibit JPN-52), available at: <<http://www.energy.gov.on.ca/en/about/>>; and "Agency Details, Independent Electricity System Operator" (Panel Exhibit JPN-57), available at: <<http://www.pas.gov.on.ca/scripts/en/BoardDetails.asp?boardID=128220>>; and IESO webpage, "About the IESO" (Panel Exhibit JPN-59), available at: <[http://www.ieso.ca/imoweb/about/about\\_the\\_ieso.asp](http://www.ieso.ca/imoweb/about/about_the_ieso.asp)>))

<sup>354</sup> Panel Reports, para. 7.40 (referring to Electricity Act of 1998, Section 5). The Panel found that, in particular, the IESO manages Ontario's wholesale electricity market, which involves monitoring and directing the movement of electricity across the IESO-controlled grid and the settlement of payments between market participants. (Ibid. para. 7.40)

(NUGs); and (v) the Electrical Safety Authority, which was tasked with regulating the system's safety.<sup>355</sup>

4.7. In addition, the Panel found that the Ontario Energy Board Act of 1998 designated the Ontario Energy Board (OEB), an "agency" of the Government of Ontario, as the regulator of "Ontario's electricity and natural gas sectors in conformity with the public interest".<sup>356</sup> In the electricity sector, the OEB sets the transmission and distribution rates, determines the prices that will be received by OPG's "regulated" assets for electricity delivered into Ontario's electricity grid, and maintains the "Regulated Price Plan" (RPP), which establishes the prices paid by retail consumers that purchase electricity from "Local Distribution Companies" (LDCs).<sup>357</sup>

4.8. In May 2002, the Ontario wholesale electricity market was opened to competition.<sup>358</sup> It was expected that the restructuring of the electricity sector would attract private investment into electricity generation. However, although electricity prices rose 30% in the months following the market opening<sup>359</sup>, the anticipated investment failed to materialize.<sup>360</sup> Instead, according to the Panel, the relatively high electricity prices led the Government of Ontario temporarily to freeze electricity prices for residential, institutional, and small business consumers.<sup>361</sup> In particular, the Panel found that, "in addition to the price volatility problems associated with the inherent attributes of competitive wholesale electricity markets, 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".<sup>362</sup> These factors included: very high temperatures during the summer of 2002, which drove up demand to levels that could not be satisfied by existing suppliers without significant price increases; the delay in re-establishing production at the Pickering Unit 4 nuclear plant; the impact of Enron's collapse on financial markets and the temporary failure of the long-term energy trading market; and the retreat of financial markets from the electricity industry.<sup>363</sup>

4.9. The Panel found that, due to the problems encountered during the 2002 market opening experience, the Government of Ontario decided to once again restructure Ontario's electricity system in 2004 by enacting the Electricity Restructuring Act of 2004.<sup>364</sup> This Act created the Ontario Power Authority (OPA) as "an 'agency' of the Government of Ontario responsible for managing Ontario's electricity supply and resources in order to meet its medium and long-term

<sup>355</sup> Panel Reports, para. 7.22 (referring to Hogan Report, pp. 20-21).

<sup>356</sup> Panel Reports, para. 7.42 (referring to Government of Ontario webpages, "All Agencies List" (Panel Exhibit JPN-49), available at: <<http://www.pas.gov.on.ca/scripts/en/BoardsList.asp>>; and "Agency Details, Ontario Energy Board" (Panel Exhibit JPN-63), available at: <<http://www.pas.gov.on.ca/scripts/en/BoardDetails.asp?boardID=764>>; and OEB webpage, "What We Do" (Panel Exhibit JPN-64), available at: <<http://www.ontarioenergyboard.ca/OEB/Industry/About+the+OEB/What+We+Do>>).

<sup>357</sup> Panel Reports, para. 7.42.

<sup>358</sup> Panel Reports, para. 7.285 (referring to Canada's first written submission to the Panel (DS412), para. 25) Between May and November 2002, 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. (Ibid. (referring to Canada's response to Panel questions Nos. 1 and 19 (second set); and first written submission to the Panel (DS412), para. 22(iv)) 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 megawatts) and total electricity output (149,690 gigawatt hours) in 2002. (Ibid., para. 7.286 (referring to Canada's response to Panel question No. 1 (second set))

<sup>359</sup> Panel Reports, para. 7.287 (referring to Government of Ontario, *Ontario's Long-Term Energy Plan* (Queen's Printer for Ontario, 2010) (Panel Exhibit CDA-6), p. 6).

<sup>360</sup> Panel Reports, para. 7.23.

<sup>361</sup> Panel Reports, para. 7.23.

<sup>362</sup> Panel Reports, para. 7.289. (fn omitted)

<sup>363</sup> Panel Reports, paras. 7.287-2.289 (referring to Government of Ontario, *Ontario's Long-Term Energy Plan* (Panel Exhibit CDA-6), p. 6; Canada's response to Panel Question No. 1(g) (second set); Japan's first written submission to the Panel (DS412), para. 25; and Electricity Conservation and Supply Task Force, *Tough Choices: Addressing Ontario's Power Needs*, Final Report to the Minister of Energy (January 2004) (Panel Exhibit CDA-59), p. 84).

<sup>364</sup> An Act to amend the Electricity Act, 1998 and the Ontario Energy Board Act, 1998 and to make consequential amendments to other Acts, *Service Ontario 2004*, Chapter 23 (Panel Exhibits CDA-18 and JPN-8). See Panel Reports, para. 7.24.

needs".<sup>365</sup> The OPA is under the "legislative responsibility" of the Government of Ontario's Ministry of Energy and receives and executes directives from the Minister of Energy.<sup>366</sup> The Panel found that the OPA's statutory objectives include 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; ...<sup>367</sup>

The Panel further found that, in order to achieve these objectives, the OPA was given the power to:

[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; ...<sup>368</sup>

4.10. In its current form, Ontario's electricity system is a partially liberalized "hybrid" system where both public and private entities participate in generation, transmission, distribution and retail activities.<sup>369</sup> The Government of Ontario, however, "continues to play a critical role in all aspects of the system's functioning".<sup>370</sup> There are three groups of generators in Ontario: (i) the government-owned assets of OPG, which is a wholly owned corporation of the Government of Ontario<sup>371</sup>; (ii) NUGs, which are private generators that entered into supply contracts in the 1980s and 1990s with Ontario Hydro<sup>372</sup>; and (iii) "Independent Power Producers" (IPPs), which include all the other generators in Ontario that have started to operate since the wholesale market was restructured.<sup>373</sup> The Panel set out in a table the mix of electricity generation that existed in Ontario in 2010:

<sup>365</sup> Panel Reports, para. 7.37 (referring to Government of Ontario webpages, "All Agencies List" (Panel Exhibit JPN-49), available at: <<http://www.pas.gov.on.ca/scripts/en/BoardsList.asp>>; and "Agency Details, Ontario Power Authority" (Panel Exhibit JPN-50), available at: <<http://www.pas.gov.on.ca/scripts/en/BoardDetails.asp?boardID=141181>>).

<sup>366</sup> Panel Reports, para. 7.37 (referring to Government of Ontario webpage, "About the Ministry of Energy" (Panel Exhibit JPN-52), available at: <<http://www.energy.gov.on.ca/en/about/>>; and OPA webpage, "Directives to OPA from Minister of Energy" (Panel Exhibit JPN-55), available at: <<http://www.powerauthority.on.ca/about-us/directives-opa-minister-energy-and-infrastructure>>).

<sup>367</sup> Panel Reports, para. 7.37 (quoting Electricity Act of 1998, Section 25.2(1)(c) and (d)).

<sup>368</sup> Panel Reports, para. 7.37 (quoting Electricity Act of 1998, Section 25.2(5)(b) and (c)).

<sup>369</sup> Panel Reports, para. 7.25 (quoting Hogan Report, p. 21).

<sup>370</sup> Panel Reports, para. 7.25.

<sup>371</sup> OPG produced approximately 58% of all electricity generated in Ontario in 2010. OPG's nuclear and base-load hydroelectric generation facilities are classified as "OPG Regulated Assets" and receive a price for electricity set by the OEB. Other "unregulated" hydroelectric and coal-fired facilities owned by OPG receive the Hourly Ontario Energy Price (HOEP) for the supply of electricity. (Panel Reports, para. 7.27)

<sup>372</sup> Panel Reports, para. 7.26. The Panel found that the prices paid to NUGs for delivered electricity, which were negotiated 20 years ago, are known to be generally higher than the HOEP. (Ibid., para. 7.31)

<sup>373</sup> Panel Reports, para. 7.26. The Panel found that 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; the Renewable Energy Supply (RES) Requests for Proposals I, II, and III; the Hydroelectric Contract Initiative (HCI) for grid-connected non-OPG-owned hydro facilities; the Combined Heat and Power (CHP) Requests for Proposals I, II, and III; the Renewable Energy Standard Offer Programme (RESOP); and the FIT Programme. (Ibid., para. 7.28)

**Table 2 – 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%	base-load	high	low	low
Hydropower	22%	19%	base-load, 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%	base-load, peak-load	n/a	n/a	n/a

Source: Panel Reports, para. 7.280, Table 2.

4.11. Generators with capacity greater than 10 megawatts (MW) typically connect to the transmission system.<sup>374</sup> The Panel found that 97% of the transmission system in Ontario is owned and operated by Hydro One Networks Inc., a subsidiary of Hydro One Inc.<sup>375</sup> The remaining 3% is owned and operated by four other private companies. Generators that are connected to the transmission system must register with the IESO. Generators with capacity of 10 MW or less generally connect to the distribution system via an LDC.<sup>376</sup> Hydro One owns and operates approximately one quarter of Ontario's distribution system. The remainder of Ontario's distribution system is operated by 80 LDCs, 77 of which are owned by municipal governments.<sup>377</sup>

<sup>374</sup> Panel Reports, para. 7.33.

<sup>375</sup> Panel Reports, para. 7.34 (referring to Hydro One Website, "Our Subsidiaries" (Panel Exhibit JPN-43), available at: <<http://www.hydroone.com/OurCompany/Pages/OurSubsidiaries.aspx>>. The Panel found that "Hydro One is a holding company wholly-owned by the Government of Ontario and an 'agent' of the Government of Ontario." (Panel Reports, para. 7.147)

<sup>376</sup> Panel Reports, paras. 7.33 and 7.35 (referring to Hydro One Website, "Distribution-connected Generators" (Panel Exhibit JPN-45); and Electricity Transmission and Distribution in Ontario (Panel Exhibit JPN-36), p. 4).

<sup>377</sup> Panel Reports, para. 7.35 (referring to Hydro One webpage, "Our Subsidiaries" (Panel Exhibit JPN-43), available at: <<http://www.hydroone.com/OurCompany/Pages/OurSubsidiaries.aspx>>; Electricity Distributors Association webpage, "Delivering Safe, Reliable and Environmentally Responsible Electricity to Ontarians", July 2010 (Panel Exhibit JPN-46), available at: <[http://www.eda-on.ca/eda/edaweb.nsf/0/762d9f4c8b3b490385257331004c49ba/\\$FILE/DELIVERING\\_ECONOMIC\\_BENEFITS.pdf](http://www.eda-on.ca/eda/edaweb.nsf/0/762d9f4c8b3b490385257331004c49ba/$FILE/DELIVERING_ECONOMIC_BENEFITS.pdf)>; Blake, Cassels & Graydon webpage, "Overview of Electricity Regulation in Canada" (Panel Exhibit JPN-7), pp. 11 and 16, accessed at: <[http://www.blakes.com/english/legal\\_updates/reference\\_guides/Overview%20of%20Electricity%20in%20Canada.pdf](http://www.blakes.com/english/legal_updates/reference_guides/Overview%20of%20Electricity%20in%20Canada.pdf)>, (no longer available); and IESO webpage, "Find Your Local Utility" (Panel Exhibit JPN-47), available at: <[http://www.ieso.ca/imoweb/siteshared/local\\_dist.asp?sid=ic](http://www.ieso.ca/imoweb/siteshared/local_dist.asp?sid=ic)>).

4.12. The Panel found that the price for electricity sold at the wholesale level in Ontario is established by the IESO through the operation of a mechanism that uses supply and demand "stacks"<sup>378</sup> 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 MCP for that electricity.<sup>379</sup> The MCP is thus set every five minutes at the intersection between electricity supply and demand stacks in the IESO wholesale market. In turn, the average of the twelve MCPs set during the course of an hour is the "Hourly Ontario Energy Price" (HOEP).<sup>380</sup>

4.13. Generators in Ontario's electricity market whose rates are not regulated or contracted receive the MCP/HOEP for the electricity they deliver into the system. The Panel found that "[t]he only generators that receive the HOEP *alone* are the OPG's unregulated hydroelectric facilities and two of its coal-fired generation facilities"<sup>381</sup>, which account for 8% of electricity generation in Ontario.<sup>382</sup> By contrast, facilities accounting for 92% of Ontario's 2010 generation capacity do not receive the HOEP, but a contracted or regulated rate.<sup>383</sup> These generators are subject to an adjustment to account for the difference between the MCP/HOEP and the generators' contracted or regulated price.<sup>384</sup> This adjustment is known as the "Global Adjustment" (GA) and it is a charge borne by either final electricity consumers or electricity generators depending on the relationship between the MCP/HOEP and the contracted or regulated rate. For instance, if the MCP/HOEP is lower than the regulated or contracted price, the GA will be a positive number representing a charge to consumers that must be paid to generators. However, if the MCP/HOEP is higher than the regulated or contracted price, the GA will be a negative number representing a charge to generators that must be paid to consumers. The Panel found that "[t]he GA has been consistently positive since at least 2009."<sup>385</sup>

4.14. Due to the fact that most generators participating in the IESO-administered wholesale market do not receive the HOEP alone, but a higher price established by the OEB (50% of capacity) or under contracts with the OPA or the OEFC (42% of capacity)<sup>386</sup>, 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.<sup>387</sup> Thus, the Panel found that:

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<sup>378</sup> The Panel understood the functioning of the IESO "stack system" to be as follows: 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 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.

(Panel Reports, para. 7.46)

<sup>379</sup> Panel Reports, para. 7.45.

<sup>380</sup> Panel Reports, para. 7.51.

<sup>381</sup> Panel Reports, para. 7.296 (referring to Canada's first written submission, para. 38). (original emphasis)

<sup>382</sup> Panel Reports, para. 7.27.

<sup>383</sup> Panel Reports, para. 7.296.

<sup>384</sup> Panel Reports, para. 7.53.

<sup>385</sup> Panel Reports, para. 7.55 (referring to IESO webpage, "Global Adjustment Archive" (Panel Exhibit JPN-11), available at: <[http://www.ieso.ca/imoweb/b100/ga\\_archive.asp](http://www.ieso.ca/imoweb/b100/ga_archive.asp)>). The Panel explained that "[t]he 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." (Ibid., para. 7.56 (referring to IESO, *HST Guide for IESO Transactions*, Issue 26.0, 12 October 2011 (Panel Exhibit JPN-84), Section 8.11, p. 35))

<sup>386</sup> Panel Reports, para. 7.296 (referring to Canada's first written submission to the Panel (DS412), para. 37).

<sup>387</sup> Panel Reports, para. 7.297.



... 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 ... 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.<sup>388</sup>

4.15. The IESO is also responsible for settling the "physical" electricity market in which participants buy and sell energy, which involves collecting electricity payments from consumers and distributing these funds to electricity generators.<sup>389</sup>

4.16. Retail prices are generally determined by adding up the MCP/HOEP, the GA, other fees and charges, and the additional distribution charge to cover the cost of delivering electricity to the consumer.<sup>390</sup> Consumers at the retail level either purchase electricity based on use from their LDCs or they enter into contracts for electricity with an LDC or licensed electricity retailer.<sup>391</sup> The Panel found that "[t]he former retail consumers pay for the electricity commodity according to the OEB's RPP, and the latter retail consumers pay for the electricity commodity according to a retail contract."<sup>392</sup> Under this retail contract, consumers "pay[] a contracted price for electricity for a fixed period, plus the GA".<sup>393</sup>

### 4.3 The FIT Programme

4.17. The feed-in tariff programme (FIT Programme)<sup>394</sup> is a scheme implemented by the Government of Ontario in 2009 to increase the supply of electricity generated from certain renewable sources of energy into the Ontario electricity system.<sup>395</sup> It is the third in a series of initiatives adopted by the Government of Ontario since 2004 to diversify its energy supply-mix and help replace coal-fired facilities.<sup>396</sup> The FIT Programme was formally launched by the OPA in 2009 pursuant to the Direction of the Ontario Minister of Energy and Infrastructure<sup>397</sup> (Minister's 2009 FIT Direction) acting under the authority of the Electricity Act of 1998, as amended by the Green Energy and Green Economy Act of 2009.<sup>398</sup> Generators participating in the FIT Programme "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".<sup>399</sup> Participation in the FIT Programme is open to

<sup>388</sup> Panel Reports, para. 7.298.

<sup>389</sup> Panel Reports, para. 7.60 (referring to IESO, Settlement Statements and Invoices: Marketplace Training (December 2010) (Panel Exhibit JPN-62), p. 1).

<sup>390</sup> Panel Reports, para. 7.57.

<sup>391</sup> Panel Reports, para. 7.57.

<sup>392</sup> Panel Reports, para. 7.57. (fn omitted) The Panel further noted that RPP prices vary according to the type of meter used by the customer (conventional or smart). (Ibid., para. 7.58)

<sup>393</sup> Panel Reports, para. 7.59 (referring to IESO webpage, "Global Adjustment" (Panel Exhibit JPN-75), available at: <[http://www.ieso.ca/imoweb/b100/b100\\_ga.asp](http://www.ieso.ca/imoweb/b100/b100_ga.asp)>).

<sup>394</sup> The complainants challenge the WTO-consistency of the FIT Programme, the individual FIT Contracts utilizing wind and solar PV sources and the individual microFIT Contracts utilizing a solar PV source executed by the OPA since the FIT Programme's inception. The complainants argue that the FIT Programme is evidenced by a number of measures listed *supra* in para. 1.2.

<sup>395</sup> Panel Reports, para. 7.65.

<sup>396</sup> The Panel found that the two earlier initiatives were the RES I (2004), II (2005), and III (2008), and the RESOP (2006). The Panel further determined that:

[u]nder the RES initiative, 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. ... 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.

(Panel Reports, para. 7.29 (fn omitted))

<sup>397</sup> 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 the OPA to develop a feed-in tariff (FIT) programme (Panel Exhibit JPN-102), and to include a requirement that the applicant submit a plan for meeting the domestic (i.e. Ontario) content goals in the FIT Rules.

<sup>398</sup> 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, *Service Ontario 2009*, Chapter 12 (Panel Exhibit JPN-101). See Panel Reports, paras. 7.65 and 7.195.

<sup>399</sup> Panel Reports, para. 7.64.

facilities located in Ontario that produce electricity from the following renewable energy sources: wind, solar PV, renewable biomass, biogas, landfill gas, and waterpower.<sup>400</sup>

4.18. The FIT Programme is divided into two streams: (i) the FIT stream – for all renewable energy projects with a capacity to produce electricity over 10 kilowatts (kW), except for solar PV projects, which must have a capacity of over 10 kW and no more than 10 MW, and waterpower projects, which must have a capacity of over 10 kW and no more than 50 MW; and (ii) the microFIT stream – for projects having a capacity to produce up to 10 kW of electricity. Participants under the microFIT stream are typically small household, farm, or business generation projects.<sup>401</sup>

4.19. The OPA implements the FIT Programme through the application of a standard set of rules, standard contracts (i.e. FIT and microFIT Contracts) and, for each class of generation technology, standard pricing. The standard rules are found in a series of instruments, including the FIT and microFIT Rules developed by the OPA<sup>402</sup>, the IESO Market Rules<sup>403</sup>, and the IESO Market Manual.<sup>404</sup> The Panel found that, in order fully to understand the parties' contractual rights and obligations, the FIT and microFIT Contracts must be read together with, respectively, the FIT and microFIT Rules.<sup>405</sup>

4.20. An entity that enters into a FIT or microFIT Contract is required to, *inter alia*, build, operate, and maintain the approved generation facility in accordance with all relevant laws and regulations, and deliver the electricity produced into the Ontario electricity system. In return for performing these and other contractual obligations, such entity will be remunerated, over the term of the particular contract, in accordance with a formula that is based on a standard "Contract Price" established by the OPA.<sup>406</sup>

4.21. In addition to these obligations, the FIT Programme imposes "Minimum Required Domestic Content Levels" that must be satisfied in the development and construction of solar PV electricity generation facilities participating in both streams of the FIT Programme and of windpower electricity generation facilities taking part in the FIT stream. The Minimum Required Domestic Content Levels do not apply to qualifying projects using any of the other renewable energy sources covered by the FIT Programme.<sup>407</sup> The applicable Minimum Required Domestic Content Levels prescribed under both streams of the FIT Programme are summarized in Table 1 at paragraph 1.4 of these Reports.

4.22. Under the FIT stream, the "Domestic Content Level" of a facility is calculated pursuant to the methodology set out in Exhibit D of the FIT Contract. Exhibit D contains four different Domestic Content Grids, each of which identifies a range of different *Designated Activities* and an associated *qualifying percentage*.<sup>408</sup> The two Domestic Content Grids under the microFIT stream are set forth in Appendix C to the microFIT Contract.<sup>409</sup> For each Designated Activity that is performed in relation to a "Contract Facility", an associated qualifying percentage will be

<sup>400</sup> Panel Reports, para. 7.66. Under the FIT Programme, all renewable fuels other than waterpower are awarded 20-year contracts. Waterpower facilities are awarded 40-year contracts. (*Ibid.*, paras. 7.64 and 7.195)

<sup>401</sup> Panel Reports, para. 7.66 (referring to FIT Rules Exhibit (version 1.5.1), Section 2.1(a)(iii); and microFIT Rules (version 1.6.1), Section 2.1(a)(iv)).

<sup>402</sup> The FIT and microFIT Rules set out, *inter alia*: (i) the project eligibility and application requirements; (ii) the tests for the connection of the project to the Ontario electricity system; and (iii) an overview of some of the key aspects of the respective contract, such as the duration, price, and settlement of payments. (Panel Reports, paras. 7.199 and 7.210)

<sup>403</sup> The Panel found that "[t]he 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." (Panel Reports, para. 7.204)

<sup>404</sup> Panel Reports, para. 7.67. The Panel found that Part 5.5 of the IESO Market Manual provides detailed instructions on how the GA is to be determined and settled. (*Ibid.*, para. 7.54 (referring to IESO Market Manual, Part 5.5 (Panel Exhibit JPN-82), Sections 1.6.7 and 1.6.11))

<sup>405</sup> Panel Reports, paras. 7.199 and 7.210.

<sup>406</sup> Panel Reports, para. 7.68 (referring to FIT Rules (version 1.5.1), Sections 7.1(a), 7.1(b), and 10.1(a); FIT Price Schedule, 3 June 2011 (Panel Exhibit JPN-30); FIT Contract (version 1.5.1), Article 3.1 and Exhibit B; and microFIT Price Schedule, 13 August 2010 (Panel Exhibit JPN-31)).

<sup>407</sup> Panel Reports, para. 7.64.

<sup>408</sup> Panel Reports, para. 7.159 (referring to FIT Contract (version 1.5.1), Exhibit D).

<sup>409</sup> Panel Reports, paras. 7.159 and 7.161 (referring to microFIT Rules (version 1.6.1), Definitions, pp. 14-16).

achieved.<sup>410</sup> A project's Domestic Content Level is determined by adding up the qualifying percentages associated with all of the Designated Activities performed in relation to that particular project. The Panel found that, pursuant to the Minimum Required Domestic Content Levels imposed by the FIT Programme, at least some Ontario-sourced *goods* (in particular, renewable energy generation equipment and components) must be used by FIT and microFIT suppliers utilizing solar PV technology and by FIT generators using windpower technology.<sup>411</sup>

4.23. The FIT and microFIT Contract Prices are established by the OPA and published in the FIT and microFIT Price Schedules.<sup>412</sup> Such prices are intended to cover the development costs plus a reasonable rate of return over the duration of the FIT and microFIT Contracts.<sup>413</sup> The Panel found that "[t]he after tax rate of return on equity used to develop the FIT Price Schedule in 2009 was 11%."<sup>414</sup> The OPA has ultimate contractual liability for all FIT and microFIT "Contract Payments". However, in practice, the actual payments are made by a combination of the OPA, the IESO, and relevant LDCs.<sup>415</sup> In particular, under the settlement process for payments to transmission-connected FIT suppliers, in the event that the GA is positive, the IESO transfers the MCP/HOEP directly to FIT generators, while the GA is paid to generators by the OPA.<sup>416</sup> By contrast, distribution-connected FIT and microFIT suppliers receive their full Contract Payments (i.e. the HOEP plus the GA) from the relevant LDC to which they are connected. The relevant LDC then seeks reimbursement of the GA from the OPA via the IESO.<sup>417</sup>

## 5 ANALYSIS OF THE APPELLATE BODY

### 5.1 The order in which the Panel dealt with Japan's claims under the SCM Agreement and its claims under the TRIMs Agreement and the GATT 1994

5.1. We begin with Japan's allegation concerning the proper sequence of analysis of its claims under the GATT 1994 and TRIMs Agreement<sup>418</sup>, on the one hand, and the SCM Agreement, on the other hand.

<sup>410</sup> By way of example, the Panel explained that "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%." (Panel Reports, para. 7.160)

<sup>411</sup> Panel Reports, para. 7.163.

<sup>412</sup> Panel Reports, paras. 7.202 and 7.213 (referring to FIT Rules (version 1.5.1), Sections 7.1(a), 7.1(b), and 10.1(a); microFIT Rules (version 1.6.1), Section 5.2 and Definitions; FIT Price Schedule, 3 June 2011 (Panel Exhibit JPN-30); and microFIT Price Schedule, 13 August 2010 (Panel Exhibit JPN-31)).

<sup>413</sup> Panel Reports, paras. 7.202 and 7.213. The Panel found that:

[t]he 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").

(Ibid., para. 7.202 (fn omitted))

The Panel further determined that, "[f]or certain technologies, a specified percentage of the Contract Price will escalate annually based on increases in the consumer price index". (Panel Reports, para. 7.202 (fn omitted)) Prices for electricity produced by windpower projects are eligible for annual escalation, whereas the ones applicable to projects utilizing solar PV technologies are not eligible for such escalation. (Ibid., para. 7.30)

<sup>414</sup> Panel Reports, para. 7.29. See also para. 7.202 (referring to Canada's response to Panel question No. 26 (first set) and No. 12 (second set); and OPA, Presentation on "Proposed Feed-in Tariff Price Schedule Stakeholder Engagement – Session 4", 7 April 2009 (Panel Exhibit CDA-46) (OPA Proposed FIT Price Schedule Presentation), slide 30).

<sup>415</sup> Panel Reports, paras. 7.68, 7.204, and 7.213.

<sup>416</sup> Panel Reports, paras. 7.62 and 7.204.

<sup>417</sup> Panel Reports, para. 7.63. The Panel found that, after paying a supplier its full Contract Payment, "the relevant LDC will ... seek to recover any amounts paid in excess of the wholesale price of electricity for the electricity delivered by the Supplier in question, from the OPA, through the IESO." (Ibid., para. 7.205 (fns omitted))

<sup>418</sup> In this part of its appeal, Japan is not suggesting that there is a particular sequence of analysis as between the TRIMs Agreement and the GATT 1994.

5.2. Before the Panel, Japan and the European Union brought claims under the SCM Agreement, the TRIMs Agreement, and the GATT 1994. The complainants requested the Panel to evaluate these claims by first focusing on those made under the SCM Agreement, because that 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. By contrast, Canada argued that the Panel should first address the claims under Article III:4 of the GATT 1994, because this provision deals most specifically, and in detail, with the focus of the complainants' challenge, namely, the Minimum Required Domestic Content Levels prescribed under the FIT Programme and related FIT and microFIT Contracts.<sup>419</sup>

5.3. The Panel first noted that Canada did not contest the complainants' assertion that the measures at issue are trade-related investment measures (TRIMs) affecting imports of renewable energy generation equipment and components. In the Panel's view, "[t]his 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, with the aspects of the FIT Programme, and the FIT and microFIT Contracts, that are at the centre of the complainants' concerns."<sup>420</sup> On this basis, the Panel decided to commence its evaluation of the complainants' claims by focusing on those made under the TRIMs Agreement. The Panel noted, however, that examining the claims under Article 2.1 of the TRIMs Agreement also entailed evaluating the merits of the complainants' claims under Article III:4 of the GATT 1994. Consequently, the Panel simultaneously evaluated the merits of both claims brought by the complainants.<sup>421</sup>

5.4. In its other appellant's submission, Japan argued that the Panel should have commenced its evaluation with Japan's claim under the SCM Agreement.<sup>422</sup> However, at the oral hearing, Japan clarified that its request in this appeal was limited to asking us to commence our own analysis with the allegations of error relating to the SCM Agreement. Japan is not suggesting that we reverse or modify a finding or legal interpretation of the Panel, or that the Panel's decision to commence its evaluation with the SCM Agreement constituted legal error or resulted in the Panel failing to conduct an objective assessment of the matter contrary to Article 11 of the DSU.<sup>423</sup>

5.5. Both the national treatment obligations in Article III:4 of the GATT 1994 and the TRIMs Agreement, and the disciplines in Article 3.1(b) of the SCM Agreement, are cumulative obligations. Article III:4 of the GATT 1994 and the TRIMs Agreement, as well as Article 3.1(b) of the SCM Agreement, prohibit the use of local content requirements in certain circumstances. These provisions address discriminatory conduct. We see nothing in these provisions to indicate that there is an obligatory sequence of analysis to be followed when claims are made under Article III:4 of the GATT 1994 and the TRIMs Agreement, on the one hand, and Article 3.1(b) of the SCM Agreement, on the other hand. Nor has Japan argued that the disposition of its claim under Article 3.1(b) of the SCM Agreement would somehow pre-empt our assessment under Article III:4 of the GATT 1994 and the TRIMs Agreement.

5.6. We are aware that, in a series of previous disputes, issues concerning the sequence of analysis have been dealt with by seeking to identify the agreement that "deals specifically, and in detail, with" the measures at issue.<sup>424</sup> Japan and the European Union both emphasized before the Panel that the focus of their complaints is the domestic content requirements that form part of the FIT Programme and FIT and microFIT Contracts.<sup>425</sup> We note that the TRIMs Agreement deals specifically with investment measures related to trade in goods or TRIMs. It does not regulate anything else. Domestic content requirements are one type of TRIM regulated under the TRIMs Agreement. One of the examples in the Illustrative List annexed to the TRIMs Agreement refers specifically to requirements relating to "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

<sup>419</sup> Panel Reports, para. 7.69.

<sup>420</sup> Panel Reports, para. 7.70. (fn omitted)

<sup>421</sup> Panel Reports, para. 7.70.

<sup>422</sup> Japan's other appellant's submission (DS412), paras. 10-15.

<sup>423</sup> Japan's response to questioning at the oral hearing.

<sup>424</sup> Appellate Body Report, *EC – Bananas III*, para. 204. See also Panel Reports, *Indonesia – Autos*, paras. 14.61-14.63; *EC – Bananas III*, paras. 7.185-7.187; *Canada – Autos*, paras. 10.63 and 10.64; and *India – Autos*, paras. 7.157-7.162.

<sup>425</sup> Panel Reports, paras. 7.6, 7.7, and 7.70.

production".<sup>426</sup> The SCM Agreement deals specifically with subsidies. It defines what government conducts constitute subsidies, classifies different kinds of subsidies, and establishes different regulations for each type of subsidy. The SCM Agreement also sets out the remedies available to WTO Members affected by subsidies and provides detailed guidance on how domestic countervailing duty investigations should be conducted. The local content requirements of the FIT Programme and related FIT and microFIT Contracts are being challenged by Japan under Article 3.1(b) of the SCM Agreement. This provision regulates so-called import-substitution subsidies, which are one of only two kinds of subsidies prohibited under the SCM Agreement. At the same time, the SCM Agreement regulates a broader universe of measures. Thus, based on the above discussion, we are not persuaded that, compared to the GATT 1994 and the TRIMs Agreement, the SCM Agreement can be described as regulating more "specifically, and in detail,"<sup>427</sup> the measures challenged in this dispute.

5.7. Japan has emphasized the differences in the remedies foreseen under the SCM Agreement and the remedy foreseen in Article 19 of the DSU.<sup>428</sup> The specific remedy provided under Article 4.7 of the SCM Agreement is an important consideration. In *EC – Export Subsidies on Sugar*, the remedy provided under Article 4.7 was the reason why the Appellate Body found that the panel had improperly exercised judicial economy when it failed to make findings under the SCM Agreement once it had found a violation of the Agreement on Agriculture.<sup>429</sup> While the difference in remedy would be relevant to a decision as to whether or not there would be a need to address the claims under the SCM Agreement, having made findings under the GATT 1994 and the TRIMs Agreement, we do not see its relevance in this case for the question of which claim to address first. In any event, this was not a case in which the Panel exercised judicial economy; the Panel made findings under Article III:4 of the GATT 1994 and the TRIMs Agreement. It then examined Japan's claims under the SCM Agreement and found that Japan had failed to establish that the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement.<sup>430</sup> Japan has appealed the Panel's finding on benefit, and we address Japan's appeal in section 5.5.2 of these Reports.

5.8. Issues of sequencing may become relevant to a logical consideration of claims under different agreements. However, no such issues arise in this case. The Panel examined the claims under Article III:4 of the GATT 1994 and the TRIMs Agreement, and then the claims under the SCM Agreement. Japan has not indicated why commencing the analysis with the SCM Agreement could lead to a different outcome than commencing with the GATT 1994 and the TRIMs Agreement, as the Panel did in this case. We see no obligation in this case to begin the analysis with the claims under the SCM Agreement. Ultimately, the decision in this case as to whether to commence the analysis with the claims under the SCM Agreement or those under the GATT 1994 and the TRIMs Agreement was within the Panel's margin of discretion.<sup>431</sup> The Panel opted to commence the analysis with the claims under the GATT 1994 and the TRIMs Agreement. We see some practical value in following the same sequence as the Panel. Therefore, we decline Japan's request that we commence our evaluation with the allegations of error relating to the SCM Agreement.

## **5.2 The applicability of Article III:8(a) of the GATT 1994 to measures falling under Article 2.2 of the TRIMs Agreement and the Illustrative List annexed thereto**

5.9. We now turn to the European Union's claim that Article III:8(a) of the GATT 1994 is applicable to measures that fall under Article 2.2 of the TRIMs Agreement and the Illustrative List annexed thereto. Before assessing the European Union's claim, we summarize the Panel's findings and the arguments raised on appeal.

<sup>426</sup> TRIMs Agreement, Annex (Illustrative List), para. 1(a).

<sup>427</sup> Appellate Body Report, *EC – Bananas III*, para. 204.

<sup>428</sup> Japan's other appellant's submission (DS412), para. 14.

<sup>429</sup> Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 332-335.

<sup>430</sup> Panel Reports, para. 7.328(ii).

<sup>431</sup> See Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 126.

### 5.2.1 The Panel's findings

5.10. The Panel began its analysis of this issue with Article 2.1 of the TRIMs Agreement. The Panel noted that Article 2.1 expressly refers to "the provisions of Article III ... of GATT 1994" and understood this to include Article III:8(a) of the GATT 1994. From this, the Panel reasoned that "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" and "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."<sup>432</sup>

5.11. Turning to Article 2.2 of the TRIMs Agreement, the Panel observed that this provision "does not impose any obligations on Members, but rather informs the interpretation of the prohibition set out in Article 2.1".<sup>433</sup> The Panel then addressed the relationship between Article 2.2 of the TRIMs Agreement and Article III:8 of the GATT 1994 as follows:

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)*.<sup>434</sup>

5.12. The Panel went on to dismiss the European Union's argument because it did not "reflect the proper sequence of the legal analysis that is envisaged under Articles 2.1 and 2.2 of the TRIMs Agreement".<sup>435</sup> The Panel explained what it considered to be the proper sequence of analysis as follows:

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.<sup>436</sup>

5.13. On the basis of the above, the Panel concluded 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.<sup>437</sup>

<sup>432</sup> Panel Reports, para. 7.118.

<sup>433</sup> Panel Reports, para. 7.119.

<sup>434</sup> Panel Reports, para. 7.119. (original emphasis)

<sup>435</sup> Panel Reports, para. 7.120.

<sup>436</sup> Panel Reports, para. 7.120. (original emphasis)

<sup>437</sup> Panel Reports, para. 7.121.

### 5.2.2 Claims and arguments on appeal

5.14. On appeal, the European Union asserts that the Panel erred in the interpretation and application of Articles 2.1 and 2.2 of the TRIMs Agreement, read in conjunction with paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement, when finding that they do not preclude the application of Article III:8(a) of the GATT 1994 to the challenged measures.

5.15. The European Union distinguishes the text of Article 2.1 and Article 2.2 of the TRIMs Agreement. It notes that, while Article 2.1 refers to Article III of the GATT 1994, Article 2.2 sets out an Illustrative List of measures "that are necessarily 'inconsistent with Article III:4'".<sup>438</sup> The European Union understands this difference in language to mean that the Panel's reasoning holds only in relation to TRIMs other than the specific measures defined through the Illustrative List. For those that fall within the scope of the Illustrative List, the question of whether they could escape a violation through the applicability of Article III:8 of the GATT 1994 no longer presents itself, because the TRIMs Agreement has conclusively settled the issue.

5.16. The European Union requests us to complete the analysis and correctly apply the legal interpretation set out above to the Panel's findings and uncontested facts on the record.

5.17. Canada asserts that the Panel correctly found that the TRIMs Agreement does not preclude the application of Article III:8(a) of the GATT 1994 to the FIT Programme's domestic content requirements.<sup>439</sup> Canada explains that, by describing the measures in the Illustrative List of TRIMs as inconsistent with "the obligation of national treatment provided for in paragraph 4 of Article III", instead of "Article III", "Article 2.2 does not address the consistency of the measures listed in the Annex with Article III, as a whole, including Article III:8(a)."<sup>440</sup>

5.18. In addition, Canada argues that the European Union "overlooks"<sup>441</sup> that the context of paragraph 1 of the Illustrative List undermines its interpretation of that paragraph. Canada points out that the Illustrative List annexed to the TRIMs Agreement also contains, in paragraph 2, examples of TRIMs that are inconsistent with Article XI:1 of the GATT 1994. It further notes that Article XI has a scope provision similar to Article III:8(a) of the GATT 1994. This scope provision is found in Article XI:2, which states that "[t]he provisions of paragraph 1 of this Article shall not extend to the following...". Consequently, Canada submits that, if the European Union's interpretation were correct, then this interpretation would also hold for TRIMs that are inconsistent with Article XI:1 of the GATT 1994. In other words, under the European Union's reasoning, the TRIMs that are listed in the Illustrative List as inconsistent with Article XI:1 must fall outside the scope of Article XI:2. Yet, Canada submits that a comparison between Article XI:2 of the GATT 1994 and the TRIMs listed as inconsistent with Article XI:1 of the GATT 1994 in the Annex reveals that this proposition "is untenable".<sup>442</sup> Canada emphasizes that the Annex contains measures that "clearly"<sup>443</sup> could fall within the scope of Article XI:2 of the GATT 1994. Therefore, Canada asserts that the European Union's interpretation of Article 2.2 of the TRIMs Agreement and paragraph 1 of the Annex is inconsistent with the text and its context. Canada thus submits that the European Union has failed to provide grounds to overturn the Panel's decision that the TRIMs Agreement does not preclude the application of Article III:8(a) of the GATT 1994 to the FIT Programme's domestic content requirements.

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<sup>438</sup> European Union's other appellant's submission (DS426), para. 31. (fn omitted)

<sup>439</sup> Canada's appellee's submission, para. 27.

<sup>440</sup> Canada's appellee's submission, para. 29.

<sup>441</sup> Canada's appellee's submission, para. 32.

<sup>442</sup> Canada's appellee's submission, para. 33.

<sup>443</sup> Canada's appellee's submission, para. 33.

### 5.2.3 Is Article III:8(a) of the GATT 1994 applicable to measures falling within the scope of Article 2.2 of the TRIMs Agreement and the Illustrative List annexed thereto?

5.19. We begin our analysis with Article 2 of the TRIMs Agreement, which provides:

#### *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.

5.20. Article 2.1 of the TRIMs Agreement prohibits Members from applying a TRIM – that is, an investment measure related to trade in goods<sup>444</sup> – “that is inconsistent with the provisions of Article III or Article XI of GATT 1994”. The cross-reference in the latter part of Article 2.1 to Article III of the GATT 1994 is unqualified. We understand this to be a reference to Article III of the GATT 1994 in its entirety, including Article III:4. Thus, as the Panel explained, a measure that is inconsistent with Article III:4 of the GATT 1994 would also be a TRIM that is incompatible with Article 2.1 of the TRIMs Agreement.<sup>445</sup> Importantly, the cross-reference to Article III also includes paragraph 8(a) of that provision. As we discuss in more detail in section 5.3 of these Reports, a measure that falls within the scope of paragraph 8(a) cannot violate Article III of the GATT 1994. This, in turn, means that a Member applying such a measure would not violate Article 2.1 of the TRIMs Agreement. We note, in this respect, that the relationship between Article 2.1 of the TRIMs Agreement and Article III of the GATT 1994 is not a point of contention between the participants.<sup>446</sup>

5.21. The issue that is contested, and that we need to resolve in this appeal, concerns the relationship between, on the one hand, Article 2.2 and the Illustrative List of the TRIMs Agreement and, on the other hand, Articles III:4 and III:8(a) of the GATT 1994. The European Union takes the position that TRIMs that fall within the scope of Article 2.2 and the Illustrative List of the TRIMs Agreement are inconsistent with Article III:4 of the GATT 1994, irrespective of whether they also fall within Article III:8(a) of the GATT 1994. According to the European Union, Article 2.2 and the Illustrative List of the TRIMs Agreement establish that measures falling within their scope and that violate the national treatment obligation in Article III:4 of the GATT 1994 cannot be justified because the derogation in Article III:8(a) is unavailable. The Panel rejected the European Union's interpretation, and Canada supports the Panel's interpretation in this appeal.

5.22. Article 2.2 refers to the obligation of national treatment provided for in paragraph 4 of Article III of the GATT 1994, as well as the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of the GATT 1994. Article 2.2 also refers to an illustrative list of TRIMs that is found in the Annex to the TRIMs Agreement. The term “illustrative” indicates that the examples in the list do not constitute a closed list. In other words, there can be other types of TRIMs that are inconsistent with the national treatment obligation in Article III:4 and the obligation of general elimination of quantitative restrictions in Article XI:1 of the GATT

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<sup>444</sup> See Article 1 of the TRIMs Agreement. The Panel found 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.” (Panel Reports, para. 7.112) This finding has not been appealed.

<sup>445</sup> Panel Reports, para. 7.117.

<sup>446</sup> European Union's and Canada's responses to questioning at the oral hearing.



1994. The use of the term "include" in paragraph 1 of the Illustrative List further supports this understanding.<sup>447</sup>

5.23. Turning to the Illustrative List referred to in Article 2.2, we note that the Panel found that the measures fall within the coverage of paragraph 1(a), which 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; ...

5.24. By its terms, a measure that falls within the coverage of paragraph 1(a) of the Illustrative List is "inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994". Thus, like Article 2.2 of the TRIMs Agreement, paragraph 1(a) of the Illustrative List refers to the obligations in Article III:4 of the GATT 1994.

5.25. The European Union draws attention to the differences in language between Article 2.2 of the TRIMs Agreement and the Illustrative List, on the one hand, and Article 2.1 of the TRIMs Agreement, on the other hand. It underscores that the latter provision refers to Article III of the GATT 1994 "as a whole"<sup>448</sup>, while Article 2.2 and the Illustrative List refer specifically to Article III:4 of the GATT 1994.

5.26. In our view, Article 2.2 provides further specification as to the type of measures that are inconsistent with Article 2.1. The operative part of Article 2.2 is the reference to the Illustrative List, which provides examples of measures that are inconsistent with the national treatment obligation. While Article 2.2 and the Illustrative List focus on the specific provisions where such obligation is reflected – that is, Article III:4 of the GATT 1994 – we do not believe it responds to the question of whether such measures are inconsistent with Article III of the GATT 1994 in its entirety. Where a measure falls within the scope of Article III:8(a), the measure is not inconsistent with Article III overall. Thus, we agree with the Panel that Article 2.2 and the Illustrative List must be understood as clarifying to which TRIMs the general obligation in Article 2.1 applies.<sup>449</sup> Furthermore, we understand the absence of a reference to Article III:8(a) of the GATT 1994 in Article 2.2 of the TRIMs Agreement and in the Illustrative List as indicating that these provisions are neutral as to the applicability of the former provision. This results in a harmonious interpretation of Articles 2.1 and 2.2 of the TRIMs Agreement and Articles III:4 and III:8(a) of the GATT 1994. By contrast, the interpretation advocated by the European Union would result in different obligations for those TRIMs that fall within the Illustrative List and those that do not.

5.27. We find additional support for this interpretation in the initial clause of Article 2.1 and Article 3 of the TRIMs Agreement. The opening clause of Article 2.1 reads: "Without prejudice to other rights and obligations under GATT 1994". This language suggests that the provision is not intended to curtail other rights that Members have under the GATT 1994. The right to discriminate in government purchases – subject to the conditions and requirements of Article III:8(a) – is one such right recognized in the GATT 1994. Moreover, Article 3 of the TRIMs Agreement, entitled "Exceptions", provides contextual support for our interpretation. It states that "[a]ll exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement." As the title and

<sup>447</sup> Article 1(e) of the Agreement on Agriculture defines "export subsidies" as "subsidies contingent upon export performance, including the export subsidies listed in Article 9 of this Agreement". In *US – Upland Cotton*, the Appellate Body noted that the use of the word "including" in Article 1(e) of the Agreement on Agriculture suggests that the list of export subsidies in Article 9 is not exhaustive. (Appellate Body Report, *US – Upland Cotton*, para. 615)

<sup>448</sup> European Union's other appellant's submission (DS426), para. 30.

<sup>449</sup> Panel Reports, para. 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."

text of Article 3 indicate, this provision refers to "exceptions". The Panel and the participants have characterized Article III:8(a) as a "scope" provision.<sup>450</sup> Even though Article III:8(a) is not one of the exceptions that "apply, as appropriate," to the TRIMs Agreement, Article 3 further suggests that the provisions of the TRIMs Agreement are not intended to constrain other rights that Members have under the GATT 1994.

5.28. The European Union argues that the Panel's interpretation "alters the nature and function of Articles 2.1, 2.2 and the Illustrative List" and "largely nullifies the effects of Article 2.2 and of the Illustrative List in relation to the general obligation in Article 2.1."<sup>451</sup> Under the Panel's interpretation, Article 2.2 and the Illustrative List continue to provide examples of TRIMs that involve discrimination and that are inconsistent with the national treatment obligation in Article III:4, and consequently would violate the obligation in Article 2.1 of the TRIMs Agreement. Contrary to the European Union's assertion, Article 2.2 and the Illustrative List continue to "introduc[e] detail and specificity to the general obligation in Article 2.1."<sup>452</sup> We agree that the Panel's interpretation means that a limited set of measures that fall both within one of the examples of the Illustrative List of the TRIMs Agreement and Article III:8(a) of the GATT 1994 ultimately would not be found to be inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement. Yet, we do not see this as nullifying the effects of Article 2.2 and the Illustrative List. Rather, it is a result of interpreting Article 2.2 and the Illustrative List harmoniously with the other provisions of the TRIMs Agreement and with Article III of the GATT 1994. In any event, the broader subset of TRIMs that fall within the Illustrative List and do not qualify for derogation under Article III:8(a) of the GATT 1994 remains inconsistent with the national treatment obligation in Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement.

5.29. We note that Canada has pointed out that the European Union's interpretation would apply equally to the examples in paragraph 2 of the Illustrative List of the TRIMs Agreement. Canada asserts that this would mean that measures falling within this paragraph 2 would be inconsistent with Article XI:1 of the GATT 1994 and that Article XI:2 would be unavailable to justify such measures.<sup>453</sup> At the oral hearing, the European Union referred to some of the requirements in Article XI:2 and questioned whether such provision would apply to the measures described by Canada. It would appear that the reasoning set out above in relation to Articles 2.1 and 2.2 of the TRIMs Agreement and Article III:4 of the GATT 1994 would apply *mutatis mutandis* to the relationship between Articles XI:1 and XI:2 of the GATT 1994. Nevertheless, we need not determine this issue conclusively in this case because we have already determined that the application of Article III:8(a) of the GATT 1994 is not precluded where the challenged measure falls within the scope of Article 2.2 and paragraph 1(a) of the Illustrative List of the TRIMs Agreement.

5.30. The European Union emphasizes the language in the first paragraph of the preamble of the TRIMs Agreement, stating that "the object and purpose of the TRIMs Agreement was precisely to 'elaborate' 'further' or 'additional' provisions to the already existing ones."<sup>454</sup> The European Union adds that the Panel's interpretation contradicts the TRIMs Agreement's object and purpose because, "[i]f Article 2.2 and the Illustrative List were to be read as merely stating the obvious i.e. that the types of measures listed in the annex discriminate against imported goods, with no other implications, they would largely be redundant."<sup>455</sup>

5.31. The first paragraph of the preamble of the TRIMs Agreement quotes the negotiating mandate of the Punta del Este Declaration<sup>456</sup>, referring to the "trade restrictive and distorting effects of investment measures" and calling for negotiations to "elaborate, as appropriate, further provisions that may be necessary to avoid such adverse effects on trade". The fourth paragraph recognizes that "certain investment measures can cause trade-restrictive and distorting effects".

<sup>450</sup> Panel Reports, fn 263 to para. 7.1113; Canada's response to questioning at the oral hearing.

<sup>451</sup> European Union's other appellant's submission (DS426), para. 33.

<sup>452</sup> European Union's other appellant's submission (DS426), para. 33.

<sup>453</sup> Canada's appellee's submission, para. 33.

<sup>454</sup> European Union's other appellant's submission (DS426), para. 35. (fn omitted)

<sup>455</sup> European Union's other appellant's submission (DS426), para. 35.

<sup>456</sup> Ministerial Declaration adopted at Punta del Este, Uruguay on 20 September 1986 to launch the Uruguay Round of Multilateral Trade Negotiations.

5.32. We do not find the European Union's reliance on the language of the Punta del Este negotiating mandate to be persuasive. Looking at the TRIMs Agreement as a whole, we consider that the "further" provisions that it contains mainly clarify the application of Articles III and XI of the GATT 1994 to a specific set of measures – namely, TRIMs. In doing so, however, there is little, if any, indication that the provisions of the TRIMs Agreement were intended to override rights recognized in the GATT, such as the right provided in Article III:8(a). On the contrary, several provisions of the TRIMs Agreement – particularly the initial clause of Article 2.1, and Articles 3 and 4 – would seem to reflect reiterative attempts to safeguard rights recognized in the GATT, rather than to override them.

5.33. For the reasons stated above, we consider that the Panel correctly rejected the European Union's argument that Article III:8(a) of the GATT 1994 is not applicable to measures that fall within the scope of Article 2.2 of the TRIMs Agreement and the Illustrative List annexed thereto. Therefore, we uphold the Panel's finding, in paragraph 7.121 of the Panel Reports, that "Paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement d[id] not obviate the need for [the Panel] 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." As we have upheld the Panel's finding, there is no basis for us to entertain the European Union's request that we complete the analysis and find that Article III:8(a) of the GATT 1994 is not applicable in the present case because the measures fall within Article 2.2 and the Illustrative List of the TRIMs Agreement.<sup>457</sup>

### 5.3 Article III:8(a) of the GATT 1994

5.34. We turn to Article III:8(a) of the GATT 1994. The three participants challenge on appeal different aspects of the Panel's interpretation and application of this provision.

5.35. Canada alleges that the Panel erred in finding that the FIT Programme and related FIT and microFIT Contracts are not covered by Article III:8(a) and that, consequently, Canada cannot rely on that provision to exclude the application of Article III:4 of the GATT 1994 to the Minimum Required Domestic Content Levels.<sup>458</sup> Canada requests us to reverse this finding, complete the legal analysis under Article III:8(a), and find that the FIT Programme and Contracts fall within the scope of Article III:8(a). Consequently, Canada requests us to find that the FIT Programme and Contracts do not breach Article III:4 of the GATT 1994 or Article 2.1 of the TRIMs Agreement.<sup>459</sup>

5.36. The European Union and Japan request us to uphold the Panel's finding that the FIT Programme and Contracts are not covered by Article III:8(a) and that, consequently, Canada cannot rely on that provision to exclude the application of Article III:4 of the GATT 1994. The European Union and Japan also support the Panel's conclusion that the FIT Programme and Contracts are inconsistent with Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994. However, in their other appeals, they each appeal several aspects of the Panel's interpretation and application of Article III:8(a) of the GATT 1994 and request us to modify certain intermediate findings by the Panel.

5.37. The Panel's findings are summarized in subsection 5.3.1. The claims and arguments of the participants are set out in subsection 5.3.2. Subsection 5.3.3 provides our interpretation of Article III:8(a) of the GATT 1994. Finally, in subsection 5.3.4, we address the Panel's application of Article III:8(a) to the facts of these disputes.

#### 5.3.1 The Panel's findings

5.38. At the outset of its analysis, the Panel addressed the question of whether the FIT Programme and related FIT and microFIT Contracts are "trade-related investment measures" (TRIMs) within the meaning of Article 1 of the TRIMs Agreement. The Panel found that one aim of the FIT Programme and Contracts is to encourage investment in the local production of equipment associated with the generation of electricity from renewable sources in Ontario.<sup>460</sup> Furthermore,

<sup>457</sup> European Union's other appellant's submission (DS426), para. 38.

<sup>458</sup> Panel Reports, para. 7.152.

<sup>459</sup> Canada's appellant's submission, para. 7.

<sup>460</sup> Panel Reports, para. 7.109 (referring to Minister's 2009 FIT Direction, p. 1).

the Panel found that the FIT Programme and Contracts "compel[] [electricity generators] to purchase and use certain types of renewable energy generation equipment sourced in Ontario in the design and construction of their facilities".<sup>461</sup> On this basis, the Panel concluded that the FIT Programme and Contracts constitute TRIMs "to the extent they envisage and impose" domestic content requirements.<sup>462</sup>

5.39. The Panel then assessed whether the FIT Programme and Contracts are consistent with Article 2.1 of the TRIMs Agreement. The Panel noted that this provision contains a reference to Article III of the GATT 1994 and, consequently, it assessed whether the FIT Programme and Contracts fall within the scope of Article III:4 of the GATT 1994, or whether they are "outside the scope of application of Article III:4 ... by virtue of the operation of Article III:8(a)".<sup>463</sup> In this respect, the Panel addressed three issues, namely:

- a. whether the FIT Programme and Contracts can be characterized as "laws, regulations or requirements governing procurement" of electricity;
- b. whether the FIT Programme and Contracts involve "procurement by governmental agencies of products purchased"; and
- c. whether "procurement" 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".

5.40. Regarding the first issue, the Panel found that a measure "governing" procurement is one that "controls, regulates or determines that procurement".<sup>464</sup> With respect to the FIT Programme and Contracts, the Panel found that the domestic content requirements for renewable energy generation equipment are a condition that must be satisfied by generators utilizing solar PV or windpower technologies in order to participate in the FIT Programme. The Panel explained that the domestic content requirements thus compel the purchase and use of certain generation equipment originating in Ontario as a necessary prerequisite for the procurement of electricity by the Government of Ontario to take place. The Panel found that, consequently, the domestic content requirements are requirements "governing" the procurement of electricity by the Government of Ontario under the FIT Programme and Contracts.<sup>465</sup> The Panel found further support in the fact that the electricity procured by the Government of Ontario is produced using the very same generation equipment that is subject to the domestic content requirements. Thus, for the Panel, there was a "close relationship" between the products affected by the domestic content requirements (renewable energy generation equipment) and the product procured (electricity).<sup>466</sup>

5.41. Second, with respect to the question of whether the FIT Programme and Contracts involve "procurement by governmental agencies of products purchased" within the meaning of Article III:8(a), the Panel stated that the term "procurement", when interpreted in its immediate context, should be understood to have the same meaning as the term "purchase".<sup>467</sup> Turning to its assessment of whether the FIT Programme and Contracts involve "purchases" of electricity, the Panel referred to its analysis of the phrase "a government ... purchases goods" in Article 1.1(a)(1)(iii) of the SCM Agreement. In that respect, the Panel found government "purchase" of goods to mean the action by which the government obtains possession (including via obtaining an entitlement) over goods through some kind of payment. The Panel stated that this interpretation was "equally applicable to guide [the Panel's] analysis ... under Article III:8(a) of the GATT 1994".<sup>468</sup> Accordingly, the Panel concluded that the FIT Programme and Contracts involve "procurement by governmental agencies of products purchased" within the meaning of Article III:8(a) of the GATT 1994.

<sup>461</sup> Panel Reports, para. 7.111.

<sup>462</sup> Panel Reports, para. 7.112.

<sup>463</sup> Panel Reports, para. 7.113.

<sup>464</sup> Panel Reports, para. 7.124 (referring to Canada's first written submission to the Panel (DS412), para. 83, in turn referring to Panel Report, *EC – Selected Customs Matters*, para. 7.529).

<sup>465</sup> Panel Reports, para. 7.124.

<sup>466</sup> Panel Reports, para. 7.127.

<sup>467</sup> Panel Reports, paras. 7.131 and 7.135.

<sup>468</sup> Panel Reports, para. 7.136 (referring to Panel Reports, section VII.C.2(c)(iii), pp. 98-107).

5.42. Third, with regard to the issue of whether 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" within the meaning of Article III:8(a), the Panel noted that the parties had advanced different meanings of the term "for governmental purposes". Canada had suggested that a purchase "for governmental purposes" may exist whenever a government purchases a product for a stated aim of the government. Japan, on the contrary, had proposed that a purchase "for governmental purposes" covers only purchases of products for governmental use, consumption, or benefit; and the European Union had submitted that the term "for governmental purposes" refers to purchases for governmental needs, including the purchase of products consumed by the government itself and products necessary for a government's provision of public services.<sup>469</sup>

5.43. The Panel stated that the ordinary meaning of the term "for governmental purposes" was relatively broad and that it may encompass all three meanings advanced by the parties.<sup>470</sup> The Panel, however, also considered that the immediately following phrase "and not with a view to commercial resale" informs and limits the otherwise relatively broad ordinary meaning of the term "governmental purposes", and that procurement of products purchased "for governmental purposes" could not at the same time be "procurement ... with a view to commercial resale or with a view to use in the production of goods for commercial sale".<sup>471</sup> The Panel then stated that, if it found that procurement of electricity by the Government of Ontario is undertaken "with a view to commercial resale or with a view to use in the production of goods for commercial sale", such procurement would not be covered by Article III:8(a). Without making a finding on whether the FIT Programme and Contracts involve purchases "for governmental purposes", the Panel turned to assess whether the Government of Ontario purchases electricity "with a view to commercial resale or with a view to use in the production of goods for commercial sale".

5.44. The Panel noted that the parties had advanced different meanings also of the phrase "with a view to commercial resale". While Canada had argued that the phrase referred to a purchase with the "aim to resell for profit", the complainants had submitted that it meant "with a view to being sold or introduced into the stream of commerce, trade or market, regardless of any profit".<sup>472</sup> The Panel stated that, under the interpretation advanced by the complainants, the Government of Ontario's purchases of electricity under the FIT Programme and Contracts are undertaken "with a view to commercial resale", because the purchased electricity is introduced into commerce in competition with private-sector electricity retailers.<sup>473</sup> The Panel then addressed the interpretation advanced by Canada that the phrase "with a view to commercial resale" refers to resale with the underlying intent to profit. In this respect, the Panel found it evident that the Government of Ontario and municipal governments profit from the resale of electricity, and, consequently, the Panel found that Canada's argument that the Government of Ontario does not purchase electricity with a view to commercial resale failed even on the terms of Canada's own interpretation of the term "commercial resale".<sup>474</sup> The Panel emphasized that it was not of the view that "commercial resale" will always necessarily involve profit, but that, because the Government of Ontario and municipal governments profit from the resale of electricity under the FIT Programme and Contracts, and because the resales of electricity are made in competition with licensed electricity retailers, the purchases of electricity by the Government of Ontario are undertaken "with a view to commercial resale".

5.45. On this basis, the Panel concluded that the FIT Programme and Contracts are not covered by Article III:8(a) and that they are therefore subject to the disciplines of Article III:4 of the GATT 1994.<sup>475</sup> The Panel then found that the FIT Programme and Contracts are inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement because they require the purchase or use of products of Canadian origin, and because compliance with that requirement is necessary in order to participate in the FIT Programme.<sup>476</sup>

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<sup>469</sup> Panel Reports, para. 7.138.

<sup>470</sup> Panel Reports, para. 7.139.

<sup>471</sup> Panel Reports, para. 7.140.

<sup>472</sup> Panel Reports, para. 7.146. (fns omitted)

<sup>473</sup> Panel Reports, para. 7.148.

<sup>474</sup> Panel Reports, para. 7.151.

<sup>475</sup> Panel Reports, para. 7.152.

<sup>476</sup> Panel Reports, para. 7.167.

### 5.3.2 Claims and arguments on appeal

5.46. Canada alleges that the Panel erred in finding that the measures at issue do not fall within the scope of Article III:8(a) of the GATT 1994 because the Government of Ontario's purchases of electricity generated from renewable sources under the FIT Programme are "with a view to commercial resale", and raises two allegations of error with respect to the Panel's interpretation of this phrase. First, Canada asserts that the Panel erred in its interpretation of Article III:8(a) by focusing on whether there is "commercial resale" of electricity by the Government of Ontario while it neglected to interpret properly the term "with a view to" in Article III:8(a). Canada contends that, under the FIT Programme and Contracts, the Government of Ontario purchases electricity with a view "to help ensure a sufficient and reliable supply of electricity for Ontarians and to protect the environment"<sup>477</sup>, and that it does not purchase electricity with a view to commercial resale. Second, Canada alleges that the Panel misinterpreted the term "commercial resale" in Article III:8(a). Canada contends that, had the Panel properly interpreted this term, it would have concluded that "commercial resale" means resale with the underlying intent to profit. With respect to the FIT Programme and Contracts, Canada submits that there is no suggestion that the Government of Ontario purchases electricity with an aim to resell for profit.

5.47. Canada additionally claims that the Panel failed to make an objective assessment of the matter, contrary to Article 11 of the DSU, in finding that the Government of Ontario's procurement of electricity under the FIT Programme is undertaken "with a view to commercial resale" within the meaning of Article III:8(a) of the GATT 1994.<sup>478</sup> Canada challenges two findings of the Panel in this respect. First, Canada challenges the Panel's finding that Hydro One Inc. and distributors sell electricity in competition with private-sector licensed retailers.<sup>479</sup> Second, Canada challenges the Panel's finding that the Government of Ontario and the municipal governments profit from the resale of electricity that is purchased under the FIT Programme.<sup>480</sup>

5.48. Japan and the European Union request us to uphold the Panel's conclusion that the FIT Programme and Contracts are inconsistent with Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994. However, in their other appeals, they each appeal several aspects of the Panel's interpretation and application of Article III:8(a) of the GATT 1994 and request us to modify certain intermediate findings of the Panel.

5.49. Japan alleges that the Panel erred in finding that the Government of Ontario "purchases" electricity. Japan argues that the structure of the energy system in Ontario, in particular the unbundling of generation, transmission, and distribution of electricity and the allocation of each of these functions together with corresponding regulatory functions to separate entities, suggests that the Government of Ontario does not engage in the physical supply or sale of electricity.

5.50. In the event that we do not reverse the Panel's finding that the measures at issue involve "purchases" by the Government of Ontario, Japan appeals, conditionally, the Panel's interpretation and application of the term "purchased for governmental purposes", and requests us to complete the analysis and find that the FIT Programme and Contracts do not involve "purchase[s] for governmental purposes". Japan alleges that the Panel failed to interpret the meaning of this phrase because it concluded merely that a purchase of goods by a governmental agency for governmental purposes could not at the same time constitute a government purchase of goods with a view to commercial resale, and applied the provision based on this assumption rather than based on a proper interpretation of the term "for governmental purposes". Japan argues that electricity is "purchased for governmental purposes" only if the purchase is made "in order to obtain certain governmental purposes or with the objective of achieving such governmental purposes".<sup>481</sup>

<sup>477</sup> Canada's appellant's submission, para. 34.

<sup>478</sup> Canada's appellant's submission, para. 48.

<sup>479</sup> Canada's appellant's submission, para. 72.

<sup>480</sup> Canada's appellant's submission, paras. 76 and 77.

<sup>481</sup> Japan's other appellant's submission (DS412), para. 174.

5.51. In the event that we reject both Japan's appeal relating to the Panel's finding that the Government of Ontario "purchases" electricity and Japan's appeal that the measures at issue involve "purchase[s] for governmental purposes", Japan requests us to find that the Panel failed to interpret properly the term "commercial resale" by concluding that profit earned by the government as a result of the "resale" was relevant evidence of its "commercial" nature. Japan submits that, in place of this erroneous conclusion, we should find that the phrase "with a view to commercial resale" means "with a view to being sold into the stream of commerce or trade"<sup>482</sup> and that, to the extent the FIT Programme and Contracts involve purchases of electricity by the Government of Ontario, such purchases are "with a view to commercial resale", because the electricity is purchased with a view to being sold or introduced into the stream of commerce, trade, or market, without regard to whether the government makes a profit from the resale.

5.52. The European Union requests us to reverse the Panel's finding that the domestic content requirements with respect to windpower and solar PV generation equipment under the FIT and microFIT Contracts "govern" the alleged procurement of electricity for the purpose of Article III:8(a) of the GATT 1994. In the European Union's view, "laws, regulations or requirements" within the meaning of Article III:8(a) must be related to the subject matter of the procurement – that is, the "products purchased for governmental purposes" – in order to "govern" such procurement. Article III:8(a) does not cover requirements or conditions that are not connected with "intrinsic characteristics"<sup>483</sup> or the nature of the product purchased. The European Union argues that conditions exogenous to the subject matter of the contract, such as the requirements relating to the origin of equipment used to generate electricity procured under the FIT Programme, do not fall under Article III:8(a) of the GATT 1994 because they have "no rational link" with the attributes of the electricity procured.<sup>484</sup>

5.53. The European Union also requests us to reverse or to declare moot and of no legal effect the Panel's statement that the term "governmental purposes" in Article III:8(a) may be read to encompass any government purchase "for a stated aim of the government".<sup>485</sup> In the event that we reverse, in response to Canada's appeal, the Panel's finding that the Government of Ontario's purchases of electricity under the FIT Programme are undertaken "with a view to commercial resale", the European Union requests us to reverse or modify the Panel's reasoning as to the meaning of "governmental purposes", to complete the analysis, and to find that the Government of Ontario's procurement of electricity under the FIT Programme is not undertaken for "governmental purposes".<sup>486</sup> The European Union maintains that the term "purchased for governmental purposes" in Article III:8(a) refers only to "government purchases of goods that are needed to sustain the work and functions of the government".<sup>487</sup> Thus, such goods will have to "be actually used or consumed by the government in the context of its administrative tasks or in the context of the exercise of its public functions".<sup>488</sup> In that event, the European Union also requests us to complete the analysis and find that the Government of Ontario's purchases of electricity under the FIT Programme are not undertaken "for governmental purposes". In this regard, the European Union argues that the Government of Ontario's purchases of electricity are not undertaken "for governmental purposes" because the electricity is not used by the Government of Ontario. If the electricity purchased by the government is not used for its own consumption, or in the performance of government functions such as the provision of public services, such purchases do not fall under Article III:8(a) of the GATT 1994. The European Union contends that the creation of an electricity system with stable, reliable, and sufficient supply of electricity from renewable sources is a legitimate policy objective, but it is not in itself a provision of a public service.

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<sup>482</sup> Japan's other appellant's submission (DS412), para. 188. (emphasis omitted)

<sup>483</sup> European Union's other appellant's submission (DS426), para. 51. (fn omitted)

<sup>484</sup> European Union's other appellant's submission (DS426), para. 53.

<sup>485</sup> European Union's other appellant's submission (DS426), para. 60 (quoting Panel Reports, para. 7.139 (fn omitted)).

<sup>486</sup> European Union's other appellant's submission (DS426), para. 61.

<sup>487</sup> European Union's other appellant's submission (DS426), para. 60.

<sup>488</sup> European Union's other appellant's submission (DS426), para. 60.

### 5.3.3 Interpretation of Article III:8(a) of the GATT 1994

5.54. The three participants challenge on appeal different aspects of the Panel's interpretation of Article III:8(a) of the GATT 1994. This is the first time that the Appellate Body is called upon to interpret this provision. Article III:8(a) of the GATT 1994 stipulates:

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.

5.55. We observe that Article III:8(a) begins with the words "The provisions of this Article shall not apply to ...". This introductory clause establishes a linkage with the remainder of Article III. The title of Article III is "National Treatment on Internal Taxation and Regulation". The national treatment principle enshrined in Article III has been a cornerstone of the multilateral trading system since its inception. This general principle, which is articulated in the first paragraph of Article III, postulates that internal measures "should not be applied ... so as to afford protection to domestic production".<sup>489</sup> Other paragraphs of Article III "constitute specific expressions" of this "overarching, 'general principle'".<sup>490</sup>

5.56. The opening clause of Article III:8(a) uses the term "apply" in the negative, thus precluding the application of the other provisions of Article III to measures that meet the requirements of that paragraph. Article III:8(a) therefore establishes a derogation from the national treatment obligation of Article III for government procurement activities falling within its scope. Measures satisfying the requirements of Article III:8(a) are not subject to the national treatment obligations set out in other paragraphs of Article III. Article III:8(a) is a derogation limiting the scope of the national treatment obligation and it is not a justification for measures that would otherwise be inconsistent with that obligation. At the same time, we note that the characterization of the provision as a derogation does not pre-determine the question as to which party bears the burden of proof with regard to the requirements stipulated in the provision.<sup>491</sup>

5.57. Article III:8(a) contains several elements describing the types and the content of measures falling within the ambit of the provision. Some of the terms qualify other terms used in the same provision, or provide guidance for the interpretation of those terms. Indeed, the participants have emphasized the relationships between the various terms in Article III:8(a), although they do not agree on the interpretation of all of them. We consider that Article III:8(a) should be interpreted holistically. This requires consideration of the linkages between the different terms used in the provision and the contextual connections to other parts of Article III, as well as to other provisions of the GATT 1994. At the same time, the principle of effective treaty interpretation requires us to give meaning to every term of the provision.<sup>492</sup>

5.58. Article III:8(a) describes the types of measures falling within its ambit as "laws, regulations or requirements governing the procurement by governmental agencies of products purchased". We note that the word "governing" links the words "laws, regulations or requirements" to the word "procurement" and the remainder of the paragraph. In the context of Article III:8(a), the word "governing", along with the word "procurement" and the other parts of the paragraph, define the subject matter of the "laws, regulations or requirements". The word "governing" is defined as "constitut[ing] a law or rule for".<sup>493</sup> Article III:8(a) thus requires an articulated connection between the laws, regulations, or requirements and the procurement, in the sense that the act of procurement is undertaken within a binding structure of laws, regulations, or requirements.

<sup>489</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 18, DSR 1996:I, p. 111.

<sup>490</sup> Appellate Body Report, *EC – Asbestos*, para. 93.

<sup>491</sup> We recall that, in *China – Raw Materials*, the Appellate Body distinguished between "exceptions" (such as the general exception of Article XX) and limitations of the scope of an obligation (such as Article XI:2(a)). (Appellate Body Reports, *China – Raw Materials*, para. 334)

<sup>492</sup> See Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:I, p. 21.

<sup>493</sup> Oxford English Dictionary online, <<http://www.oed.com/view/Entry/80304>>.



5.59. The term "procurement" may refer generally to "[t]he action of obtaining something; acquisition", or it may refer more specifically to "the action or process of obtaining equipment and supplies".<sup>494</sup> In a more technical sense, procurement usually refers to formal procedures used by governments to acquire goods or services.<sup>495</sup> In Article III:8(a), the word "procurement" is related to the words "products purchased". In this respect, the Panel found that the term "procurement" in Article III:8(a) should be given the "same essential meaning" as the word "purchased" and *vice versa*.<sup>496</sup> However, in our view, the concepts of "procurement" and "purchase" are not to be equated. As we see it, "procurement" is the operative word in Article III:8(a) describing the process and conduct of the governmental agency. The word "purchased" is used to describe the type of transaction used to put into effect that procurement. Not every procurement needs to be effectuated by way of a purchase, and not every purchase is part of a process of government procurement. The use of the word "purchased" in the same provision suggests reading the word "procurement" as referring to the process of obtaining products, rather than as referring to an acquisition itself, because, if procurement was understood to refer simply to any acquisition, it would not add any meaning to Article III:8(a) in addition to what is already expressed by the word "purchased". We therefore understand the word "procurement" to refer to the process pursuant to which a government acquires products. The precise range of contractual arrangements that are encompassed by the concept of "purchase" is not a matter we need to decide in this case.

5.60. Article III:8 further specifies what is procured and by whom. The subject matter of the procurement is a "product", and it is being procured by a "governmental agency". The term "agency" is defined as "[a] business, body, or organization providing a particular service, or negotiating transactions on behalf of a person or group".<sup>497</sup> The word "agency" is used in connection with the word "governmental" and, accordingly, Article III:8(a) refers to entities acting for or on behalf of government. The Appellate Body has held that the meaning of "government" is derived, in part, from the functions that it performs and, in part, from the authority under which it performs those functions.<sup>498</sup> We therefore consider that the question of whether an entity is a "governmental agency", in the sense of Article III:8(a), is determined by the competences conferred on the entity concerned and by whether that entity acts for or on behalf of government.

5.61. We consider that Articles XVII:1 and XVII:2 of the GATT 1994 provide relevant context for the interpretation of the term "governmental agency" in Article III:8(a). Article XVII:1 stipulates obligations for state trading enterprises and Article XVII:2 sets out a derogation from those obligations for certain government procurement transactions. In contrast to Article III:8(a), the provisions of Article XVII relate to "state trading enterprises" and not to "governmental agencies". According to Article XVII:1, this includes state enterprises and enterprises that are conferred exclusive or special privileges from the state. It follows that the GATT 1994 recognizes that there is a public and a private realm, and that government entities may act in one, the other, or both. Governments may limit the actions of entities to the public realm or give entities competences to act in the private realm. In our view, the term "governmental agencies" refers to those entities acting for or on behalf of government in the public realm within the competences that have been conferred on them to discharge governmental functions. This further confirms our understanding that a "governmental agency" is an entity acting for or on behalf of government and performing governmental functions within the competences conferred on it.

5.62. We turn next to the term "products purchased" within the meaning of Article III:8(a). A "product" in the sense of this provision is something that is capable of being traded. The term "product" is also found in other provisions of Article III of the GATT 1994 that provide relevant context. Paragraphs 2 and 4, in particular, focus on the treatment accorded to "products". Article III:4 prohibits discrimination against imported products, that is, it prohibits a Member from treating imported products less favourably than like products of national origin. In the context of Article III:2, the national treatment obligation applies also to the treatment of imported products that are directly competitive to or substitutable with domestic products.

<sup>494</sup> Oxford English Dictionary online, <<http://www.oed.com/view/Entry/151913>>.

<sup>495</sup> Such procedures typically express principles, such as efficiency or transparency. See e.g. the 2011 Model Law on Public Procurement prepared by the United Nations Commission on International Trade Law (UNCITRAL).

<sup>496</sup> Panel Reports, para. 7.131.

<sup>497</sup> Oxford English Dictionary online, <<http://www.oed.com/view/Entry/3851>>.

<sup>498</sup> Appellate Body Reports, *Canada – Dairy*, para. 97; and *US – Anti-Dumping and Countervailing Duties (China)*, para. 290.

5.63. We have found above that Article III:8(a) stipulates conditions under which derogation from the obligations in Article III takes place. The derogation in Article III:8(a) becomes relevant only if there is discriminatory treatment of foreign products that are covered by the obligations in Article III, and this discriminatory treatment results from laws, regulations, or requirements governing procurement by governmental agencies of products purchased. Both the obligations in Article III and the derogation in Article III:8(a) refer to discriminatory treatment of products. Because Article III:8(a) is a derogation from the obligations contained in other paragraphs of Article III, we consider that the same discriminatory treatment must be considered both with respect to the obligations of Article III and with respect to the derogation of Article III:8(a). Accordingly, the scope of the terms "products purchased" in Article III:8(a) is informed by the scope of "products" referred to in the obligations set out in other paragraphs of Article III. Article III:8(a) thus concerns, in the first instance, the product that is subject to the discrimination. The coverage of Article III:8 extends not only to products that are identical to the product that is purchased, but also to "like" products. In accordance with the Ad Note to Article III:2, it also extends to products that are directly competitive to or substitutable with the product purchased under the challenged measure. For convenience, this range of products can be described as products that are in a competitive relationship. What constitutes a competitive relationship between products may require consideration of inputs and processes of production used to produce the product. In its rebuttal of Canada's claim under Article III:8(a), the European Union acknowledges that the cover of Article III:8(a) may also extend to discrimination relating to inputs and processes of production used in respect of products purchased by way of procurement.<sup>499</sup> Whether the derogation in Article III:8(a) can extend also to discrimination of the kind referred to by the European Union is a matter we do not decide in this case.<sup>500</sup>

5.64. We now turn to the next element of Article III:8(a). The provision refers to purchases "for governmental purposes". The participants have put forward divergent views as to the meaning of the term "for governmental purposes" in Article III:8(a). Canada advocates a broad interpretation that may encompass any purchase for a stated aim of the government.<sup>501</sup> Canada claims that its interpretation was accepted by the Panel.<sup>502</sup> In response to questioning at the oral hearing, Canada clarified that the inquiry under "governmental purposes" needs to go beyond the stated aim of the government, and must include an assessment of whether a government has traditionally supplied a certain product, whether it has a constitutional mandate to do so, and that it must take account of the role of government in a particular country, focusing on the history, constitution, and legislation of a particular government. The European Union considers Canada's interpretation to be overly broad. For the European Union, the key issue is whether the "products purchased" are needed to sustain the work and functions of the government and therefore will genuinely be utilized in some way by the government in the exercise of its public functions (including the provision of public services).<sup>503</sup> The European Union accepts that "products purchased for governmental purposes" need not be confined to those for the consumption or physical use by the government.<sup>504</sup> Japan emphasizes the word "for", which it considers requires an inquiry into whether there is a true and genuine connection between the "purchase" and the "governmental purpose" at issue.<sup>505</sup>

5.65. Contrary to what Canada alleges, it is not apparent to us that the Panel developed its own interpretation of the term "for governmental purposes". The Panel did suggest that the "ordinary meaning" of the term "governmental purposes" is "relatively broad" and could encompass all three meanings put forward by the parties, including Canada's interpretation.<sup>506</sup> Yet, the Panel did not

<sup>499</sup> The European Union explains that, when it refers to product "characteristics", it does so not as necessarily referring to physically detectable characteristics, but as referring to elements that define the nature of the product more broadly. The European Union submits that the environmental profile or the environmental attributes that a particular product may incorporate, even if they do not materialize into any particular physical characteristic, could legitimately form part of the requirements of the product purchased that are closely related to the subject matter of the contract. (European Union's other appellant's submission (DS426), fn 43 to para. 51)

<sup>500</sup> We do not address in this case rules for determining the origin of products purchased. It has not been alleged in this case that the Minimum Required Domestic Content Levels are rules of origin.

<sup>501</sup> Canada's appellee's submission, para. 59.

<sup>502</sup> Canada's appellee's submission, para. 59 (referring to Panel Reports, paras. 7.138 and 7.139).

<sup>503</sup> European Union's opening statement at the oral hearing.

<sup>504</sup> European Union's opening statement at the oral hearing.

<sup>505</sup> Japan's other appellant's submission (DS412), para. 171.

<sup>506</sup> Panel Reports, para. 7.139.

stop there. Immediately after this statement, the Panel indicated that it had to "interpret this expression within its context".<sup>507</sup> Ultimately, however, the Panel did not define "governmental purposes". Instead, the Panel stated 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)".<sup>508</sup> Based on the proposition that a purchase "for governmental purposes" cannot at the same time amount to a government purchase of goods "with a view to commercial resale", the Panel did not come to a conclusion on whether the FIT Programme and Contracts involve purchases of electricity for "governmental purposes". Rather, the Panel turned to the question of whether those purchases are made with a view to commercial resale, based on the assumption that, if it found that to be the case, this would also imply that the purchases are not made for "governmental purposes".<sup>509</sup>

5.66. The word "purpose" may refer to "an object in view; a determined intention or aim" or it may refer to "the end to which an object or action is directed".<sup>510</sup> In Article III:8(a), the word "purpose" is used in conjunction with the word "governmental". Accordingly, the term "governmental purposes" may refer either to the intentions or aims of a government, or it may refer to government as the end to which the product purchased is directed. We note that in Article III:8(a) the word "governmental" is used once in connection with "purposes", and again in connection with the word "agencies". The reference to "governmental agencies" defines the identity of the entity carrying out the procurement. Yet, because governmental agencies by their very nature pursue governmental aims or objectives, the additional reference to "governmental" in relation to "purposes" must go beyond simply requiring some governmental aim or objective with respect to purchases by governmental agencies.

5.67. We further note that the French version of Article III:8(a) refers to "*les besoins des pouvoirs publics*" and the Spanish version of the provision refers to "*las necesidades de los poderes públicos*". The term "purposes" thus corresponds to the terms "*besoins*" and "*necesidades*", respectively, in the French and the Spanish texts. Both the French and the Spanish terms correspond closely to the English term "needs".<sup>511</sup> As such, the French and the Spanish text can be read harmoniously<sup>512</sup> with an interpretation of the word "purposes" in English as referring to purchases of products directed at the government or purchased for the needs of the government in the discharge of its functions. By contrast, the words "*besoins*" or "*necesidades*" cannot be read harmoniously with the definition of the term "purpose" as "objectives" or "aims" of the government, because neither the word "*besoins*" in French, nor the word "*necesidades*" in Spanish encompass the notion of an aim or objective.<sup>513</sup>

5.68. Article XVII:2 of the GATT 1994 provides relevant context for the interpretation of the words "governmental purposes" in Article III:8(a). The provision refers to "imports of products for immediate or ultimate consumption in governmental use". By referring to immediate and ultimate consumption in governmental use, Article XVII:2 identifies instances in which a product may be said to be purchased for governmental purposes. An obvious example is where a governmental agency purchases a good, uses it to discharge its governmental functions, and the good is totally consumed in the process. None of the participants disputes that this would constitute an example of a good purchased for governmental purposes. We also note that Article XVII:2 is phrased more narrowly than Article III:8(a), as the former provision refers to "immediate or ultimate consumption in governmental use". This in turn suggests that, where products purchased are consumed in governmental use, Article III:8(a) does not require that this be "immediate or ultimate". Therefore, we are of the view that the phrase "products purchased for governmental purposes" in Article III:8(a) refers to what is consumed by government or what is provided by government to recipients in the discharge of its public functions. The scope of these functions is to

<sup>507</sup> Panel Reports, para. 7.139.

<sup>508</sup> Panel Reports, para. 7.145.

<sup>509</sup> Panel Reports, para. 7.145.

<sup>510</sup> Oxford English Dictionary online, <<http://www.oed.com/view/Entry/154972>>.

<sup>511</sup> *The Oxford Spanish Dictionary*, B. Galimberti and R. Russell (eds.) (Oxford University Press, 1994), p. 523; *Le Nouveau Petit Robert*, P. Varrød (ed.) (Dictionnaires Le Robert, 1993), pp. 246-247.

<sup>512</sup> Article 33 of the Vienna Convention reflects the principle that the treaty text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail. For the covered agreements, Article XVI of the WTO Agreement provides that the English, French, and Spanish language each are authentic. Consequently, the terms of Article III:8(a) of the GATT 1994 are presumed to have the same meaning in each authentic text.

<sup>513</sup> *Diccionario de la Lengua Española*, 22nd edn (Real Academia Española, 2001), p. 1065.

be determined on a case by case basis.<sup>514</sup> Finally, we recall that Article III:8(a) refers to purchases "for governmental purposes".<sup>515</sup> The word "for" relates the term "products purchased" to "governmental purposes", and thus indicates that the products purchased must be intended to be directed at the government or be used for governmental purposes. Thus, Article III:8(a) requires that there be a rational relationship between the product and the governmental function being discharged.

5.69. We turn next to the analysis of the last element of the text of Article III:8(a), namely, the phrase "and not with a view to commercial resale or with a view to use in the production of goods for commercial sale". In the context of Article III:8(a), the words "with a view to commercial resale" relate back to the "products purchased" and thus attach to the same textual element as the clause "for governmental purposes". Both the terms "for governmental purposes" and "not with a view to commercial resale" further qualify and limit the scope of "products purchased". These two requirements are linked by the words "and not", which suggests that the requirement of purchases not being made with a view to commercial resale must be met in addition to the requirement of purchases being made for governmental purposes. Accordingly, a purchase that does not fulfil the requirement of being made "for governmental purposes" will not be covered by Article III:8(a) regardless of whether it complies with the requirement of being made "not with a view to commercial resale". These are cumulative requirements. We therefore disagree with the Panel's proposition that where a government purchase of goods is made "with a view to commercial resale", it is for that reason also not a purchase "for governmental purposes".

5.70. Turning then to the meaning of the words "commercial resale", we note that the term "resale" is defined as the "sale of something previously bought".<sup>516</sup> In the context of Article III:8(a), the word "resale" refers to the term "products purchased". Accordingly, the product not to be "resold" on a commercial basis is the product "purchased for governmental purposes". As we see it, "commercial resale" is a resale of a product at arm's length between a willing seller and a willing buyer. Much of the debate in this case has focused on whether procurement "with a view to commercial resale" must involve profit. Canada, in particular, has argued that procurement "with a view to commercial resale" is procurement "with the aim to resell for profit".<sup>517</sup> Japan and the European Union reject the proposition that profit, or an intent to profit, is a required element.<sup>518</sup> Although the Panel ultimately found the existence of profit in this case<sup>519</sup>, it seemed unpersuaded by Canada's argument that a profit element is required for a resale to be "commercial".<sup>520</sup> The Panel observed, in this regard, that "it is a fact that loss-making sales can be, and often are, a part of ordinary commercial activity."<sup>521</sup>

5.71. As we see it, whether a transaction constitutes a "commercial resale" must be assessed having regard to the entire transaction. In doing so, the assessment must look at the transaction from the seller's perspective and at whether the transaction is oriented at generating a profit for the seller. We see profit-orientation generally as an indication that a resale is at arm's length. Profit-orientation indicates that the seller is acting in a self-interested manner. Yet, as the Panel noted, there are circumstances where a seller enters into a transaction out of his or her own interest without making a profit. There are different circumstances in which a seller may offer a product at a price that does not allow him or her to make a profit, or sometimes even fully to recoup cost. In such circumstances, it may be useful to look at the seller's long-term strategy. This is because loss-making sales could not be sustained indefinitely and a rational seller would be expected to be profit-oriented in the long term, though we accept that strategies can vary widely and thus do not see this as applying axiomatically. The transaction must also be assessed from the perspective of the buyer. A commercial resale would be one in which the buyer seeks to maximize his or her own interest. It is an assessment of the relationship between the seller and the buyer in

<sup>514</sup> At the oral hearing an example was discussed, in which a public hospital purchases pharmaceuticals and provides them to patients. Both Canada and the European Union accepted that this could qualify as a purchase "for governmental purposes".

<sup>515</sup> Emphasis added.

<sup>516</sup> Oxford English Dictionary online, <<http://www.oed.com/view/Entry/163370>>.

<sup>517</sup> Panel Reports, para. 7.146.

<sup>518</sup> Panel Reports, para. 7.146.

<sup>519</sup> This finding has been appealed by Canada under Article 11 of the DSU. See *infra*, paras. 5.83 and 5.84.

<sup>520</sup> Panel Reports, para. 7.151.

<sup>521</sup> Panel Reports, para. 7.151.

the transaction in question that allows a judgement to be made whether a transaction is made at arm's length.

5.72. Finally, we turn to the clause "not ... with a view to use in the production of goods for commercial sale" in Article III:8(a). Where the provision uses the same words as in the phrase "not with a view to commercial resale", we consider that these words have the same meaning in both clauses. Furthermore, while the penultimate clause of Article III:8(a) refers to commercial "resale", the last clause refers simply to "sale". To us, this is due to the fact that the penultimate clause addresses the sale of the product previously bought by the governmental agency and the last clause addresses the sale of a product that is different from the product previously bought by the government. However, we consider that both clauses refer essentially to the same type of sales transactions.

5.73. The provision further refers to "use in the production of goods". The word "use" is defined as "[t]he act of putting something to work, or employing or applying a thing, for any (*esp.* a beneficial or productive) purpose".<sup>522</sup> The relevant purpose in the sense of the provision is then specified by the words "in the production of goods". The preposition "in" expresses a relation of inclusion and thus suggests that the product has a role in the production of goods. Finally, we note that the clause "not with a view to commercial resale" and the clause "with a view to use in the production of goods for commercial sale" are connected with the word "or", which suggests that the provision covers only products that are neither purchased with a view to commercial resale, nor purchased with a view to use in the production of goods for commercial sale.

5.74. In sum, we consider that Article III:8(a) sets out a derogation from the national treatment obligation contained in Article III of the GATT 1994. The provision exempts from the national treatment obligation certain measures containing rules for the process by which government purchases products. Under Article III:8(a), the entity procuring products for the government is a "governmental agency". We have found above that a "governmental agency" is an entity performing functions of government and acting for or on behalf of government. Furthermore, we have found that the derogation of Article III:8(a) must be understood in relation to the obligations stipulated in Article III. This means that the product of foreign origin must be in a competitive relationship with the product purchased.<sup>523</sup> Furthermore, Article III:8(a) is limited to products purchased for the use of government, consumed by government, or provided by government to recipients in the discharge of its public functions. On the contrary, Article III:8(a) does not cover purchases made by governmental agencies with a view to reselling the purchased products in an arm's-length sale and it does not cover purchases made with a view to using the product previously purchased in the production of goods for sale at arm's length.

#### 5.3.4 Application of Article III:8(a) of the GATT 1994 to the facts of these disputes

5.75. We now turn to consider whether the Panel erred in finding that the FIT Programme and related FIT and microFIT Contracts are not covered by Article III:8(a) and that they are therefore subject to the disciplines of Article III:4 of the GATT 1994.<sup>524</sup> We note that the product that is subject to the Minimum Required Domestic Content Levels of the FIT Programme and Contracts challenged by the complainants as discriminatory under Article III:4 of the GATT 1994 and the TRIMs Agreement is certain renewable energy generation equipment.<sup>525</sup> The product purchased by the Government of Ontario under the FIT Programme and Contracts, however, is electricity and not generation equipment.<sup>526</sup> The generation equipment is purchased by the generators themselves. Accordingly, the product being purchased by a governmental agency for purposes of Article III:8(a) – namely, electricity – is not the same as the product that is treated less favourably as a result of the Minimum Required Domestic Content Levels of the FIT Programme and Contracts.

<sup>522</sup> Oxford English Dictionary online, <<http://www.oed.com/view/Entry/220635>>.

<sup>523</sup> Whether the derogation in Article III:8(a) can extend also to discrimination relating to inputs and processes of production used in respect of products purchased by way of procurement is a matter we do not decide in this case. (See *supra*, para. 5.63)

<sup>524</sup> Panel Reports, para. 7.152.

<sup>525</sup> Panel Reports, para. 7.124. See also paras. 7.158-7.160.

<sup>526</sup> Panel Reports, para. 7.64.

5.76. We observe that the Panel noted the difference between the product subject to the Minimum Required Domestic Content Levels and the product subject of procurement.<sup>527</sup> However, the Panel found that, in the present case, purchases of electricity nonetheless fall within the scope of the derogation of Article III:8(a), because the generation equipment "is needed and used" to produce the electricity, and therefore there is a "close relationship" between the products affected by the domestic content requirements (generation equipment) and the product procured (electricity).<sup>528</sup>

5.77. Canada supports the Panel's finding that there is a "close relationship" between the product affected by the domestic content requirements (generation equipment) and the product procured by the Government of Ontario (electricity), because the domestic content requirements for electricity generation equipment are a condition that must be satisfied by generators utilizing solar PV or windpower technologies in order to participate in the FIT Programme, and because the electricity procured by the Government of Ontario is produced using the very same generation equipment that is subject to the domestic content requirements.<sup>529</sup>

5.78. We recall our finding above that laws, regulations, or requirements "governing" procurement must articulate a connection between those legal instruments and procurement in the sense that the act of procurement is taken within a binding structure of laws, regulations, or requirements. We acknowledge that, under the challenged measures, a connection is articulated between the procurement of electricity and the Minimum Required Domestic Content Levels regarding generation equipment. However, in our view, this connection under municipal law is not dispositive of the issue, because Article III:8(a) imposes also other conditions.

5.79. We have found above that the conditions for derogation under Article III:8(a) must be understood in relation to the obligations stipulated in the other paragraphs of Article III. This means that the product of foreign origin allegedly being discriminated against must be in a competitive relationship with the product purchased. In the case before us, the product being procured is electricity, whereas the product discriminated against for reason of its origin is generation equipment. These two products are not in a competitive relationship. None of the participants has suggested otherwise, much less offered evidence to substantiate such proposition. Accordingly, the discrimination relating to generation equipment contained in the FIT Programme and Contracts is not covered by the derogation of Article III:8(a) of the GATT 1994.<sup>530</sup> We therefore reverse the Panel's findings, in paragraphs 7.127, 7.128, and 7.152 of the Panel Reports, that the Minimum Required Domestic Content Levels of the FIT Programme and related FIT and microFIT Contracts are laws, regulations, or requirements governing the procurement by governmental agencies of electricity within the meaning of Article III:8(a) of the GATT 1994. Instead, we find that the Minimum Required Domestic Content Levels cannot be characterized as "laws, regulations or requirements governing the procurement by governmental agencies" of electricity within the meaning of Article III:8(a) of the GATT 1994.

5.80. We recall that both Japan and the European Union directed claims to various parts of the Panel's analysis regarding Article III:8(a). In particular, Japan claims that the Panel erred in finding that the Government of Ontario's purchases of electricity under the FIT Programme constitute "procurement" within the meaning of Article III:8(a)<sup>531</sup>, because the structure of the energy system in Ontario, in particular the unbundling of generation, transmission, and distribution of electricity and the allocation of each of these functions together with corresponding regulatory functions to separate entities, suggests that the Government of Ontario does not engage in the physical supply or sale of electricity. The European Union contends that the domestic content requirements of the measures at issue are not covered by Article III:8(a) because they relate to generation equipment, a product that is different and "completely disconnected" from the product purchased by the government, which is electricity.<sup>532</sup>

<sup>527</sup> Panel Reports, paras. 7.125 and 7.126 and fn 271 thereto.

<sup>528</sup> Panel Reports, para. 7.127.

<sup>529</sup> Canada's appellee's submission, paras. 47-57.

<sup>530</sup> We recall that we do not address in this case rules for determining the origin of products purchased.

It has not been alleged in this case that the Minimum Required Domestic Content Levels are rules of origin.

<sup>531</sup> Panel Reports, para. 7.136.

<sup>532</sup> European Union's other appellant's submission (DS426), para. 53; Panel Reports, para. 7.128.

5.81. Both Japan and the European Union have raised additional claims but have done so on a conditional basis. Japan and the European Union conditionally appeal the Panel's interpretation and application of the term "for governmental purposes".<sup>533</sup> Japan conditionally appeals the Panel's interpretation and application of the term "commercial resale".<sup>534</sup>

5.82. We have addressed the various elements of Article III:8(a) to which the claims of Japan and the European Union relate in a holistic interpretation of this provision set out above. Having found that the Minimum Required Domestic Content Levels do not fall within the ambit of the derogation in Article III:8(a), we need not address these further allegations of error raised by the European Union and Japan seeking reversal of intermediate findings by the Panel. These findings are moot.

5.83. Canada claims that the Panel erred in finding that the Government of Ontario's purchases of electricity under the FIT Programme are undertaken "with a view to commercial resale". It additionally makes two claims under Article 11 of the DSU in connection with this finding. In particular, Canada argues that the Panel failed to make an objective assessment of the matter before it, contrary to Article 11 of the DSU, when finding that the measures at issue involve purchases "with a view to commercial resale" within the meaning of Article III:8(a) of the GATT 1994. More specifically, Canada claims that the Panel acted inconsistently with Article 11 of the DSU in finding that: (i) Hydro One Inc. and distributors sell electricity in competition with private-sector licensed retailers; and (ii) the Government of Ontario and the municipal governments profit from the resale of electricity purchased under the FIT Programme to consumers.

5.84. Our conclusion that the measures at issue are not covered by Article III:8(a) of the GATT 1994 is not premised on a finding that the Government of Ontario's procurement of electricity under the FIT Programme is undertaken "with a view to commercial resale". Rather, it is based on our finding that Article III:8(a) does not cover discriminatory treatment of the equipment used to generate the electricity that is procured by the Government of Ontario. Furthermore, we have mooted the Panel's intermediate findings, including the finding that the Government of Ontario's procurement of electricity under the FIT Programme and Contracts is undertaken "with a view to commercial resale". Thus, we do not consider it necessary to address further Canada's claims.

5.85. In the light of our finding that the Minimum Required Domestic Content Levels do not fall within the ambit of Article III:8(a), and in the light of the fact that Canada has not appealed the Panel's finding that the FIT Programme and Contracts are inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement<sup>535</sup>, the Panel's conclusion, in paragraph 8.2 of the Japan Panel Report and in paragraph 8.6 of the EU Panel Report, that the Minimum Required Domestic Content Levels prescribed under the FIT Programme and related FIT and microFIT Contracts are inconsistent with Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994 stands.

#### **5.4 Did the Panel properly exercise judicial economy when it declined to make a finding under Japan's "stand-alone" claim under Article III:4 of the GATT 1994?**

5.86. We now turn to Japan's allegation that the Panel failed to comply with its duties under Article 11 of the DSU and exercised false judicial economy by failing to make a finding with respect to Japan's claim under Article III:4 of the GATT 1994, which was independent of Japan's claim involving both Article III:4 of the GATT 1994 and the TRIMs Agreement.

<sup>533</sup> Panel Reports, para. 7.145.

<sup>534</sup> Panel Reports, para. 7.151.

<sup>535</sup> Panel Reports, para. 7.167. Canada did not contest before the Panel that the measures at issue are TRIMs. (Ibid., para. 7.70) Also, the Panel noted 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." (Ibid., fn 254 to para. 7.107)

5.87. We recall briefly how this issue was argued before the Panel. Japan claimed that the measures at issue 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.<sup>536</sup> This claim was independent from, and additional to, its claim of violation of the TRIMs Agreement, which also included Article III:4.<sup>537</sup> For convenience, we refer below to the first claim as Japan's "stand-alone Article III:4 claim". We refer to the second claim as Japan's "TRIMs–Article III:4 claim".

5.88. As described in Section 5.2, the Panel decided to "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".<sup>538</sup> The Panel explained that it was "apparent from the terms of Article 2.1 of the TRIMs Agreement" that, in undertaking its evaluation under the TRIMs Agreement, it would "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."<sup>539</sup>

5.89. At the end of its analysis, the Panel 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 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."<sup>540</sup> The Panel then concluded:

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.<sup>541</sup>

5.90. At the interim review stage, Japan requested the Panel to "address Japan's other argument and that it do so by undertaking a separate analysis of Article III:4 of the GATT 1994."<sup>542</sup> Japan argued that "this separate analysis is necessary in order for the Panel to discharge its responsibilities under Articles 3 and 11 of the DSU."<sup>543</sup> Canada did not comment on Japan's request.<sup>544</sup>

5.91. The Panel responded as follows:

[W]e 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.<sup>545</sup>

<sup>536</sup> Japan's first written submission to the Panel (DS412), para. 262.

<sup>537</sup> Japan's first written submission to the Panel (DS412), para. 295 et seq.

<sup>538</sup> Panel Reports, para. 7.70.

<sup>539</sup> Panel Reports, para. 7.70.

<sup>540</sup> Panel Reports, para. 7.166.

<sup>541</sup> Panel Reports, para. 7.167. The Panel made the following recommendation on the basis of its earlier conclusion:

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.

We recommend that Canada bring its measures into conformity with its obligations under the TRIMs Agreement and the GATT 1994.

(Japan Panel Report (DS412), paras. 8.4 and 8.5)

<sup>542</sup> Panel Reports, para. 6.71.

<sup>543</sup> Panel Reports, para. 6.71.

<sup>544</sup> Panel Reports, para. 6.71.

<sup>545</sup> Panel Reports, para. 6.72.



5.92. On appeal, Japan claims that the Panel improperly exercised judicial economy when it declined to make a finding with respect to Japan's stand-alone Article III:4 claim. We note that the Panel did not use the term "judicial economy" to describe its disposition of Japan's stand-alone Article III:4 claim. The only explanation offered by the Panel is in the interim review section of the Panel Reports quoted above. While the Panel did not state explicitly that it was exercising judicial economy, the explanation offered by the Panel in the interim review suggests that is what the Panel had in mind.

5.93. The question before us, therefore, is whether the Panel's exercise of judicial economy in this case was proper. Since panels have a margin of discretion with respect to the exercise of judicial economy, to succeed in its claim on appeal Japan has to demonstrate that the Panel exceeded this discretion. In accordance with Appellate Body jurisprudence, this means that Japan would have to show that the Panel provided only a "partial resolution of the matter at issue", or that an additional finding with respect to Japan's stand-alone Article III:4 claim "is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance"<sup>546</sup> by Canada with those recommendations and rulings.

5.94. At the outset, we emphasize that this is not a case in which the panel failed to make a finding under a provision alleged by the complainant to have been violated. The Panel in this case has made a finding of violation of Article III:4 of the GATT 1994. It is true that this finding of violation rests on an assessment of the measures at issue under the Illustrative List of TRIMs annexed to the TRIMs Agreement, and in particular on paragraph 1(a). While it is not said in so many words, paragraph 1(a) is an instance in which an imported product is treated less favourably than a like domestic product. Understood in this manner, it is not obvious what a stand-alone finding of violation of Article III:4 of the GATT 1994 would add to a finding of violation of Article III:4 that is consequential to an assessment under the Illustrative List of the TRIMs Agreement.

5.95. Japan argues that a stand-alone finding under Article III:4 would result in broader implementation obligations. Different implementation obligations have been one of the factors used in the past to assess whether the exercise of judicial economy was proper or improper. However, this is not a case like *EC – Export Subsidies on Sugar*, where the remedy available as a result of a finding of violation of the SCM Agreement<sup>547</sup> was different to the remedy available in relation to a finding of violation of the Agreement on Agriculture. There is no difference here between the remedy that would be available under Article 19.1 of the DSU in the case of a stand-alone Article III:4 finding of violation and the TRIMs–Article III:4 finding of violation entered by the Panel.

5.96. At the oral hearing, Japan clarified its position on the differences in implementation obligations, explaining that Canada could lower the FIT Programme's domestic content requirements to a point where such requirements could be met exclusively through the use of local services. Japan was of the view that such a situation would not be addressed by the Panel's TRIMs–Article III:4 finding, but that such situation would have been covered had the Panel made a stand-alone finding under Article III:4 of the GATT 1994.

5.97. We note that Japan's argument is premised on a change to the Minimum Required Domestic Content Levels of the FIT Programme. Japan has not suggested that the Minimum Required Domestic Content Levels under either the FIT or microFIT stream could be fulfilled at present using services exclusively. In fact, before the Panel, Japan emphasized that the opposite was the case, explaining 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."<sup>548</sup> In other words, as the Panel noted, it was Japan's contention that "purely service activities contained

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<sup>546</sup> Appellate Body Reports, *Australia – Salmon*, para. 223; and *EC – Export Subsidies on Sugar*, para. 331. See also Appellate Body Reports, *Canada – Wheat Exports and Grain Imports*, para. 133; and *US – Upland Cotton*, para. 732.

<sup>547</sup> Article 4.7 of the SCM Agreement provides:

If the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay. In this regard, the panel shall specify in its recommendation the time period within which the measure must be withdrawn.

<sup>548</sup> Japan's first written submission to the Panel (DS412), para. 173. (original emphasis) See also Panel Reports, para. 7.161.

in each Domestic Content Grid[] are not sufficient to meet the 'Minimum Required Domestic Content Levels'.<sup>549</sup> The Panel "carefully reviewed the operation of the 'Minimum Required Domestic Content Level'" and agreed with Japan "that in all of the situations described ... by Japan, at least some Ontario-sourced (and therefore Canadian-sourced) goods must be used to satisfy them."<sup>550</sup> Thus, Japan's argument regarding implementation is based on a measure that is different from the measure that was before the Panel. We do not believe that it was necessary or appropriate for the Panel to make an additional finding so as to anticipate that Canada would modify the measures at issue in the manner suggested by Japan.

5.98. Moreover, it does not appear that Japan asked the Panel for different kinds of relief for each of its two Article III:4 lines of argumentation. Japan simply requested that the Panel recommend that Canada "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."<sup>551</sup> In the event, the Panel recommended "that Canada bring its measures into conformity with its obligations under the TRIMs Agreement and the GATT 1994."<sup>552</sup> Thus, besides the short-hand way the Panel referred to the measures at issue and the order in which the agreements are listed, the Panel's recommendation closely follows what Japan requested.

5.99. Japan also relies on the Appellate Body report in *US – Tuna II (Mexico)* to support its position. In that case, the Appellate Body faulted the panel for failing to make findings on Mexico's claims under Articles I and III of the GATT 1994 having assessed the measure under Articles 2.1, 2.2, and 2.4 of the Agreement on Technical Barriers to Trade (TBT Agreement). The Appellate Body explained:

To us, it seems that the Panel's decision to exercise judicial economy rested upon the assumption that the obligations under Article 2.1 of the *TBT Agreement* and Articles I:1 and III:4 of the GATT 1994 are substantially the same. This assumption is, in our view, incorrect. In fact, as we have found above, the scope and content of these provisions is not the same. Moreover, in our view, the Panel should have made additional findings under the GATT 1994 in the event that the Appellate Body were to disagree with its view that the measure at issue is a "technical regulation" within the meaning of the *TBT Agreement*. As a result, it would have been necessary for the Panel to address Mexico's claims under the GATT 1994 given that the Panel found no violation under Article 2.1 of the *TBT Agreement*. By failing to do so, the Panel engaged, in our view, in an exercise of "false judicial economy" and acted inconsistently with its obligations under Article 11 of the DSU.<sup>553</sup>

<sup>549</sup> Panel Reports, para. 7.161. Japan demonstrated this by showing that, under the FIT stream, the use of services would yield a maximum qualifying percentage of 20% for wind projects, and of between 22% and 28% for solar PV projects depending on the technology used. The Minimum Required Domestic Content Levels under the FIT Programme are: wind projects, 25% for 2009-2011 milestones and 50% as of 2012; and solar PV projects, 50% for 2009-2010 milestones and 60% as of 2011. As regards microFIT solar PV projects, Japan explained that the maximum qualifying percentage for services is 27% or 28% depending on the technology used, whereas the Minimum Required Domestic Content Level is 40% for 2009-2010 milestones and 60% as of 2011. (See Panel Reports, paras. 7.158 and 7.161; and Japan's first written submission to the Panel (DS412), para. 173)

<sup>550</sup> Panel Reports, para. 7.163.

<sup>551</sup> Panel Reports, para. 3.2(b). Japan did request separate findings, asking the Panel to find that:

(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.

(Ibid., para. 3.1(b) and (c))

<sup>552</sup> Japan Panel Report (DS412), para. 8.5.

<sup>553</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 405 (referring to Appellate Body Report, *Australia – Salmon*, para. 223).

5.100. There is a key difference between the situation in the present case and the situation that was before the Appellate Body in *US – Tuna II (Mexico)*. In this case, the Panel made findings of violation under both Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994, while in *US – Tuna II (Mexico)*, the panel made no findings of violation under Articles I:1 and III:4 of the GATT 1994 or Article 2.1 of the TBT Agreement. Thus, the situation in this case and the situation in *US – Tuna II (Mexico)* are the diametrical opposite.

5.101. In our view, the circumstances of this case more closely resemble *US – Upland Cotton* rather than *US – Tuna II (Mexico)*. We recall that, in *US – Upland Cotton*, Brazil claimed that export credit guarantees provided by the United States to certain agricultural products were export subsidies prohibited under Articles 3.1(a) and 3.2 of the SCM Agreement.<sup>554</sup> The panel in that case determined that the export credit guarantees were indeed export subsidies prohibited under Articles 3.1(a) and 3.2 of the SCM Agreement. For purposes of its assessment, the panel relied on item (j) of the Illustrative List of Export Subsidies annexed to the SCM Agreement.<sup>555</sup> At the interim review stage, the panel denied Brazil's request "to make certain additional 'factual' findings regarding the parties' evidence and argumentation relating to Brazil's allegation that the ... export credit guarantee programmes at issue constitute prohibited export subsidies under the elements of Articles 1 and 3.1(a) of the *SCM Agreement*".<sup>556</sup>

5.102. Brazil subsequently appealed the Panel's finding, arguing that it constituted false judicial economy. The Appellate Body observed that Brazil's claim was premised "on its submission that item (j) of the Illustrative List of Export Subsidies annexed to the *SCM Agreement* is a distinct obligation from that contained in Article 3.1(a), read together with Article 1.1".<sup>557</sup> The Appellate Body declined to decide whether the premise on which Brazil based its argument was correct, because, "even if [the Appellate Body] were to assume that such a claim were possible, [it] would conclude that the Panel was within its discretion in exercising judicial economy in respect of Brazil's claim".<sup>558</sup> According to the Appellate Body, the panel's finding that US export credit guarantee programs constituted a prohibited export subsidy under Article 3.1(a) because they did not meet the criteria in item (j) was "sufficient to resolve the matter".<sup>559</sup> Consequently, the Appellate Body rejected Brazil's claim and found that the panel's exercise of judicial economy was proper.<sup>560</sup>

5.103. The circumstances described above are similar to those surrounding Japan's claim in the present case. Both cases involve findings of inconsistency that proceeded on the basis of the application of an illustrative list. In the case of item (j) of the Illustrative List of Export Subsidies, fulfilment of the elements of that provision results in a finding that there is a prohibited export subsidy under Article 3.1(a) of the SCM Agreement. In the present case, fulfilment of the elements in paragraph 1(a) of the Illustrative List of TRIMs results in a finding of inconsistency with Article III:4 of the GATT 1994. In both cases, the elements that must be demonstrated under the relevant paragraphs of the Illustrative Lists are not necessarily the same as those that must be demonstrated pursuant to the underlying obligation. In addition, in both cases, the underlying

<sup>554</sup> Brazil also challenged the export credit guarantees under the Agreement on Agriculture.

<sup>555</sup> Item (j) of the Illustrative List of Export Subsidies provides:

The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.

<sup>556</sup> Panel Report, *US – Upland Cotton*, para. 6.31. Brazil alleged that, "in the event one of the parties appeals and the Appellate Body reverses the Panel's conclusion on item (j), it might not have the necessary facts at its disposal to 'complete the analysis' with respect to Brazil's claims under Articles 1 and 3.1(a) of the *SCM Agreement*". (Ibid.)

<sup>557</sup> Appellate Body Report, *US – Upland Cotton*, para. 730 (referring to Brazil's other appellant's submission, para. 22).

<sup>558</sup> Appellate Body Report, *US – Upland Cotton*, para. 731. In fn 1139 thereto, the Appellate Body explained that the panel did not expressly state that it was exercising judicial economy. Instead, the panel stated that it did not believe that it was "necessary to address Brazil's additional arguments". (Panel Report, *US – Upland Cotton*, para. 6.31 (emphasis omitted)) Brazil initially described the panel's failure to make a finding as an error by the panel in the "interpretation and application of Article 3.1(a) of the *SCM Agreement*, as well as of Article 3.7 of the DSU". (Brazil's other appellant's submission in *US – Upland Cotton*, para. 22) Later in its submission, however, Brazil described the panel's error as a "misapplication of the principle of judicial economy". (Ibid., para. 23; see also paras. 33 and 39-41)

<sup>559</sup> Appellate Body Report, *US – Upland Cotton*, para. 732.

<sup>560</sup> Appellate Body Report, *US – Upland Cotton*, para. 733.

obligation captures a broader set of measures than the examples in the Illustrative Lists. Thus, the Panel's decision to exercise judicial economy in the present case with respect to Japan's stand-alone Article III:4 claim is consistent with the panel's approach in *US – Upland Cotton*, which the Appellate Body found not to have been an improper exercise of judicial economy.

5.104. In sum, we are not persuaded that the Panel's failure to make a finding on Japan's stand-alone Article III:4 claim provided only a "partial resolution of the matter at issue" or that an additional finding on Japan's stand-alone Article III:4 claim "is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance"<sup>561</sup> by Canada with those recommendations and rulings. Therefore, we reject Japan's claim that the Panel failed to fulfil its obligations under Article 11 of the DSU and exercised false judicial economy by declining to make a finding on Japan's stand-alone Article III:4 claim.

5.105. Japan requests, if we were to conclude that the Panel's exercise of judicial economy was false, that we complete the analysis of its stand-alone Article III:4 claim. Given that we have found that it was not improper for the Panel to have declined to make a finding on Japan's stand-alone Article III:4 claim, we need not further consider Japan's request.

## 5.5 Claims under the SCM Agreement

### 5.5.1 Article 1.1(a) – "Financial contribution" or "income or price support"

5.106. Japan appeals several aspects of the Panel's findings under Article 1.1(a) of the SCM Agreement. In particular, Japan argues that the Panel erred in its interpretation and application of Article 1.1(a) in finding that the FIT Programme and related FIT and microFIT Contracts constitute government "purchases [of] goods" under Article 1.1(a)(1)(iii).<sup>562</sup> With respect to the Panel's interpretation of Article 1.1(a)(1), Japan contends that the Panel erred in finding that subparagraphs (i) and (iii) of Article 1.1(a)(1) are mutually exclusive.<sup>563</sup> With respect to the application of Article 1.1(a), Japan requests us to reverse the Panel's finding that the FIT Programme and Contracts are government "purchases [of] goods" and to find instead that the measures at issue are appropriately characterized as "direct transfer[s] of funds", "potential direct transfers of funds", or "income or price support" under Article 1.1(a). In the alternative, Japan requests us to modify the Panel's finding in this regard to find that the measures at issue may *also* be characterized as "direct transfer[s] of funds", "potential direct transfers of funds", or "income or price support" under Article 1.1(a) of the SCM Agreement.<sup>564</sup>

5.107. In addition, Japan argues that the Panel improperly exercised judicial economy with respect to Japan's claim that the measures at issue constitute "income or price support" within the meaning of Article 1.1(a)(2) of the SCM Agreement, and thereby failed to make an objective assessment of the matter as required by Article 11 of the DSU. Japan requests us to find that the FIT Programme and Contracts may be characterized as "income or price support" and that a benefit exists with respect to this characterization of the challenged measures.<sup>565</sup>

5.108. We first summarize the Panel's findings under Article 1.1(a) of the SCM Agreement and then address each of Japan's claims on appeal.

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<sup>561</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 403 (quoting Appellate Body Report, *Australia – Salmon*, para. 223).

<sup>562</sup> Japan's other appellant's submission (DS412), para. 29.

<sup>563</sup> Japan's other appellant's submission (DS412), para. 49.

<sup>564</sup> Japan's other appellant's submission (DS412), para. 48.

<sup>565</sup> Japan's other appellant's submission (DS412), para. 59.

### 5.5.1.1 The Panel's findings

5.109. Before the Panel, Japan argued that the FIT Programme and related FIT and microFIT Contracts are "direct transfer[s] of funds" and "potential direct transfers of funds" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement. Alternatively, Japan submitted that the measures at issue are "income or price support" within the meaning of Article 1.1(a)(2).<sup>566</sup> Canada disagreed with this position and asserted that the measures at issue can only be legally characterized as financial contributions in the form of government "purchases [of] goods" within the meaning of Article 1.1(a)(1)(iii).<sup>567</sup>

5.110. Following an examination of the measures at issue, the Panel found that the appropriate legal characterization of the FIT Programme and 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.<sup>568</sup> The Panel's reasoning in reaching this conclusion was based on three key elements. First, it noted that the OPA transfers funds to FIT suppliers for "delivered electricity" into Ontario's electricity grid.<sup>569</sup> It is by paying a FIT Contract Price for delivered electricity that the Government of Ontario seeks to achieve the objective of securing investment in new generation facilities for the purposes of diversifying Ontario's supply-mix. Thus, in the Panel's view, there is no grant element inherent in the design and operation of the FIT Programme. The Panel highlighted that, while FIT and microFIT Contracts facilitate suppliers' search for project financing, it would be wrong to characterize the Contract Payments themselves as finance payments for the construction of a generation facility.<sup>570</sup>

5.111. Second, the Panel found that the Government of Ontario takes possession over electricity and thus "purchases electricity".<sup>571</sup> The Panel found 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).<sup>572</sup> In particular, given the specific characteristics of electricity, the Panel preferred to characterize a purchase of electricity as involving the transfer of an *entitlement* to electricity, rather than the taking of physical possession of the electricity.<sup>573</sup> Moreover, the Panel rejected the European Union's argument that the notion of government "purchases [of] goods" implies that the government is the entity being supplied with something for *its use*.<sup>574</sup>

5.112. The Panel then observed that government "purchases [of] goods" require the involvement of the "government" or a "public body". In the Panel's view, this is exactly what happens through the FIT Programme and Contracts, where the combined actions of all three "public bodies" involved (i.e. the OPA, Hydro One Inc., and the IESO) demonstrate that the Government of Ontario purchases electricity within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.<sup>575</sup>

<sup>566</sup> Panel Reports, para. 7.169. Before the Panel, the European Union submitted that the measures at issue 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), or as a form of "income or price support" under the terms of Article 1.1(a)(2) of the SCM Agreement. As an alternative to these two lines of argument, the European Union maintained that the challenged measures might also be characterized as "potential direct transfers of funds" under Article 1.1(a)(1)(i), or as governmental action that involves "entrust[ment] or direct[ion]" in the sense of Article 1.1(a)(1)(iv). (Ibid., para. 7.176)

<sup>567</sup> Panel Reports, para. 7.181.

<sup>568</sup> Panel Reports, paras. 7.222 and 7.243.

<sup>569</sup> Panel Reports, paras. 7.223 and 7.224.

<sup>570</sup> Panel Reports, para. 7.224. In particular, the Panel found that "[t]he OPA does not pay for renewable energy equipment or facilities. It does not make any upfront lump-sum advances to the FIT generators". (Ibid., para. 7.223)

<sup>571</sup> Panel Reports, paras. 7.239.

<sup>572</sup> Panel Reports, para. 7.231.

<sup>573</sup> Panel Reports, para. 7.229. (original emphasis)

<sup>574</sup> Panel Reports, para. 7.230.

<sup>575</sup> Panel Reports, paras. 7.231-7.239.

5.113. Third, the Panel found that the legislative and regulatory framework of the FIT Programme and Contracts supports the conclusion that the challenged measures are perceived by the Government of Ontario and by others in Ontario as governmental activity that involves the procurement or purchase of electricity.<sup>576</sup>

5.114. Next, the Panel explained why it disagreed with the complainants' proposed legal characterizations of the measures at issue. It recognized that the challenged measures exhibit some of the basic features of certain forms of "direct transfer[s] of funds", in that the measures involve an exchange of rights and obligations that includes the payment of money.<sup>577</sup> However, the Panel did not agree with the complainants that this means that they can also be legally characterized as "direct transfer[s] of funds" for the purposes of the SCM Agreement. For the Panel, to conclude that government "purchases [of] goods" can also be legally characterized as "direct transfer[s] of funds" would infringe the principle of effective treaty interpretation, as this reading would result in reducing subparagraph (iii) of Article 1.1(a)(1) to "redundancy or inutility".<sup>578</sup> The Panel disagreed that the complainants' request was supported by the Appellate Body's interpretation in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* that "[t]he structure of [Article 1.1(a)(1)] does not expressly preclude that a transaction could be covered by more than one subparagraph."<sup>579</sup> In the Panel's view, this statement "does not amount to a *finding* that transactions properly characterized as 'purchases [of] goods' can also constitute 'direct transfer[s] of funds'".<sup>580</sup> In addition, the Panel concluded that the measures at issue cannot be "potential direct transfers of funds" under Article 1.1(a)(1)(i) or a form of financial contribution involving government "entrust[ment] or direct[ion]" within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement.<sup>581</sup>

5.115. Moreover, the Panel decided to exercise judicial economy with respect to the complainants' allegation that the measures at issue may be legally characterized as "income or price support" under Article 1.1(a)(2) of the SCM Agreement. The Panel considered that such finding was not necessary to resolve the complainants' claims under the SCM Agreement given that: (i) the Panel majority ultimately rejected the complainants' allegations regarding "benefit" as they relate to government "purchases [of] goods"; and (ii) when the challenged measures are characterized as "income or price support", the complainants' arguments regarding "benefit" are "essentially the same" as those rejected by the Panel majority in its assessment of the measures at issue as government "purchases [of] goods".<sup>582</sup>

### **5.5.1.2 Whether the Panel erred in finding that the FIT Programme and Contracts are government "purchases [of] goods" under Article 1.1(a)(1)(iii) of the SCM Agreement**

5.116. On appeal, Japan challenges the Panel's interpretation and application of Article 1.1(a)(1) of the SCM Agreement. First, we examine Japan's challenge to the Panel's interpretation of Article 1.1(a)(1) and then we turn to address Japan's claim regarding the Panel's application of this provision. With respect to the interpretation of Article 1.1(a)(1), Japan argues that the Panel erred in finding that subparagraphs (i) and (iii) are "mutually exclusive".<sup>583</sup> In Japan's view, after concluding that the measures at issue are properly characterized as government "purchases [of] goods", the Panel, in effect, made such finding of mutual exclusivity by rejecting the complainants' argument that the measures at issue may *also* be legally characterized as "direct transfer[s] of funds" or "potential direct transfers of funds". For Japan, this finding mainly derives from the Panel's observation that "[w]e 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'".<sup>584</sup> Japan argues that nothing precludes a panel from determining

<sup>576</sup> Panel Reports, para. 7.242.

<sup>577</sup> Panel Reports, para. 7.243.

<sup>578</sup> Panel Reports, para. 7.246 (quoting Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:1, p. 21).

<sup>579</sup> Panel Reports, para. 7.247 (quoting Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, fn 1287 to para. 613).

<sup>580</sup> Panel Reports, para. 7.247. (original emphasis)

<sup>581</sup> Panel Reports, para. 7.248.

<sup>582</sup> Panel Reports, para. 7.249.

<sup>583</sup> Japan's other appellant's submission (DS412), para. 49.

<sup>584</sup> Japan's other appellant's submission (DS412), para. 49 (quoting Panel Reports, para. 7.246 (fn omitted)).

that a measure may be characterized in multiple ways under Article 1.1(a)(1) of the SCM Agreement, as long as the panel's findings are based on a proper understanding of the measure's relevant characteristics and an objective assessment of the facts. Japan submits that this conclusion follows from the Appellate Body's findings in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* that Article 1.1(a)(1) "does not explicitly spell out the intended relationship between the constituent subparagraphs" and that its structure "does not expressly preclude that a transaction could be covered by more than one subparagraph".<sup>585</sup>

5.117. Canada argues that there is no merit to Japan's claim that the Panel erred by finding that subparagraphs (i) and (iii) of Article 1.1(a)(1) are mutually exclusive. Canada submits that the Panel correctly found that the FIT Programme and Contracts could not be properly characterized as "direct transfer[s] of funds" as well as government "purchases [of] goods", and that this finding is entirely consistent with the Appellate Body report in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*. In particular, Canada argues that, while in a general sense the structure of Article 1.1(a)(1) does not preclude that a transaction could be covered by more than one subparagraph, the same aspects of the same measure cannot at the same time be properly characterized as government "purchases [of] goods" and "direct transfer[s] of funds".<sup>586</sup>

5.118. We begin by providing an overview of the relevant findings by the Panel regarding the interpretative issue raised by Japan. In addressing the legal characterization of the FIT Programme and Contracts under the SCM Agreement, the Panel found the measures at issue to be government "purchases [of] goods" under subparagraph (iii) of Article 1.1(a)(1). Then, the Panel rejected the complainants' argument that the challenged measures could *also* be legally characterized as "direct transfer[s] of funds" under subparagraph (i).<sup>587</sup> In rejecting the complainants' argument, the Panel recognized that the measures at issue 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 that includes the payment of money.<sup>588</sup> In addition to rejecting the complainants' request regarding the characterization of the measures at issue, the Panel went on to make the interpretative finding that it could not conclude that "government 'purchases [of] goods' could also be legally characterized as 'direct transfer[s] of funds' without infringing [the] principle [of effective treaty interpretation]".<sup>589</sup> Moreover, the Panel disagreed that the complainants' request was supported by the Appellate Body's interpretation in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* that "[t]he 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."<sup>590</sup> In the Panel's view, this statement "does not amount to a *finding* that transactions properly characterized as 'purchases [of] goods' can also constitute 'direct transfer[s] of funds'".<sup>591</sup>

5.119. To the extent that this finding by the Panel means that the coverage of subparagraphs (i) and (iii) of Article 1.1(a)(1) is mutually exclusive, we disagree. We recall that, in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body found that Article 1.1(a)(1) "does not explicitly spell out the intended relationship between the constituent subparagraphs"<sup>592</sup> and that the structure of this provision "does not expressly preclude that a transaction could be covered by more than one subparagraph".<sup>593</sup> In that dispute, the Appellate Body also found that "a direct transfer of funds" under subparagraph (i) "may involve reciprocal rights and obligations"<sup>594</sup>, given that it covers

<sup>585</sup> Japan's other appellant's submission (DS412), para. 50 (quoting Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 613 and fn 1287 thereto, respectively). (emphasis added by Japan omitted)

<sup>586</sup> Canada's appellee's submission, para. 117.

<sup>587</sup> Panel Reports, para. 7.243. We note that, although the Panel rejected Japan's claim that the measures at issue constitute "direct transfer[s] of funds" and "potential direct transfers of funds", the Panel's arguments mainly focused on explaining why the challenged measures do not constitute "direct transfer[s] of funds". (Panel Reports, paras. 7.243-7.248)

<sup>588</sup> Panel Reports, para. 7.243.

<sup>589</sup> Panel Reports, para. 7.246.

<sup>590</sup> Panel Reports, para. 7.247 (quoting Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, fn 1287 to para. 613).

<sup>591</sup> Panel Reports, para. 7.247. (original emphasis) The Panel indicated that, while it may be possible to characterize different aspects of the same measure as different types of financial contributions (e.g. a governmental programme involving loans and government purchases of goods), the customary rules of interpretation do not lend support to the position advanced by the complainants. (Ibid.)

<sup>592</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 613.

<sup>593</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, fn 1287 to para. 613.

<sup>594</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 617.

situations where the recipient assumes obligations to the government in exchange for the funds provided, such as loans and equity infusions.<sup>595</sup> The Appellate Body further held that the term "purchase" under subparagraph (iii) usually means "that the person or entity providing the goods will receive some consideration in return".<sup>596</sup>

5.120. When determining the proper legal characterization of a measure under Article 1.1(a)(1) of the SCM Agreement, a panel must assess whether the measure may fall within any of the types of financial contributions set out in that provision. In doing so, a panel should scrutinize the measure both as to its design and operation and identify its principal characteristics.<sup>597</sup> Having done so, the transaction may naturally fit into one of the types of financial contributions listed in Article 1.1(a)(1). However, transactions may be complex and multifaceted. This may mean that different aspects of the same transaction may fall under different types of financial contribution. It may also be the case that the characterization exercise does not permit the identification of a single category of financial contribution and, in that situation, as described in the *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* Appellate Body report, a transaction may fall under more than one type of financial contribution. We note, however, that the fact that a transaction may fall under more than one type of financial contribution does not mean that the types of financial contributions set out in Article 1.1(a)(1) are the same or that the distinct legal concepts set out in this provision would become redundant, as the Panel suggests.<sup>598</sup> We further observe that, in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body did not address the question of whether, in the situation described above, a panel is under an obligation to make findings that a transaction falls under more than one subparagraph of Article 1.1(a)(1).

5.121. In the light of these considerations, we believe that the Panel's finding that subparagraphs (i) and (iii) are mutually exclusive is not consistent with the Appellate Body's interpretations in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*. Consequently, we declare moot and of no legal effect the Panel's finding, in paragraph 7.246 of the Panel Reports, that "government 'purchases [of] goods' could [not] also be legally characterized as 'direct transfer[s] of funds' without infringing [the] principle [of effective treaty interpretation]", inasmuch as it negates the possibility that a transaction may fall under more than one type of financial contribution under Article 1.1(a)(1) of the SCM Agreement.

5.122. Turning to the application of Article 1.1(a)(1) of the SCM Agreement, Japan challenges on appeal the Panel's finding that the FIT Programme and Contracts are government "purchases [of] goods" within the meaning of Article 1.1(a)(1)(iii). Japan requests us to reverse this finding and to find instead that the measures at issue are appropriately characterized as "direct transfer[s] of funds", "potential direct transfers of funds", or "income or price support" under Article 1.1(a) of the SCM Agreement, or alternatively modify the Panel's finding in this regard to find that these measures may *also* be characterized as "direct transfer[s] of funds", "potential direct transfers of funds", or "income or price support" under Article 1.1(a) of the SCM Agreement.<sup>599</sup>

5.123. We recall that the Panel found that government "purchases [of] goods" within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement occur "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)".<sup>600</sup> At the oral hearing, Japan clarified that it is not challenging this interpretation by the Panel on appeal. Nor does Japan dispute the Panel's findings that: (i) the OPA pays for delivered electricity; (ii) the Government of Ontario through Hydro One takes possession of the electricity during its transmission to end consumers; and (iii) the legislative, regulatory, and contractual framework of the FIT Programme characterizes the challenged measures as procurements or purchases of electricity.<sup>601</sup> Rather, Japan submits that the Panel failed to

<sup>595</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 617. The Appellate Body indicated that, in the case of grants, "the conveyance of funds will not involve a reciprocal obligation on the part of the recipient". (Ibid.)

<sup>596</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 619.

<sup>597</sup> Appellate Body Reports, *China – Auto Parts*, para. 171. See also, Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 586.

<sup>598</sup> Panel Reports, para. 7.246.

<sup>599</sup> Japan's other appellant's submission (DS412), paras. 48 and 189 (referring to Panel Reports, paras. 7.243 and 7.328(i)).

<sup>600</sup> Panel Reports, para. 7.231.

<sup>601</sup> Japan's other appellant's submission (DS412), paras. 30 and 31.



determine the proper legal characterization of the challenged measures on the basis of an evaluation of their "principal and relevant characteristics".<sup>602</sup> In Japan's view, this requires a panel to appreciate fully all relevant facts and surrounding circumstances, which may include whether, and to what extent, a measure would serve to achieve a stated policy goal. In particular, Japan claims that the Panel overlooked the Government of Ontario's policy decision to unbundle the generation, transmission, and distribution of electricity to achieve its goal of ensuring a stable supply of electricity in Ontario, as well as the design and operation of the FIT Programme and Contracts within the framework of the Ontario electricity market.<sup>603</sup> On this basis, Japan puts forward the following arguments to support its assertion that the Panel erred in characterizing the measures at issue as government "purchases [of] goods".

5.124. First, Japan argues that, given the Government of Ontario's policy choice of unbundling the different functions of electricity supply, the role of the OPA should be central for the proper characterization of the FIT Programme and Contracts under Article 1.1(a)(1). In particular, Japan alleges that the characterization of the measures at issue should be informed by the fact that one government entity (the OPA) makes the payments for electricity, while a different government entity (Hydro One) receives and transmits electricity delivered by suppliers. Thus, in Japan's view, the OPA serves as a financing entity, not a purchasing entity, because it never takes possession of electricity.<sup>604</sup> We do not consider this argument to be persuasive. Ontario's policy decision to unbundle its electricity system and to allocate responsibilities between different government entities does not undermine the conclusion that the Government of Ontario purchases electricity through the FIT Programme and Contracts. While it is true that the OPA is the entity charged with paying FIT suppliers for delivered electricity and Hydro One is the entity transmitting electricity, both entities were found by the Panel to be "public bod[ies]" within the meaning of Article 1.1(a)(1) of the SCM Agreement.<sup>605</sup> Similarly, the Panel found the IESO to constitute a "public body" under Article 1.1(a)(1).<sup>606</sup> Since in the present case all the entities involved are public bodies and thus their activities are attributable to the government, it is not relevant whether the Government of Ontario acts through one or several of these entities. Indeed, the Panel found that "the *combined actions* of all three 'public bodies'"<sup>607</sup> – the OPA, Hydro One, and the IESO – demonstrate that the Government of Ontario purchases electricity within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement. The Panel's findings that the OPA, Hydro One, and the IESO are public bodies under Article 1.1(a)(1) have not been appealed by Japan. Consequently, Japan's argument that the OPA itself does not take possession over electricity does not undermine the Panel's finding that the Government of Ontario purchases electricity through the FIT Programme and Contracts. This is so because Hydro One, which is the entity transmitting electricity, was also found to be a public body, and the Panel found that the "combined actions" of the OPA, Hydro One, and the IESO demonstrate that the Government of Ontario purchases electricity.

5.125. Japan's second argument on appeal is that the Government of Ontario's goals of achieving a stable supply of electricity and stimulating renewable energy are not addressed through purchases of electricity by the government, but rather through the allocation of distinct roles to the entities operating in Ontario's electricity system and the implementation of certain

<sup>602</sup> Japan's other appellant's submission (DS412), para. 31. (emphasis omitted)

<sup>603</sup> Japan's other appellant's submission (DS412), para. 31.

<sup>604</sup> Japan's other appellant's submission (DS412), para. 39.

<sup>605</sup> Panel Reports, paras. 7.234, 7.235, 7.239, and fn 464 thereto. We note that the Panel found that the OPA and the IESO are agents of the Government of Ontario and noted that there is no dispute between the parties that they are a "public bod[ies]" for the purpose of Article 1.1(a)(1) of the SCM Agreement. (Ibid., fn 464 to para. 7.239) We observe that the Panel found that "Hydro One is an agent of the Government of Ontario", thereby being "a provincial government organization ... 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". (Ibid., para. 7.234 (referring to and quoting Government of Ontario webpages, "All Agencies List" (Panel Exhibit JPN-49), available at: <<http://www.pas.gov.on.ca/scripts/en/BoardsList.asp>>; and "Agencies: Boards, Commissions, Councils, Authorities and Foundations" (Panel Exhibit JPN-51), available at: <[http://www.ontario.ca/en/your\\_government/ONT06\\_018949.html](http://www.ontario.ca/en/your_government/ONT06_018949.html)>, p. 1)) The Panel further found that Hydro One's status as an agent of the Government of Ontario and the fact that "the Government of Ontario has 'meaningful control' over Hydro One's activities" demonstrate that it is a "public body" within the meaning of Article 1.1(a)(1) of the SCM Agreement. (Ibid., paras. 7.234 and 7.235)

<sup>606</sup> Panel Reports, para. 7.239 and fn 464 thereto.

<sup>607</sup> Panel Reports, para. 7.239. (emphasis added; fn omitted)

programmes.<sup>608</sup> Although it may be correct that the Government of Ontario seeks to meet its goals of achieving a stable supply of electricity and stimulating renewable energy through various entities and programmes, Japan's argument disregards that the Government of Ontario implements these policies through, *inter alia*, programmes involving purchases of electricity by the government.<sup>609</sup> This is the case of the FIT Programme. We recall that the OPA, a public body under the SCM Agreement, enters into FIT and microFIT Contracts with suppliers participating in the FIT Programme. As found by the Panel, the function of these contracts is the delivery of electricity by FIT and microFIT suppliers and, in return, the OPA undertakes to pay the supplier remuneration in the form of a Contract Price.<sup>610</sup> We highlight that "[t]he FIT Rules provide that the OPA is responsible for making all Contract Payments to the Supplier."<sup>611</sup> Similarly, "ultimate liability for [payments of the Contract Price] under the microFIT Contract lies with the OPA."<sup>612</sup> Moreover, we note that, as part of Ontario's policy decision of unbundling responsibilities and functions between different governmental entities within its electricity system, Japan has not identified any financing provided by the OPA to FIT and microFIT suppliers beyond the remuneration provided in exchange for delivering electricity into the system. As stated above, this remuneration constitutes the payment for electricity delivered into the system by FIT and microFIT suppliers. Hence, the fact that Ontario's goals to ensure a stable supply of electricity and to provide renewable energy are pursued through several entities and programmes does not change the fact that the Government of Ontario purchases electricity pursuant to the FIT Programme and Contracts.

5.126. Moreover, Japan argues that the existence of private entities supplying electricity to consumers in Ontario shows that it is unnecessary for a governmental agency to take possession over (i.e. purchase) electricity in order to achieve its objectives.<sup>613</sup> We disagree that this is of particular relevance for the proper characterization of the FIT Programme and Contracts under the SCM Agreement. Determining the proper legal characterization of the measures at issue under Article 1.1(a)(1) does not require assessing whether it is *necessary* for government entities to take possession of electricity to achieve Ontario's objectives or whether or not private entities are permitted to supply electricity to consumers in Ontario. The issue is whether the FIT Programme and Contracts in fact involve purchases of electricity by the Government of Ontario and thus fall within subparagraph (iii) of Article 1.1(a)(1). In the present case, the Panel concluded that the *combined actions* of the OPA, Hydro One, and the IESO demonstrate that the Government of Ontario purchases electricity within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.<sup>614</sup> Japan's argument, in our view, does not undermine this finding by the Panel.

5.127. Finally, Japan suggests that the Panel erred by assuming that, if a measure is characterized in a particular manner under domestic law (e.g. as a government purchase), it can never be characterized in a different manner under WTO law.<sup>615</sup> We understand Japan to be arguing that the Panel erred in finding that the characterization of a measure under domestic law is dispositive of its legal characterization under WTO law. Japan is correct in arguing that the manner in which municipal law characterizes a measure is not determinative for its characterization under the covered agreements. We recall that the Appellate Body has found that "a panel may examine the municipal law of a WTO Member for the purpose of determining whether that Member has complied with its obligations under the *WTO Agreement*"<sup>616</sup> and that "[t]he label given to an instrument under municipal law ... is not dispositive and cannot be the end of our analysis".<sup>617</sup> However, we do not consider that, in reaching its conclusion as to the proper

<sup>608</sup> Japan's other appellant's submission (DS412), para. 40.

<sup>609</sup> In addition to generators participating in the FIT Programme, other generators in Ontario receive prices that are set under different types of electricity supply contracts, including under the RES Requests for Proposals I, II, and III and the RESOP. (Panel Reports, paras. 7.27 and 7.28)

<sup>610</sup> Panel Reports, paras. 7.208 and 7.214.

<sup>611</sup> Panel Reports, para. 7.204 (referring to FIT Rules (version 1.5.1), Sections 6.3(a) and 8.4; and FIT Contract (version 1.5.1), Section 3.1).

<sup>612</sup> Panel Reports, para. 7.213 (referring to microFIT Contract (version 1.6.1), Section 4.4.1).

<sup>613</sup> Japan's other appellant's submission (DS412), para. 41.

<sup>614</sup> Panel Reports, para. 7.239.

<sup>615</sup> Japan's other appellant's submission (DS412), para. 43.

<sup>616</sup> Appellate Body Report, *US – Section 211 Appropriations Act*, para. 105.

<sup>617</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 593. Similarly, in *US – Softwood Lumber IV*, the Appellate Body found that "it would be inappropriate to characterize, for purposes of applying any provisions of the WTO covered agreements, the same thing or transaction differently, depending on its legal categorization within the jurisdictions of different Members." (Appellate Body Report, *US – Softwood Lumber IV*, para. 56)

characterization of the measures at issue under the SCM Agreement, the Panel relied exclusively on their characterization under Ontario law, as Japan contends. On the contrary, the Panel recognized that the label given to an instrument under municipal law is not dispositive of the analysis under WTO law and found that the measures at issue constitute government "purchases [of] goods" under Article 1.1(a)(1)(iii) for three main reasons. First, the OPA pays for electricity that is delivered into Ontario's electricity grid.<sup>618</sup> Second, the Government of Ontario takes possession over electricity and therefore purchases electricity.<sup>619</sup> Third, only as "a relevant factor" in its analysis, the Panel took into account 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".<sup>620</sup> The Panel concluded that the legislative and regulatory framework of the FIT Programme, as well as the language found in certain clauses of the FIT and microFIT Contracts, "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".<sup>621</sup> Consequently, we disagree with Japan that the Panel's analysis was based on the proposition that the characterization of a measure under domestic law is dispositive of its legal characterization under WTO law.

5.128. For these reasons, we do not consider that the Panel erred in its characterization of the measures at issue under Article 1.1(a)(1) of the SCM Agreement. Accordingly, we uphold the Panel's finding, in paragraphs 7.243 and 7.328(i) of the Panel Reports, that the FIT Programme and related FIT and microFIT Contracts are government "purchases [of] goods" within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.

5.129. Having upheld the Panel's finding that the measures at issue are properly characterized as government "purchases [of] goods" under Article 1.1(a)(1)(iii), we turn to examine Japan's alternative claim that we modify the Panel's finding in this regard to find that these measures may *also* be characterized as "direct transfer[s] of funds" or "potential direct transfers of funds" under Article 1.1(a)(1)(i) of the SCM Agreement.<sup>622</sup> Japan also requests us to find that the FIT Programme and Contracts may be characterized as "income or price support" under Article 1.1(a)(2) of the SCM Agreement.<sup>623</sup> We note that Japan also claims that the Panel acted inconsistently with Article 11 of the DSU by exercising false judicial economy with respect to its claim that the challenged measures constitute "income or price support". We will thus address Japan's request to find that the measures at issue may be characterized as "income or price support" once we have made a determination on whether the Panel exercised false judicial economy regarding this claim of Japan.

5.130. As a preliminary matter, we note that the characterization of a transaction under Article 1.1(a) of the SCM Agreement may have implications for the manner in which the assessment of whether a benefit is conferred is to be conducted. For instance, the context provided by Article 14 of the SCM Agreement presents different methods for calculating the amount of a subsidy in terms of benefit to the recipient depending on the type of financial contribution at issue. However, although different characterizations of a measure may lead to different *methods* for determining whether a benefit has been conferred, the issue to be resolved under Article 1.1(b) remains to ascertain whether a "financial contribution" or "any form of income or price support" has conferred a benefit to the recipient.<sup>624</sup>

5.131. With this in mind, we do not believe that the arguments advanced by Japan are sufficient to demonstrate that the measures at issue are "direct transfer[s] of funds" or "potential direct transfers of funds". We recall that Japan argued that the challenged measures are "direct transfer[s] of funds" because the OPA distributes funds to FIT generators from the amounts

<sup>618</sup> Panel Reports, para. 7.223.

<sup>619</sup> Panel Reports, paras. 7.231 and 7.239.

<sup>620</sup> Panel Reports, para. 7.242.

<sup>621</sup> Panel Reports, para. 7.242.

<sup>622</sup> Japan's other appellant's submission (DS412), paras. 48 and 189.

<sup>623</sup> Japan's other appellant's submission (DS412), paras. 48 and 189.

<sup>624</sup> In the context of examining a financial contribution, the Appellate Body found in *Canada – Aircraft* that the analysis under Article 1.1(b) of the SCM Agreement requires assessing whether a financial contribution "makes the recipient 'better off' than it would otherwise have been, absent that contribution". (Appellate Body Report, *Canada – Aircraft*, para. 157)

collected from consumers through the GA. Japan further argues that the fact that FIT and microFIT generators are entitled to guaranteed payments for all electricity generated for the duration of the FIT and microFIT Contracts makes the payments under these contracts "potential direct transfers of funds".<sup>625</sup> Japan's arguments in this respect do not present any new characteristics of the measures at issue that go beyond, or are different from, the payment of consideration by the Government of Ontario through the OPA in exchange for electricity delivered into the grid by FIT and microFIT suppliers during a 20-year contract. To us, Japan's arguments merely underscore and reiterate certain specific aspects of the FIT Programme and Contracts, such as the conveyance of funds in exchange for delivered electricity and the fact that the OPA commits to pay for such electricity for the duration of the contracts. Japan overlooks that all these aspects are part of a broader transaction that involves an exchange of rights and obligations, that is, the payment of consideration in return for electricity delivered into Ontario's electricity system. Pursuant to this composite transaction, the Government of Ontario, through the OPA, enters into 20-year contracts with FIT and microFIT suppliers and pays them a Contract Price as consideration in exchange for electricity delivered into the system. We do not see in Japan's arguments any aspects different from, or in addition to, those characteristics that led us to agree with the Panel that the transactions at issue constitute government "purchases [of] goods". We are not persuaded that, on the basis of these arguments and features of the challenged measures, Japan has established that these measures should in addition be characterized as "direct transfer[s] of funds" or "potential direct transfers of funds".

5.132. For these reasons, we reject Japan's appeal that the FIT Programme and FIT and microFIT Contracts may also be characterized as "direct transfer[s] of funds" or "potential direct transfers of funds" under Article 1.1(a)(1)(i) of the SCM Agreement.

### **5.5.1.3 Did the Panel err in exercising judicial economy with respect to the allegations that the measures at issue constitute "income or price support"?**

5.133. Japan argues that the Panel improperly exercised judicial economy with respect to Japan's claim that the FIT Programme and related FIT and microFIT Contracts constitute "income or price support" under Article 1.1(a)(2) of the SCM Agreement, and thereby failed to make an objective assessment of the matter as required by Article 11 of the DSU. Japan requests us to find that the challenged measures may be characterized as "income or price support", and to find that a benefit exists with respect to this characterization of the FIT Programme and Contracts.<sup>626</sup>

5.134. We recall that the Appellate Body has found in relation to the principle of judicial economy that "[a] panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."<sup>627</sup> The Appellate Body has, however, cautioned that "panels may refrain from ruling on every claim as long as it does not lead to a 'partial resolution of the matter'."<sup>628</sup> In this regard, the Appellate Body has found that "[a] panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings ... 'in order to secure effective resolution of disputes to the benefit of all Members.'"<sup>629</sup>

5.135. On appeal, Japan contends that the Panel failed to explain why the Panel's findings with respect to Japan's benefit argument in connection with its financial contribution claim under Article 1.1(a)(1) would also be applicable to Japan's benefit argument in connection with its income or price support claim under Article 1.1(a)(2). Japan argues that whether the measures confer a benefit must be examined in relation to the particular subparagraph of Article 1.1(a) at issue. In Japan's view, it is not clear why the Panel's rejection of Japan's benefit argument in

<sup>625</sup> Japan's other appellant's submission (DS412), para. 46.

<sup>626</sup> Japan's other appellant's submission (DS412), paras. 57-59.

<sup>627</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:1, p. 340. (fn omitted)

<sup>628</sup> Appellate Body Report, *US – Upland Cotton*, para. 732 (quoting Appellate Body Report, *Australia – Salmon*, para. 223).

<sup>629</sup> Appellate Body Report, *Australia – Salmon*, para. 223 (quoting Article 21.1 of the DSU). See also, Appellate Body Reports, *Canada – Wheat Exports and Grain Imports*, para. 133; and *EC – Export Subsidies on Sugar*, para. 335.

connection with its financial contribution claim necessarily implies rejection of its benefit argument in relation to income or price support claim.<sup>630</sup>

5.136. We observe that Japan's request for findings before the Panel did not distinguish between situations where the measures would be characterized as a "financial contribution" and as "income or price support". Rather, Japan focused on requesting the Panel to make a recommendation that Canada "withdraw its prohibited subsidies without delay".<sup>631</sup> Thus, the thrust of Japan's claim concerned the existence of prohibited subsidies and the specific remedy associated with such finding, rather than the specific characterization of the challenged measures as financial contribution and/or income or price support.

5.137. Moreover, although the characterization of a transaction under Article 1.1(a) may have implications for the manner in which the determination of benefit under Article 1.1(b) of the SCM Agreement is conducted, Japan has not elaborated whether and in which way the benefit analysis would have been different, or would have led to a different outcome, if the Panel had characterized the FIT Programme and Contracts as "income or price support" instead of as a "financial contribution". Rather, as argued by Canada, Japan's benefit argument before the Panel relied on the same benchmarks in both situations, in particular, the HOEP and the average wholesale rate for electricity in competitive markets outside of Ontario.<sup>632</sup> We note that the Panel rejected these benchmarks for the purposes of determining whether the measures at issue confer a benefit.<sup>633</sup>

5.138. Thus, given that the basis of Japan's benefit arguments in both instances was "essentially the same"<sup>634</sup>, and that the Panel rejected Japan's benefit arguments as they relate to Article 1.1(a)(1), we do not believe that an additional finding by the Panel that the challenged measures constitute "income or price support" within the meaning of Article 1.1(a)(2) was necessary to resolve fully the dispute. Accordingly, we reject Japan's claim that the Panel failed to fulfil its obligations under Article 11 of the DSU and exercised false judicial economy by declining to make a finding on Japan's claim that the measures at issue constitute "income or price support" under Article 1.1(a)(2) of the SCM Agreement.

5.139. Given that we have rejected Japan's claim that the Panel exercised false judicial economy by declining to make a finding on Japan's claim that the measures at issue constitute "income or price support", we decline to make a finding on whether the FIT Programme and Contracts may be characterized as "income or price support" under Article 1.1(a)(2) of the SCM Agreement.

### 5.5.2 Article 1.1(b) – "Benefit"

5.140. In this section we address the claims by the European Union and Japan that the Panel erred in finding that the complainants failed to establish that the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement, as well as their alternative claim that the Panel acted inconsistently with Article 11 of the DSU.

5.141. Japan claims that the Panel erred both in the interpretation and in the application of Article 1.1(b) of the SCM Agreement. Japan argues, first, that the Panel erred in interpreting Article 1.1(b) because it failed to analyze the question of benefit from a perspective other than the framework of Article 14(d) of the SCM Agreement. Second, Japan claims that the Panel erred because it wrongly rejected benchmarks of the current Ontario electricity market and chose an improper benchmark for its alternative counterfactual analysis, which was based on costs and ignored the demand-side of the market.<sup>635</sup>

<sup>630</sup> Japan's other appellant's submission (DS412), para. 58.

<sup>631</sup> Japan's first written submission to the Panel (DS412), para. 304.

<sup>632</sup> Canada's appellee's submission, para. 125. See also, Japan's first written submission to the Panel (DS412), paras. 219, 220, 222, 234, and 244.

<sup>633</sup> Panel Reports, paras. 7.313 and 7.319.

<sup>634</sup> Panel Reports, paras. 7.249.

<sup>635</sup> Japan's other appellant's submission (DS412), para. 110.

5.142. The European Union claims that the Panel wrongly applied Article 1.1(b) of the SCM Agreement to the facts of this case by engaging into the examination of market counterfactuals when it was an uncontested fact that FIT generators would not have obtained any remuneration from the market in Ontario absent the FIT Programme. According to the European Union, the conclusion as to the existence of a benefit should have been made "with little difficulty"<sup>636</sup> by the Panel without the need to examine market counterfactuals or proxies.

5.143. The European Union and Japan request that we reverse the Panel's finding that the complainants failed to establish that the challenged measures confer a benefit, within the meaning of Article 1.1(b) of the SCM Agreement, and that we complete the legal analysis and find that the challenged measures confer a benefit, based on the factual findings made by the Panel and uncontested facts on the Panel record. This evidence shows that, absent the FIT Programme, FIT generators would not have obtained the remuneration provided by the FIT Programme on the basis of the prevailing market conditions in Ontario.<sup>637</sup> Moreover, the European Union requests us to declare moot and of no legal effect the Panel's findings and observations, in paragraphs 7.276 to 7.327 of the Panel Reports, concerning hypothetical counterfactuals and market proxies.<sup>638</sup>

5.144. In the alternative, should we agree with the Panel's finding under Article 1.1(b) of the SCM Agreement, the European Union and Japan claim that the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU, in concluding that there was not enough evidence on the record that would allow it to make findings on the existence of benefit under Article 1.1(b) of the SCM Agreement, based on its own approach to the question of benefit.<sup>639</sup> The European Union and Japan request that we complete the analysis based on the factual findings by the Panel and uncontested facts on the record and find that the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement.

5.145. Whether we reverse the Panel's findings under Article 1.1(b) of the SCM Agreement or find that the Panel failed to make an objective assessment under Article 11 of the DSU, both the European Union and Japan request that we complete the analysis and find that the challenged measures amount to subsidies prohibited under Articles 3.1(b) and 3.2 of the SCM Agreement.<sup>640</sup>

5.146. Canada requests that we reject the cross-appeals of the European Union and Japan and uphold the Panel's finding that the complainants failed to establish that the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement and constitute prohibited subsidies inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement.<sup>641</sup> In particular, Canada contends that the European Union's and Japan's approach to benefit ignores the Panel's findings that the IESO-administered wholesale market is not a "market" appropriate for the purposes of a "benefit" analysis and that, absent the FIT Programme, new entrants into the market would probably negotiate a price for wind- and solar PV-generated electricity.<sup>642</sup> Canada also considers that the complainants' criticisms on appeal of the Panel majority's observations about an alternative constructed benchmark are misplaced, because these were simply the Panel majority's views about an alternative approach to benefit, made at the complainants' urging and were not legal findings by the Panel.<sup>643</sup>

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<sup>636</sup> European Union's other appellant's submission (DS426), para. 162. (fn omitted)

<sup>637</sup> European Union's other appellant's submission (DS426), para. 171; Japan's other appellant's submission (DS412), para. 118.

<sup>638</sup> European Union's other appellant's submission (DS426), para. 170.

<sup>639</sup> European Union's other appellant's submission (DS426), para. 173; Japan's other appellant's submission (DS412), para. 119.

<sup>640</sup> European Union's other appellant's submission (DS426), paras. 172 and 205; Japan's other appellant's submission (DS412), para. 126.

<sup>641</sup> Canada's appellee's submission, para. 214.

<sup>642</sup> Canada's appellee's submission, para. 189.

<sup>643</sup> Canada's appellee's submission, para. 205.

### 5.5.2.1 The Panel's findings

5.147. The Panel found that Japan and the European Union failed to establish that the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement.<sup>644</sup>

5.148. The Panel began its analysis by setting out the legal standard for determining the existence of a benefit under Article 1.1(b) of the SCM Agreement. The Panel recalled that a financial contribution will confer a benefit within the meaning of Article 1.1(b) when it provides an advantage to its recipient, and that the existence of any such advantage is to be determined by comparing the position of the recipient in the marketplace with and without the financial contribution. The Panel pointed out that Article 14(d) of the SCM Agreement, although not intended to define the circumstances when a government's purchase of goods will confer a benefit within the meaning of Article 1.1(b), provides useful context for such a determination.<sup>645</sup>

5.149. The Panel then reviewed the Ontario electricity market and its 2002 market opening experience. Based on the evidence submitted by the parties, the Panel found that there is no effective competition in Ontario's current wholesale electricity market. Rather, in the Panel's view, Ontario's wholesale electricity market is better characterized as a part of an electricity system that is defined by the Government of Ontario's policy decisions and regulations. These decisions and regulations govern the supply-mix (including electricity generated from renewable sources) that is necessary to ensure a safe, reliable, and long-term supply of electricity in Ontario, and the process to recover the electricity system's costs.<sup>646</sup>

5.150. Regarding the specific market benchmarks proposed by the complainants, the Panel found, first, that electricity wholesale prices in Ontario (i.e. the HOEP) result from the operation of forces of supply and demand that are significantly affected by government intervention in a way that renders them an inappropriate benchmark to conduct the present benefit analysis. In particular, the Panel found that generators' price offers in the IESO-administered wholesale market are not motivated by the need to cover marginal costs of production, but rather by the need to be chosen to supply electricity into the Ontario grid in order to receive the contracted or regulated prices. Thus, the HOEP is not an "equilibrium price" determined by the forces of supply and demand, but rather "a tool for the IESO to make the dispatch decisions needed to balance *physical* supply and demand for electricity".<sup>647</sup>

5.151. Therefore, the Panel concluded that the Ontario prices on the basis of which the complainants had made their case of benefit – namely, the HOEP and all of the HOEP-derivatives advanced by the complainants, such as the weighted-average wholesale rate for generators other than FIT or RESOP<sup>648</sup> in 2010, retail prices under the RPP in 2010, and import and export prices – could not serve as appropriate benchmarks for the purpose of the benefit analysis.<sup>649</sup>

5.152. The Panel also rejected four benchmarks from out-of-province electricity markets – Alberta, in Canada, and New York State, New England, and the Mid-Atlantic region (PJM Interconnection), in the United States – submitted by the complainants as proxies for the wholesale electricity market price in Ontario. As regards Alberta, the Panel considered that the "market approach"<sup>650</sup> introduced in Alberta could not be reproduced in Ontario with the same degree of success in the light of the particular conditions of supply and demand in Ontario and of the renewable and non-renewable generating capacity that would need to be renewed, replaced, or added to the Ontario electricity system by 2030.<sup>651</sup> As for the other three markets, the Panel was persuaded by evidence on the record showing that these markets do not provide participating generators with all of the revenues they need to be present on the market. Thus, these three markets do not represent competitive wholesale electricity markets that are capable, on their own,

<sup>644</sup> Panel Reports, para. 7.328(ii).

<sup>645</sup> Panel Reports, para. 7.271.

<sup>646</sup> Panel Reports, para. 7.308.

<sup>647</sup> Panel Reports, para. 7.298 (referring to Canada's first written submission to the Panel (DS426), para. 71; opening statement at the first Panel meeting, para. 83; and Hogan Report, pp. 37-41). (original emphasis)

<sup>648</sup> Renewable Energy Standard Offer Program (RESOP).

<sup>649</sup> Panel Reports, para. 7.308.

<sup>650</sup> Panel Reports, para. 7.306.

<sup>651</sup> Panel Reports, para. 7.310.

of attracting sufficient investment in generation capacity to secure a reliable system of electricity supply.<sup>652</sup>

5.153. Moreover, the Panel was not persuaded of the premise underlying the complainants' arguments – namely, that, in the absence of the FIT Programme, FIT generators would be faced with having to operate in a competitive wholesale electricity market. The Panel considered that competitive wholesale electricity markets will only rarely remunerate the mix of generators needed to secure a reliable electricity system with enough revenue to cover all their costs (including fixed and sunk costs), let alone a system that ensures the inclusion of facilities using solar PV and windpower technologies in the supply-mix.<sup>653</sup>

5.154. The Panel was of the view that, under the prevailing conditions of supply and demand in Ontario, a competitive wholesale electricity market would fail to attract the degree of investment in generating capacity needed to secure a reliable supply of electricity. Therefore, the Panel did not consider it appropriate to determine whether the FIT Programme and related 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 was effective competition.<sup>654</sup>

5.155. At the end of its benefit benchmark analysis, the Panel rejected Canada's argument that the relevant "market" for the purpose of the benefit analysis should be the market for electricity produced from solar PV and windpower technologies. The Panel observed that consumers of electricity in Ontario do not distinguish electricity on the basis of different generation technologies, either by way of price or usage, and that no arguments had been advanced to suggest that the physical properties of electricity change depending upon how it is generated. Accordingly, the Panel found that, in Ontario, there is only one single market for electricity that is generated from all sources of energy.<sup>655</sup>

5.156. Having rejected the benchmarks proposed by the complainants, the Panel made its own suggestion as to what it considered could be an appropriate benchmark in the circumstances of this case. The Panel explained that 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. In the circumstances of the present case, this could be done by comparing the terms and conditions of the challenged FIT and microFIT Contracts with those that would be offered by commercial distributors of electricity that acquire electricity pursuant to a governmental obligation from solar PV and windpower generator facilities of a comparable scale to those functioning under the FIT Programme.<sup>656</sup>

5.157. According to the Panel, this approach could be used to determine whether the challenged measures confer a benefit by comparing the rate of return obtained by FIT generators under the terms and conditions of the FIT and microFIT Contracts with the average cost of capital in Canada for projects with a comparable risk profile in the same period. The Panel observed that such a comparison would allow for an immediate and clear determination of whether FIT generators are being overcompensated by the government, and therefore receive a benefit within the meaning of Article 1.1(b) of the SCM Agreement.<sup>657</sup> The Panel then assessed whether there was sufficient factual information on the record to apply its own proposed benchmark. After reviewing the evidence on the record, the Panel found that the information available was insufficient to determine the average cost of capital in Canada for projects with a risk profile comparable to the challenged FIT and microFIT Contracts during the relevant period.<sup>658</sup>

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<sup>652</sup> Panel Reports, para. 7.310.

<sup>653</sup> Panel Reports, para. 7.309.

<sup>654</sup> Panel Reports, para. 7.312.

<sup>655</sup> Panel Reports, para. 7.318.

<sup>656</sup> Panel Reports, para. 7.322.

<sup>657</sup> Panel Reports, para. 7.323.

<sup>658</sup> Panel Reports, para. 7.326.



### 5.5.2.2 Whether the Panel erred in finding that the European Union and Japan failed to establish that the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement

5.158. In addressing the claims by the European Union and Japan under Article 1.1(b) of the SCM Agreement, we begin by reviewing the legal standard adopted by the Panel in its Article 1.1(b) analysis. We then address the Panel's analysis of the relevant market followed by an analysis of the appropriate benchmark for the remuneration of wind- and solar PV-generated electricity. Finally, in the light of the appropriate market benchmark, we consider the Panel's assessment of the benefit benchmarks submitted by the complainants.

#### 5.5.2.2.1 The legal standard for the determination of benefit under Article 1.1(b) of the SCM Agreement

5.159. We begin our analysis of the Panel's finding under Article 1.1(b) of the SCM Agreement by reviewing the legal standard adopted by the Panel for the determination of benefit. Relying on the jurisprudence of the Appellate Body under Article 1.1(b), the Panel considered that a financial contribution confers a benefit within the meaning of Article 1.1(b) when it confers an advantage on its recipient, and that such an advantage is to be determined by comparing the position of the recipient in the marketplace with and without the financial contribution.<sup>659</sup> The Panel further observed that Article 14(d) of the SCM Agreement – which establishes guidelines for calculating the amount of subsidy for the purpose of countervailing duties investigations under Part V of the SCM Agreement in cases involving purchases of goods by a government – provides useful context for the determination of benefit in the present disputes.<sup>660</sup>

5.160. According to the Panel, *one way* to assess whether the challenged measures confer a benefit within the meaning of Article 1.1(b) is to examine whether, under the benchmark provided in Article 14(d) of the SCM Agreement, the remuneration obtained by windpower and solar PV generators under the FIT Programme is "more than adequate" when compared to the remuneration the same generators would, in the light of the "prevailing market conditions", otherwise receive on the relevant "market" for electricity in Ontario.<sup>661</sup> The Panel noted that the relevant market need not be one that is "undistorted by government intervention", or that is devoid of any degree of government intervention.<sup>662</sup> Nevertheless, the Panel recalled that, where the role of the government in the market is so predominant that it effectively determines prices, there would be no way of telling whether the recipient is better off absent the financial contribution, and the market that is the object of the government intervention cannot serve as an appropriate benchmark under Article 14(d).<sup>663</sup>

5.161. Japan argues that the Panel erred in interpreting Article 1.1(b) because it failed to analyze the question of benefit from a perspective other than the framework of Article 14(d) of the SCM Agreement. Japan points out that, while Article 14(d) provides a particular methodology for calculating the amount of the benefit for the purpose of the imposition of countervailing measures, no precise quantification of the benefit is required in a prohibited subsidy dispute under Article 3.1 of the SCM Agreement, where a complainant merely needs to demonstrate that a benefit exists.<sup>664</sup> The European Union does not challenge the Panel's interpretation of Article 1.1(b), but, in the context of its challenge of the Panel's application of Article 1.1(b), it also remarks that, in a prohibited subsidies case, the issue of the amount of the subsidy is irrelevant, such that, in these disputes, there is no need to identify the relevant benchmark in order to establish the amount of the benefit conferred by the FIT Programme.<sup>665</sup>

<sup>659</sup> Panel Reports, para. 7.271 (referring to Appellate Body Reports, *US – Softwood Lumber IV*, para. 51; and *Canada – Aircraft*, para. 157).

<sup>660</sup> Panel Reports, para. 7.271 (referring to Appellate Body Report, *Canada – Aircraft*, paras. 157 and 158).

<sup>661</sup> Panel Reports, para. 7.272.

<sup>662</sup> Panel Reports, para. 7.274 (quoting Appellate Body Report, *US – Softwood Lumber IV*, para. 87; and referring to Panel Report, *US – Softwood Lumber IV*, paras. 7.50-7.51).

<sup>663</sup> Panel Reports, para. 7.274 (referring to Appellate Body Report, *US – Softwood Lumber IV*, paras. 157 and 158).

<sup>664</sup> Japan's other appellant's submission (DS412), para. 98.

<sup>665</sup> European Union's other appellant's submission (DS426), para. 162 and fn 170 thereto.

5.162. We are not persuaded that, by analyzing whether a benefit is conferred on the basis of the guidelines contained in Article 14(d), the Panel erred in the interpretation of Article 1.1(b) of the SCM Agreement. We observe that the Panel stated at the beginning of its analysis that Article 14(d) is "not intended to define the circumstances when a government purchase of goods will confer a benefit in disputes involving Part[s II and] III of the SCM Agreement"<sup>666</sup>, but that it provides useful context in a benefit analysis under Article 1.1(b). Moreover, the Panel clarified that Article 14(d) simply suggests *one way* to demonstrate that the challenged measures confer a benefit.<sup>667</sup>

5.163. The Appellate Body has stated in previous disputes that whether a benefit has been conferred should be determined by assessing whether the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market.<sup>668</sup> Moreover, in previous disputes under both Parts II and III of the SCM Agreement, the Appellate Body has relied on Article 14 as the relevant context for the interpretation of benefit under Article 1.1(b).<sup>669</sup> Article 14(d) contains guidelines for determining whether government purchases of goods make a recipient "better off" than it would otherwise be in the marketplace. Article 14 is used in countervailing duties cases to calculate the amount of the subsidy in terms of the benefit to the recipient. Although Article 14 is in Part V of the SCM Agreement, the Panel was correct in pointing out that it is relevant context to the interpretation of Article 1.1(b) for the purpose of Part II of the SCM Agreement, and that it can be used as relevant context to determine whether a subsidy exists.<sup>670</sup>

5.164. We do not think that a different approach should be adopted when, as in the case of prohibited subsidies, one has to determine whether a benefit exists as opposed to its precise quantification. A market benchmark can tell us whether a benefit exists and usually its size. However, in the absence of a market benchmark, it will not be possible to establish if a subsidy exists at all. That a financial contribution confers an advantage on its recipient cannot be determined in absolute terms, but requires a comparison with a benchmark, which, in the case of subsidies, derives from the market. This is so, in our view, regardless of whether the advantage needs to be precisely quantified or not.

5.165. We thus consider that the Panel's interpretative approach to the question of benefit under Article 1.1(b) of the SCM Agreement, including the reliance on the context found in Article 14(d), is the correct one. We do not consider that the determination of the mere existence, as opposed to the amount, of the subsidy calls for a different interpretation of how to determine benefit under Article 1.1(b). A determination of the existence of a benefit under Article 1.1(b), read in the context of Article 14(d) of the SCM Agreement, requires a comparison between actual remuneration and a market-based benchmark or proxy, and thus between amounts, in order to determine the existence of a benefit.

5.166. In the light of the above, we do not consider that the Panel committed an error in the interpretation of the legal standard for the determination of benefit under Article 1.1(b) of the SCM Agreement.

<sup>666</sup> Panel Reports, para. 7.271.

<sup>667</sup> Panel Reports, paras. 7.271-7.273.

<sup>668</sup> Appellate Body Report, *Canada – Aircraft*, para. 157.

<sup>669</sup> Appellate Body Reports, *Canada – Aircraft*, para. 155; and *EC and certain member States – Large Civil Aircraft*, paras. 972-975.

<sup>670</sup> In *Canada – Aircraft*, the Appellate Body noted that:

[a]lthough the opening words of Article 14 state that the guidelines it establishes apply "[f]or the purposes of Part V" of the *SCM Agreement*, which relates to "countervailing measures", our view is that Article 14, nonetheless, constitutes relevant context for the interpretation of "benefit" in Article 1.1(b).

(Appellate Body Report, *Canada – Aircraft*, para. 155) See also Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 703.

### 5.5.2.2.2 The relevant market

5.167. Having identified the legal standard applicable to the benefit analysis, the Panel first reviewed the economics of wholesale electricity markets and the Ontario 2002 market opening experience to conclude that "competitive wholesale electricity markets will only rarely attract sufficient investment in the generation capacity needed to secure a reliable supply of electricity" and that this "could not have been achieved in Ontario in 2002 solely on the basis of the operation of a competitive wholesale electricity market".<sup>671</sup> Then the Panel reviewed several in-province and out-of-province benchmarks that were put forward by the complainants and which were all based on the assumption that the relevant market for the benefit comparison was a single market for electricity generated from all sources of energy. As we consider further below, the Panel considered all these benchmarks to be distorted, and thus not appropriate, for a proper benefit analysis.

5.168. The Panel undertook and completed a full benefit benchmark analysis before it reached a conclusion on the definition of the relevant market. The Panel defined the relevant market only in paragraph 7.318, after it had rejected all the benchmarks proposed by the complainants. In defining the relevant market, the Panel stated that "[t]here is ... 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", considering that, "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"<sup>672</sup>, and that no arguments had been advanced to suggest that the physical properties of electricity change depending upon how it is generated. Accordingly, the Panel agreed with the complainants that the relevant market for the purpose of the benefit analysis was the market for electricity generated from all sources of energy.<sup>673</sup>

5.169. We see two main problems with the Panel's analysis of the relevant market for the purpose of the benefit comparison in these disputes. First, we are of the view that the Panel should have started, rather than concluding, its benefit analysis with the definition of the relevant market. The definition of the relevant market is central to, and a prerequisite for, a benefit analysis under Article 1.1(b) the SCM Agreement. The existence of a benefit can properly be established only by comparing the prices of goods and services in the relevant market where they compete. It would seem logical for a panel that is tasked with a benefit determination to begin its analysis by defining the relevant market, which will be used for the purposes of undertaking the benefit analysis. Instead, in this case, the Panel took note of the parties' divergent views on the relevant market<sup>674</sup>, and proceeded to analyze the benefit benchmarks put forward by the complainants, before taking a position on the relevant market for the benefit comparison. At the end of its benefit analysis, the Panel defined the relevant market for the benefit analysis as a single market for electricity generated from all sources of energy, but concluded that the competitive wholesale electricity market could not be the appropriate focus of the benefit analysis in these disputes.<sup>675</sup>

5.170. Second, we observe that, on the one hand, the fact that electricity is physically identical, regardless of how it is generated, suggests that there is high demand-side substitutability between electricity generated through different technologies. On the other hand, however, there are additional factors that may be used to differentiate on the demand-side, which the Panel did not consider in its analysis of the relevant market. Factors such as the type of contract, the size of the customer, and the type of electricity generated (base-load *versus* peak-load) may differentiate the market.<sup>676</sup>

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<sup>671</sup> Panel Reports, para. 7.292.

<sup>672</sup> Panel Reports, para. 7.318. (fns omitted)

<sup>673</sup> Panel Reports, para. 7.318.

<sup>674</sup> Panel Reports, para. 7.278.

<sup>675</sup> Panel Reports, para. 7.320.

<sup>676</sup> For instance, certain customers, due to their size, operation, and contract, may require electricity at certain times of the day or night, thus increasing demand for base-load or peak-load electricity. Large industrial-sized customers are likely to be able to negotiate more favourable contract conditions than will be offered to household customers. The market may also be differentiated by contract type – i.e. its duration or whether prices are hedged or flexible.

5.171. In addition, the Panel did not analyze supply-side factors in the definition of the relevant market. In *EC and certain member States – Large Civil Aircraft*, in addressing market definition for the purposes of Articles 6(3)(a) and 6(3)(b) of the SCM Agreement, the Appellate Body found that both demand-side and supply-side considerations should be taken into account in the definition of the relevant market. The Appellate Body found:

Demand-side substitutability – that is, when two products are considered substitutable by consumers – is an indispensable, but not the only relevant, criterion to consider when assessing whether two products are in a single market. Rather, a consideration of substitutability on the supply-side may also be required. For example, evidence on whether a supplier can switch its production at limited or prohibitive cost from one product to another in a short period of time may also inform the question of whether two products are in a single market.<sup>677</sup>

5.172. Had the Panel undertaken an analysis of demand-side and supply-side factors, and in particular supply-side factors, the significance of government intervention in the electricity market to the definition of the relevant market would have become evident. Such an analysis would have permitted the Panel to reach different conclusions, particularly if, as it explained later in its Reports, it was of the view that the competitive wholesale electricity market was not the appropriate focus of the benefit analysis in these disputes.

5.173. The Panel recognized that "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".<sup>678</sup> However, considerations as to the relevance of regulatory intervention in the Ontario electricity market are entirely absent from the definition of the relevant market, which the Panel used for the purpose of the benefit analysis.

5.174. In the present disputes, supply-side factors suggest that windpower and solar PV producers of electricity cannot compete with other electricity producers because of differences in cost structures and operating costs and characteristics. Windpower and solar PV technologies have very high capital costs (as compared to other generation technologies), very low operating costs, and fewer, if any, economies of scale. Windpower and solar PV technologies produce electricity intermittently (depending on the availability of wind and sun) and cannot be relied on for base-load and peak-load electricity. Differences in cost structures and operating costs and characteristics between windpower and solar PV technologies, on the one hand, and other technologies, on the other hand, make it very unlikely, if not impossible, that the former may exercise any form of price constraint on the latter. In contrast, conventional generators produce an identical commodity that can be used for base-load and peak-load electricity. They have larger economies of scale and exercise price constraints on windpower and solar PV generators.<sup>679</sup>

5.175. In circumstances where the supply of electricity from different sources is blended and, for as long as the differences in costs for conventional and renewable electricity are so significant, markets for wind- and solar PV-generated electricity can only come into existence as a matter of government regulation. It is often the government's choice of supply-mix of electricity generation technologies that creates markets for wind- and solar PV-generated electricity. A government may choose the supply-mix by setting administered prices (based on the principles of cost recovery and reasonable margin) for technologies that would not otherwise be able to recover their costs on the spot market. Alternatively, a government may require that private distributors or the government itself buy part of their requirements of electricity from certain specified generation technologies. As we consider further below, in both instances, the definition of a certain supply-mix by the government cannot *in and of itself* be considered as conferring a benefit within the meaning of Article 1.1(b) of the SCM Agreement.

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<sup>677</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1121.

<sup>678</sup> Panel Reports, para. 7.308.

<sup>679</sup> See Hogan Report, pp. 6-8.

5.176. We also note that the Panel's analysis of the relevant market focused on the preferences of the final consumers and ignored that electricity is purchased by the Government of Ontario at the wholesale level and then resold to consumers at the retail level. Final consumers at the retail level may not distinguish between electricity on the basis of generation technology, because all electricity fed into the grid is blended regardless of the energy generation technology used. However, at the wholesale level, the government's purchase decisions are shaped by its definition of the energy supply-mix. The decisions taken by the government on the energy supply-mix as including wind- and solar PV-generated electricity necessarily dictate its electricity purchase decisions at the wholesale level. In this respect, where government decisions require a certain supply-mix, electricity from different generation technologies is not substitutable at the wholesale level. Had the Panel distinguished between the conditions of supply and demand at the wholesale and retail levels, it would have reached conclusions on the relevant market definition that took into account the Government of Ontario's choice of energy supply-mix.

5.177. A government's definition of the energy supply-mix will generally reflect a variety of policy imperatives that inform governmental action. As we discuss further below, among these is reducing reliance on fossil fuels to secure the sustainability of electricity markets in the long term, as well as addressing the negative and positive externalities that are associated with conventional and renewable electricity production. Moreover, the government definition of the energy supply-mix may reflect the fact that consumers are ready to purchase electricity that results from the combination of different generation technologies, even if this is more expensive than electricity that is produced exclusively from conventional generation sources.

5.178. In our view, not only should the Panel have defined the relevant market at the outset of its benefit analysis, but, in its analysis of the relevant market, it should also have considered that in Ontario the government definition of the energy supply-mix for electricity shapes the markets in which generators of electricity through different technologies compete. We recall that Canada had argued before the Panel that the relevant market for the purpose of the benchmark analysis should be the market for electricity produced from windpower or solar PV technology.<sup>680</sup> Had the Panel more thoroughly scrutinized supply-side factors, it would have come to the conclusion that, even if demand-side factors weigh in favour of defining the relevant market as a single market for electricity generated from all sources of energy, supply-side factors suggest that important differences in cost structures and operating costs and characteristics among generating technologies prevent the very existence of windpower and solar PV generation, absent government definition of the energy supply-mix of electricity generation technologies. This, in turn, would have lead the Panel to conclude that the benefit comparison under Article 1.1(b) should not be conducted within the competitive wholesale electricity market as a whole, but within competitive markets for wind- and solar PV-generated electricity, which are created by the government definition of the energy supply-mix.

5.179. Bearing in mind the relevant market in the light of the Government of Ontario's definition of the energy supply-mix and the prevailing market conditions for wind- and solar PV-generated electricity in Ontario, we now turn to the identification of what we consider would be in the circumstances of these disputes the appropriate benchmark for the benefit comparison under Article 1.1(b) of the SCM Agreement.

#### **5.5.2.2.3 Identification of a benefit benchmark for electricity produced from windpower and solar PV technologies**

5.180. Although the Panel defined the relevant market as a single market for electricity generated from all energy sources and, as we consider further below, engaged in an in-depth analysis of all market benchmarks for blended electricity put forward by the complainants, the Panel stated in its conclusions on benefit that, in the case of electricity, the competitive wholesale electricity market is not an appropriate benchmark, given that government intervention is required to achieve certain policy goals, such as ensuring a stable and reliable supply of electricity, including from renewable sources. The Panel's finding that the complainants failed to establish benefit was based on two fundamental considerations.

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<sup>680</sup> Panel Reports, paras. 7.277 and 7.318.

5.181. First, the Panel remarked 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."<sup>681</sup> Second, the Panel remarked 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. The Panel was of the view that, "at present, this goal can only be achieved by means of government intervention in what would otherwise be unacceptable competitive market outcomes."<sup>682</sup>

5.182. These considerations by the Panel on the determination of benefit in electricity markets, and specifically in Ontario, stand in contrast to the Panel's definition of the relevant market for the benefit comparison as a single market for electricity generated from all sources of energy, and to its analysis of the blended electricity benchmarks submitted by the complainants. We understand these statements by the Panel to suggest that a benchmark for wind- and solar PV-generated electricity in Ontario should take into account the government's definition of the energy supply-mix as including windpower and solar PV generation. However, we do not consider that these statements should be interpreted as suggesting that the policy objectives underlying electricity production and supply entirely prevent a market-based approach to the determination of benefit. To do so would mean to read an exception into Article 1.1(b) based on the rationale of the subsidy that has no textual basis in the Agreement.

5.183. A benefit analysis under Article 1.1(b), read in the context of Article 14(d) of the SCM Agreement, involves a comparison with a market benchmark or proxy. Article 14(d) states, on the one hand, that purchases of goods should be considered as conferring a benefit if "the purchase is made for more than adequate remuneration" and, on the other hand, that the adequacy of remuneration has to be determined in relation to the "prevailing market conditions" for the good or service in question in the country of purchase. The adequacy of remuneration is only one aspect of the Article 14(d) comparison, the other being the "prevailing *market* conditions"<sup>683</sup> in the country of purchase, which requires a comparison with a market benchmark.

5.184. That Article 14(d) requires a comparison with *market* conditions was confirmed by the Appellate Body in *US – Softwood Lumber IV*. The Appellate Body found that, in cases where the private prices of the goods in question in the country of provision are distorted, it is possible to resort to an out-of-country benchmark or to a constructed benchmark, provided that the necessary adjustments are made to reflect conditions in the market of purchase.<sup>684</sup> The very purpose of resorting to an out-of-country or to a constructed benchmark is to replicate competitive market conditions that are absent in the country of purchase. Thus, resorting to a benchmark that does not reflect market conditions would not be consistent with the guidelines of Article 14(d), as interpreted by the Appellate Body in *US – Softwood Lumber IV*.

5.185. Nevertheless, while introducing legitimate policy considerations into the determination of benefit cannot be reconciled with Article 1.1(b) of the SCM Agreement, we do not think that a market-based approach to benefit benchmarks excludes taking into account situations where governments intervene to create markets that would otherwise not exist. For example, governments create electricity markets with constant and reliable supply. By regulating the quantity and the type of electricity that is supplied through the network (base-load, intermediate-load, or peak-load) and the timing of such supply, governments ensure that there is a continuous supply-demand balance between generators and consumers, thus avoiding imbalances that would destabilize the network and cause interruptions of power supply. Although this type of intervention has an effect on market prices, as opposed to a situation where prices are determined by unconstrained forces of supply and demand, it does not exclude *per se* treating the resulting prices as market prices for the purposes of a benefit analysis under Article 1.1(b) of the

<sup>681</sup> Panel Reports, para. 7.309. (original emphasis)

<sup>682</sup> Panel Reports, para. 7.312.

<sup>683</sup> Emphasis added.

<sup>684</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 103.

SCM Agreement. In fact, in the absence of such government intervention, there could not be a market with a constant and reliable supply of electricity.<sup>685</sup>

5.186. Similarly, considerations relating to the choice of energy supply-mix by a government, including wind- and solar PV-generated electricity, may be crucial to the viability and sustainability of the electricity market in the long term. Governments intervene by reducing reliance on fossil energy resources and promoting the generation of electricity from renewable energy resources to ensure the sustainability of electricity markets in the long term. Fossil energy resources are exhaustible, and thus fossil energy needs to be replaced progressively if electricity supply is to be guaranteed in the long term. Government intervention in favour of the substitution of fossil energy with renewable energy today is meant to ensure the proper functioning or the existence of an electricity market with a constant and reliable supply of electricity in the long term. Like the government regulation that ensures the stability and reliability of supply in the electricity market, a government's choice to include windpower and solar PV generation in the energy supply-mix should not be considered as preventing the identification or adaptation of competitive benefit benchmarks for purposes of an analysis under Article 1.1(b) of the SCM Agreement.

5.187. Government intervention ensures that electricity markets may exist in the current form where consumers have a constant and reliable access to electricity. However, the regulation of electricity markets by governments is guided not only by immediate and short-term considerations relating to the nature of electricity and electricity systems, and requiring the management of "dispatchable" and "non-dispatchable" generators and loads, but also by long-term considerations aimed at ensuring that consumers have stable access to electricity in the coming years and increasingly from renewable sources. It is in the latter situation that the government's management of the energy supply-mix plays a key role.

5.188. Nevertheless, a distinction should be drawn between, on the one hand, government interventions that create markets that would otherwise not exist and, on the other hand, other types of government interventions in support of certain players in markets that already exist, or to correct market distortions therein. Where a government creates a market, it cannot be said that the government intervention distorts the market, as there would not be a market if the government had not created it. While the creation of markets by a government does not *in and of itself* give rise to subsidies within the meaning of the SCM Agreement, government interventions in existing markets may amount to subsidies when they take the form of a financial contribution, or income or price support, and confer a benefit to specific enterprises or industries.

5.189. We further note that a comparison between renewable energy electricity generators and conventional energy electricity generators requires consideration of the full costs associated with the generation of electricity. In this respect, if, on the one hand, higher prices for renewable electricity have certain positive externalities, such as guaranteeing long-term supply and addressing environmental concerns, on the other hand, lower prices for non-renewable electricity generation have certain negative externalities, such as the adverse impact on human health and the environment of fossil fuel energy emissions and nuclear waste disposal. Considerations related to these externalities will often underlie a government definition of the energy supply-mix and thus be the reason why governments intervene to create markets for renewable electricity generation. On this point, we agree with the Panel's statement that, where government intervention that internalizes social costs and benefits is limited to defining the broad parameters of the market, "significant scope will remain for private actors to operate within those parameters on the basis of commercial considerations".<sup>686</sup>

5.190. In the light of the above, and in particular in view of the fact that the government's definition of the energy supply-mix for electricity generation does not *in and of itself* constitute a subsidy, we believe that benefit benchmarks for wind- and solar PV-generated electricity should be found in the markets for wind- and solar PV-generated electricity that result from the supply-mix definition. Thus, where the government has defined an energy supply-mix that includes windpower and solar PV electricity generation technologies, as in the present disputes, a benchmark

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<sup>685</sup> In particular, the Panel points out that, if supply and demand were not continuously balanced between generators and consumers, this would destabilize the networks, "leading to brownouts, blackouts or, in extreme cases, the interruption of power to all consumers". (Panel Reports, para. 7.11 (referring to Hogan Report, p. 13))

<sup>686</sup> Panel Reports, fn 633 to para. 7.322.

comparison for purposes of a benefit analysis for windpower and solar PV electricity generation should be with the terms and conditions that would be available under market-based conditions for each of these technologies, taking the supply-mix as a given.

5.191. Having determined that an appropriate benefit benchmark for windpower and solar PV generators should take into account the government definition of the energy supply-mix, we now turn to consider the Panel's analysis of the benefit benchmarks submitted by the complainants.

#### 5.5.2.2.4 The Panel's benefit benchmark analysis

5.192. After setting out the interpretative framework of Articles 1.1(b) and 14(d) of the SCM Agreement and before defining the relevant market, the Panel proceeded to examine various Ontario blended electricity market benchmarks put forward by the complainants. The Panel examined: (i) the HOEP – that is, the price for electricity sold at the wholesale level in the IESO-administered market; (ii) the retail prices offered under the RPP; and (iii) the export and import prices to and from neighbouring provinces and the United States. The Panel rejected all these benchmarks, as it had found that they were distorted by the government intervention in the market, and thus not suitable.<sup>687</sup>

5.193. Having rejected all Ontario prices as distorted, the Panel, following the Appellate Body's finding in *US – Softwood Lumber IV*, examined as possible benchmarks prices in four out-of-province electricity markets: Alberta, New York State, New England, and the PJM Interconnection. The Panel rejected Alberta because of the differences in the conditions of supply and demand as compared to Ontario. It rejected New York State, New England, and the PJM Interconnection because it found that generators in these markets also receive capacity payments.<sup>688</sup> As we have considered above, after it had rejected all the benchmarks put forward by the complainants, the Panel found that the relevant market for the benefit comparison was the wholesale market in Ontario for electricity generated from all sources of energy.<sup>689</sup>

5.194. The European Union claims that the Panel wrongly applied Article 1.1(b) of the SCM Agreement to the facts of this case. The Panel should not have engaged in the examination of market counterfactuals in order to make a comparison to determine the adequacy of the remuneration provided to FIT generators through the FIT Programme.<sup>690</sup> In the view of the European Union, recourse to hypothetical market counterfactuals or proxies was not necessary, as it was uncontested that FIT generators would not have obtained any remuneration from the market in Ontario in view of the "prevailing market conditions" where the same good (electricity) produced by using other generating technologies was much less remunerated. In the light of this, the European Union argues that the conclusion as to the existence of benefit should have been made "with little difficulty" by the Panel without the need to examine market counterfactuals or proxies.<sup>691</sup>

5.195. Japan agrees with the dissenting opinion in the Panel Reports that the history of the Ontario electricity market and the design, structure, and operation of the FIT Programme demonstrate that solar PV and windpower generators would not be able to operate in the Ontario market without the FIT Programme, and that this fact alone is sufficient to establish the existence of benefit under Article 1.1(b) of the SCM Agreement.<sup>692</sup>

5.196. We observe that the arguments of the European Union and Japan on appeal are very similar to those put forward in the dissenting opinion in the Panel Reports. We understand the European Union and Japan to argue that the Panel erred under Article 1.1(b) of the SCM Agreement because it embarked in a full benefit benchmark analysis instead of establishing the existence of benefit based on a simple "but for" test. Under such a test, the history, structure, and objectives of the FIT Programme, as well as the uncontested fact that, absent the

<sup>687</sup> Panel Reports, paras. 7.293-7.302 and 7.317. The Panel also rejected the weighted-average wholesale rate during 2010 for generators other than FIT and RESOP generators, as a "HOEP-derivative[]". (Panel Report, para. 7.308 and fn 610)

<sup>688</sup> Panel Reports, paras. 7.305-7.307.

<sup>689</sup> Panel Reports, para. 7.318.

<sup>690</sup> European Union's other appellant's submission (DS426), para. 168.

<sup>691</sup> European Union's other appellant's submission (DS426), para. 162. (fn omitted)

<sup>692</sup> Japan's other appellant's submission (DS412), para. 76.



FIT Programme, solar PV and windpower generators would not operate in the Ontario electricity market, would reveal the existence of a benefit.

5.197. We first observe that if, as the Panel acknowledged, windpower and solar PV energy generation would not occur in Ontario absent the government's definition of the energy supply-mix, a "but for" approach would be inapposite for establishing benefit, because such an approach would, by definition, not measure what the recipient could obtain in the marketplace for windpower and solar PV energy generation. Benefit cannot be established on the basis of a "but for" market counterfactual, which presupposes that the relevant market is electricity generated from all energy sources, in a situation where the government defines its energy supply-mix as including wind- and solar PV-generated electricity, and accordingly creates separate markets for wind- and solar PV-generated electricity. Assuming that benefit could be established by determining whether or not windpower and solar PV generators would have entered the market "but for" the FIT Programme, the fundamental question that needs to be answered is "what" market provides the appropriate benchmark. Before answering the question of whether windpower and solar PV generators would have entered the market, the relevant market in which they would operate needs to be defined. It is in this market that the appropriate benchmark would need to be identified.

5.198. We further observe that Canada states that what it has accepted is that the HOEP and its derivatives are insufficient to attract investment in new generation technology of any kind and that, absent the FIT Programme, prospective windpower and solar PV generators would most probably agree on a negotiated price with the Government of Ontario.<sup>693</sup> This is different from accepting that windpower and solar PV FIT generators would not be in the market absent the FIT Programme, as Japan and the European Union argue Canada did. Canada argued before the Panel that the relevant market for the purpose of the benefit analysis is electricity generated through solar PV and windpower technologies. Although the Panel rejected Canada's argument that the relevant market from an economic perspective is wind- and solar PV-generated electricity, it seems to have agreed with Canada that, absent the FIT Programme, FIT generators would not have to operate in a competitive wholesale electricity market, but would negotiate their rates with the government.<sup>694</sup>

5.199. We have disagreed with the relevant market definition underpinning the Panel's benefit analysis. We consider, for the reasons given above, that markets for wind- and solar PV-generated electricity exist in Ontario only because of government intervention. Thus, we do not consider that the Panel could have determined that benefit exists because FIT generators would not have entered the Ontario wholesale blended electricity market "but for" the FIT Programme. This is so because, as we have explained above, we do not consider that the relevant benchmark is to be found in the wholesale market for electricity generated from all sources of energy, but rather in the markets for wind- and solar PV-generated electricity, which are defined by the Government of Ontario's choice of the energy supply-mix. Therefore, in our view, the relevant question is whether windpower and solar PV electricity suppliers would have entered the wind- and solar PV-generated electricity markets absent the FIT Programme, not whether they would have entered the blended wholesale electricity market.

5.200. Japan also considers that the conclusion that benefit exists because FIT generators would not have been on the market absent the FIT Programme is also supported by comparisons with market benchmarks based on Article 14(d) of the SCM Agreement. Specifically, Japan refers to the weighted-average wholesale rate and the commodity portion of Ontario retail prices under the RPP (RPP retail prices). These prices, which are significantly lower than the FIT rates, do not depend on the HOEP, as they are fixed by contract or regulation.<sup>695</sup>

<sup>693</sup> Canada's appellee's submission, para. 170 and fn 190 thereto.

<sup>694</sup> Panel Reports, para. 7.315.

<sup>695</sup> According to Japan, the weighted-average wholesale rate in 2010 was between 7.02 and 7.13 cents/kWh, while the highest commodity portion of RPP retail prices was 10.8 cents/kWh. 2009 FIT prices for wind-generated electricity were 13.5 cents/kWh for on-shore and 19 cents/kWh for off-shore. 2009 FIT prices for solar PV-generated electricity ranged from 44.3 to 80.2 cents/kWh. (Japan's other appellant's submission (DS412), paras. 90-92; Panel Reports, para. 7.30)

5.201. Japan contends that the Panel wrongly rejected these benchmarks because they were distorted by government intervention. It argues that a market price to be used as a benchmark in a subsidy determination can be influenced by government intervention without resulting in a circular comparison, as affirmed by the Appellate Body in *US – Softwood Lumber IV*, particularly where the question is about the existence of the subsidy, not its size.<sup>696</sup> The European Union does not directly address on appeal the Panel's rejection of in-province and out-of-province electricity prices as a benefit benchmark. As considered above, in the view of the European Union, the Panel erred in engaging in a benefit benchmark analysis when it could have determined easily the existence of benefit based on a "but for" test. Accordingly, the European Union asks us to determine the existence of benefit and to declare the Panel's findings on the in-province and out-of-province market benchmarks "moot and with no legal effect".<sup>697</sup>

5.202. In addressing the market benchmarks put forward by the complainants, the Panel found that there is no effective competition in Ontario's wholesale electricity market, and that this market is better characterized as a part of an electricity system defined by the Government of Ontario's policy decisions and regulations governing the supply-mix (including electricity generated from renewable sources) that is necessary to ensure a safe, reliable, and long-term supply of electricity in Ontario, and the process to recover the electricity system costs.<sup>698</sup>

5.203. The Panel found that generators' price offers in the IESO-administered wholesale market are not motivated by the need to cover marginal costs of production, but rather by the need to be chosen to supply electricity into the Ontario grid in order to receive the contracted or regulated prices. Thus, the HOEP, the wholesale electricity price in the IESO-administered market, is not an "equilibrium price" determined by the forces of supply and demand, but rather "a tool for the IESO to make the dispatch decisions needed to balance *physical* supply and demand for electricity".<sup>699</sup> The Panel observed that 92% of generators do not receive the HOEP, but a contracted or regulated price that is higher than the HOEP, and that contracted or regulated prices have been constantly above the HOEP since at least 2009.<sup>700</sup> Therefore, the Panel concluded that the HOEP and all of the HOEP-derivatives (such as the weighted-average wholesale rate for generators other than FIT or RESOP in 2010, the RPP retail prices in 2010, and import and export prices) advanced by the complainants as benefit benchmarks could not serve as appropriate benchmarks for the purpose of the benefit analysis.<sup>701</sup>

5.204. We recall that we have considered above that the proper benchmark for wind- and solar PV-generated electricity should take into account the Government of Ontario's definition of the energy supply-mix as including wind- and solar PV-generated electricity, which implies the existence of separate markets for wind- and solar PV-generated electricity. The weighted-average wholesale rate and the RPP retail prices are prices for blended electricity, that is, electricity generated from all sources of energy. As such, we consider that the weighted-average wholesale rate and the RPP retail prices are not appropriate benchmarks to determine whether the FIT Programme confers a benefit on windpower and solar PV generators. For the same reason, we consider that all the other in-province and out-of-province blended electricity benchmarks that were submitted to the Panel are not appropriate benefit benchmarks.

5.205. Both Japan and the European Union also argue that the Panel's error under Article 1.1(b) of the SCM Agreement is underscored by the fact that the Panel found that mere participation in the FIT Programme confers an "advantage" within the meaning of the *chapeau* of paragraph 1(a) of the Illustrative List of the TRIMs Agreement, based on the objective, design, and operation of the FIT Programme, while it did not consider that, for the same reasons, it confers a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement.<sup>702</sup> Japan considers that this

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<sup>696</sup> Japan's other appellant's submission (DS412), para. 104 (referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 93).

<sup>697</sup> European Union's other appellant's submission (DS426), para. 170. (emphasis omitted)

<sup>698</sup> Panel Reports, para. 7.308.

<sup>699</sup> Panel Reports, para. 7.298. (original emphasis; fn omitted)

<sup>700</sup> Panel Reports, para. 7.55.

<sup>701</sup> Panel Reports, para. 7.308.

<sup>702</sup> European Union's other appellant's submission (DS426), para. 169; Japan's other appellant's submission (DS412), para. 117.

contradiction also evidences a lack of objective assessment by the Panel and thus constitutes a violation of Article 11 of the DSU.<sup>703</sup>

5.206. In its analysis of the compatibility of the challenged measures with the GATT 1994 and the TRIMs Agreements, the Panel found that, in the light of the fixed price to be paid over a period of 20 years, "*mere participation* in [the] FIT Programme may be viewed as obtaining an 'advantage' within the meaning of the chapeau of Paragraph 1(a) of the Illustrative List."<sup>704</sup> Under the SCM Agreement, the Panel, however, found that Japan and the European Union failed to establish that the challenged measures confer a benefit within the meaning of Article 1.1(b).<sup>705</sup>

5.207. Article 1.1(b) of the SCM Agreement does not refer to "advantage", but to "benefit". However, in *Canada – Aircraft*, the Appellate Body noted that "[t]he dictionary meaning of 'benefit' is 'advantage', 'good', 'gift', 'profit', or, more generally, 'a favourable or helpful factor or circumstance'."<sup>706</sup> The Appellate Body further stated that "the ordinary meaning of 'benefit' clearly encompasses some form of advantage".<sup>707</sup>

5.208. In *Canada – Aircraft* and in its later jurisprudence, the Appellate Body did not equate the notions of "benefit" and "advantage". The Appellate Body's interpretation of "benefit" in Article 1.1(b) of the SCM Agreement clearly suggests that, while benefit involves some form of advantage, the former has a more specific meaning under the SCM Agreement. "Benefit" is linked to the concepts of "financial contribution" and "income or price support", and its existence requires a comparison in the marketplace. The same cannot be said about an "advantage" within the meaning of the TRIMs Agreement. Paragraph 1 of the Illustrative List of the TRIMs Agreement simply refers to TRIMs that are necessary to obtain an advantage.<sup>708</sup> The concept of "advantage" in the TRIMs Agreement has to be interpreted in the context of this Agreement and, without entering into the merit of such an interpretation, it seems to us that "advantage" under the TRIMs Agreement may take other forms than a "financial contribution" or a "benefit" under the SCM Agreement. In any event, a finding of an "advantage" under the TRIMs Agreement does not require a comparison with a benefit benchmark in the relevant market, as required for a benefit analysis under the SCM Agreement.

5.209. Thus, while we do not exclude that certain measures that provide an advantage within the meaning of paragraph 1 of the Illustrative List of the TRIMs Agreement may also confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement, it is conceivable that a measure that confers an advantage within the meaning of paragraph 1 of the Illustrative List of the TRIMs Agreement be found not to confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement.

5.210. In sum, we do not consider that the Panel finding that mere participation in the FIT Programme constitutes an advantage within the meaning of paragraph 1 of the Illustrative List of TRIMs while, at the same time, not finding that benefit exists under Article 1.1(b) of the SCM Agreement demonstrates that the Panel committed an error under Article 1.1(b). Neither are we persuaded that, in doing so, the Panel entered into a contradiction, which Japan argues would constitute a violation of Article 11 of the DSU.

<sup>703</sup> Japan's other appellant's submission (DS412), para. 117.

<sup>704</sup> Panel Reports, para. 7.165. (original emphasis)

<sup>705</sup> Panel Reports, para. 7.328(ii).

<sup>706</sup> Appellate Body Report, *Canada – Aircraft*, para. 153 (quoting *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 214; *The Concise Oxford Dictionary*, 9th edn, D. Thompson (ed.) (Clarendon Press, 1995), p. 120; and *Webster's Third New International Dictionary* (unabridged) (William Benton, 1966), Vol. I, p. 204).

<sup>707</sup> Appellate Body Report, *Canada – Aircraft*, para. 153. (fn omitted)

<sup>708</sup> The *chapeau* to paragraph 1 of the Illustrative List of the TRIMs Agreement states that: 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, ...

5.211. In the light of all of the above, we consider that the approach and the benefit benchmarks advanced by the European Union and Japan are not appropriate to determine the existence of benefit for windpower and solar PV generation under the FIT Programme.

#### 5.5.2.2.5 Conclusions under Article 1.1(b) of the SCM Agreement

5.212. In its benefit analysis, on the one hand, the Panel correctly considered that the need to secure a reliable supply of electricity through an energy supply-mix that included windpower and solar PV generation rendered inappropriate a comparison of the FIT remuneration with the terms and conditions available on the competitive wholesale electricity market.<sup>709</sup> On the other hand, the Panel accepted the complainants' line of argument, including their market definition, and proceeded to evaluate whether a benefit had been conferred based on benefit benchmarks for a single market for electricity generated from all sources of energy.

5.213. Further, in its "observations on one approach to the question of benefit"<sup>710</sup> made after its finding under Article 1.1(b) of the SCM Agreement, the Panel proposed to compare FIT remunerations for windpower and solar PV generators with the remuneration that windpower and solar PV generators would obtain on competitive markets for wind- and solar PV-generated electricity. The benchmark under the Panel's approach was "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".<sup>711</sup> This approach clearly suggests that the benefit comparison should take place within markets for windpower and solar PV technologies that result from the government's definition of the energy supply-mix. Thus, while the Panel first conducted a benefit benchmark analysis that presupposed a single market for electricity generated from all sources of energy, it then proposed an alternative approach to assessing benefit, which required a comparison within the windpower and solar PV generation technologies, respectively.

5.214. It seems to us that, in its "observations on one approach to the question of benefit", the Panel identified the proper market for the benefit comparison in respect of windpower and solar PV generation in Ontario that would not exist absent government definition of the energy supply-mix. We fail to understand, however, why the Panel did not then choose to conduct its benefit analysis on the basis of a benchmark that reflected the energy supply-mix. Instead, the Panel reviewed the complainants' line of argument that was based on a single wholesale electricity market and limited itself to making some *obiter dicta* observations on the appropriate benchmark only after it had found that the complainants had failed to demonstrate the existence of benefit under an approach that the Panel considered to be incorrect.

5.215. We note that, in making a claim, a complainant has the responsibility of providing evidence and arguments that the panel must objectively assess. While a panel cannot make the case for a complainant, it has the competence "freely to use arguments submitted by any of the parties – or to develop its own legal reasoning – to support its own findings and conclusions on the matter under its consideration".<sup>712</sup> Panels also have broad fact-finding powers and may seek information from any source. We do not think that the Panel should have limited its analysis to the proposed benefit approach, and/or to the benchmarks that were part of the complainants' principal argument, in a situation where the evidence and the arguments presented by the complainants, and the arguments in response by Canada, may have allowed it to develop its own reasoning and to make findings based on a benchmark that took into account the government's definition of the energy supply-mix. Provided the complainants had presented relevant evidence and arguments to make a *prima facie* case, it was for the Panel to analyze the appropriate benchmark or proxy. We observe that arguments and evidence were presented before the Panel that could have been useful in identifying a benefit benchmark that took into account the Government of Ontario's definition of the energy supply-mix, including wind- and solar PV-generated electricity.

<sup>709</sup> Panel Reports, para. 7.312.

<sup>710</sup> Panel Reports, para. 7.321. (emphasis omitted)

<sup>711</sup> Panel Reports, para. 7.322.

<sup>712</sup> Appellate Body Report, *EC – Hormones*, para. 156. See also Appellate Body Report, *US – Certain EC Products*, para. 123.

5.216. In making a *prima facie* case of benefit under Article 1.1(b) of the SCM Agreement, the burden was on the complainants to identify a suitable benchmark and to make adjustments, where necessary. While the complainants focused their main arguments before the Panel on blended electricity market benchmarks (the HOEP, the average wholesale rate, retail rates, import and export prices, as well as out-of-province rates), the European Union also presented arguments and evidence on electricity rates from renewable sources in Ontario and in Quebec in response to Canada's argument that the relevant markets for the benefit comparison were the markets for wind- and solar PV-generated electricity. The European Union argued in its second written submission and in its opening oral statement at the second meeting of the Panel that benefit could be demonstrated by comparing the FIT remuneration with the terms and conditions under the Request for Proposals of Renewable Energy Supply (RES) I, II, and III and with the Quebec 2005 and 2008 competitive contracts for wind farms.<sup>713</sup> Thus, if the Panel believed, as is evident from its Reports, that the appropriate benefit comparison could not take place in the competitive wholesale electricity market, it could have explored instead these arguments.

5.217. In its "observations on one approach to the question of benefit", the Panel proposed a benefit benchmark based on the Government of Ontario's choice of the energy supply-mix as including wind- and solar PV-generated electricity. The Panel attempted to apply such benchmark by comparing the rates of return obtained by FIT generators with the average cost of capital in Canada for projects having a comparable risk profile in the same period, but found that there was not enough evidence on the record to make such a comparison. We express no views about the merits of a comparison between FIT rates of return and the average cost of capital in Canada. However, we note that the Panel did not even explore the possibility of an electricity supply-mix benchmark based on the evidence submitted by the complainants regarding previous renewable energy programmes in Ontario (RES) and out-of-province (Quebec).

5.218. The complainants' principal benefit claims focused on benchmarks in the competitive wholesale blended electricity market. However, the European Union also presented arguments and evidence that would have allowed the Panel to compare the FIT remuneration with a benchmark reflecting competitive prices in generation technology-specific markets, provided that appropriate adjustments would have been proposed by the European Union and reviewed by the Panel. This could have allowed the Panel to conduct its benefit analysis on the basis of the appropriate benefit benchmark that it evoked in paragraphs 7.309 to 7.313 of its Reports and that it later developed in its *obiter dicta* observations on an alternative approach to the question of benefit.

5.219. In the light of the above, we consider that the Panel committed an error in not conducting the benefit analysis on the basis of a market that is shaped by the government's definition of the energy supply-mix, and of a benchmark located in that market reflecting competitive prices for windpower and solar PV generation. We, therefore, reverse the Panel's findings, in paragraph 7.328(ii) of the Panel Reports, paragraph 8.3 in the Japan Panel Report, and paragraph 8.7 in the EU Panel Report, that Japan and the European Union failed to establish that the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement and thereby that Canada acted inconsistently with Articles 3.1(b) and 3.2 of the SCM Agreement.

5.220. Having reversed the Panel's finding that the complainants failed to establish the existence of benefit, no determination exists as to whether or not the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement. We shall consider further below, whether, on the basis of factual findings of the Panel and undisputed facts on the Panel record, we can complete the analysis and determine whether the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement and whether Canada acted inconsistently with Articles 3.1(b) and 3.2 of the SCM Agreement.

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<sup>713</sup> European Union's second written submission to the Panel (DS426), paras. 82-84; and opening statement at the second Panel meeting, paras. 25 and 26.

### 5.5.2.3 Whether the Panel acted inconsistently with Article 11 of the DSU in finding that the European Union and Japan failed to establish that the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement

5.221. Both the European Union and Japan claim, in the alternative, should we agree with the Panel's findings under Article 1.1(b) of the SCM Agreement, that the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU, in concluding that there was not enough evidence on the record that would allow it to reach conclusions on benefit under Article 1.1(b) of the SCM Agreement, based on its own approach to the question of benefit.<sup>714</sup> Moreover, the European Union and Japan also claim that the fact that the Panel first defined the relevant market as the market for electricity that is generated from all sources of energy, but later developed its own counterfactual relying on a separate market for solar PV- and wind-generated electricity, constitutes a contradiction, which is itself a violation of Article 11 of the DSU.<sup>715</sup>

5.222. We have reversed the Panel's findings that the European Union and Japan failed to demonstrate that the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement. Thus, the condition for us to consider the European Union's and Japan's alternative claims under Article 11 of the DSU is not met. Therefore, we do not address the alternative claims that the Panel failed to make an objective assessment of the matter according to Article 11 of the DSU. We further note that, having reversed the Panel's finding under Article 1.1(b) of the SCM Agreement, there is no need for us to address the alternative claims under Article 11 of the DSU to provide a positive solution to these disputes.

### 5.5.2.4 Completion of the analysis

5.223. Both Japan and the European Union have requested, should we reverse the Panel's "benefit" finding, that we complete the legal analysis on the basis of the factual findings made by the Panel and uncontested evidence on the Panel's record and find that the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement and constitute prohibited subsidies inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement.<sup>716</sup>

5.224. Therefore, having reversed the Panel's "benefit" finding, we now turn to consider whether we can complete the legal analysis and determine first whether the FIT Programme and related FIT and microFIT Contracts confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement. In previous disputes, the Appellate Body has completed the analysis with a view to facilitating the prompt settlement and effective resolution of the dispute.<sup>717</sup> However, the Appellate Body has held that it can do so only if the factual findings of the panel and the undisputed facts on the panel record provide it with a sufficient basis for its own analysis.<sup>718</sup> The Appellate Body has found it impossible to complete the legal analysis due to insufficient factual findings in the panel report or a lack of undisputed facts on the panel record.<sup>719</sup> Also among the reasons that have prevented the Appellate Body from completing the legal analysis are the

<sup>714</sup> European Union's other appellant's submission (DS426), para. 173; Japan's other appellant's submission (DS412), para. 119.

<sup>715</sup> European Union's other appellant's submission (DS426), para. 199; Japan's other appellant's submission (DS412), para. 111.

<sup>716</sup> Japan's other appellant's submission (DS412), para. 118; European Union's other appellant's submission (DS426), para. 171.

<sup>717</sup> See e.g. Appellate Body Reports, *Australia – Salmon*, paras. 117-118; *US – Wheat Gluten*, paras. 80-92; and *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 43-52.

<sup>718</sup> See Appellate Body Reports, *Australia – Salmon*, paras. 209, 241, and 255; *Korea – Dairy*, paras. 91 and 102; *Canada – Autos*, paras. 133 and 144; and *Korea – Various Measures on Beef*, para. 128. The Appellate Body has indicated that it may complete the analysis only if the provision that a panel has not examined is "closely related" to a provision that the panel has examined, and that the two are "part of a logical continuum". (Appellate Body Report, *Canada – Periodicals*, p. 24, DSR 1997:1, p. 469) See also Appellate Body Reports, *EC – Asbestos*, para. 79; and *EC – Export Subsidies on Sugar*, para. 337.

<sup>719</sup> See Appellate Body Reports, *US – Section 211 Appropriations Act*, para. 343; and *EC – Asbestos*, para. 78. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body completed the analysis "assuming that the evidence submitted by the United States [was] accurate and uncontested" (Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 662), or, in other words, on the basis of what the losing party had admitted or submitted. (Ibid. fn 1561 to para. 741)

complexity of the issues, the absence of full exploration of the issues before the panel, and, consequently, considerations for parties' due process rights.<sup>720</sup>

5.225. In the present disputes, the assessment of whether benefit is conferred would require completing the analysis. This would involve conducting a comparison with a benefit benchmark to determine whether the remuneration obtained by FIT generators confers on them an advantage as compared to the remuneration they would otherwise have been able to obtain in the marketplace. However, as explained above, the parameters of the marketplace would need to take into account the energy supply-mix defined by the Government of Ontario. We also recall that we have agreed with the Panel that Article 14(d) constitutes relevant context for the determination of the existence of benefit under Article 1.1(b) of the SCM Agreement. A determination of benefit in the framework of Article 14(d) requires a comparison between actual remuneration and a market-based benchmark or proxy. For the purposes of that comparison in these disputes, the market-based, price-discovery mechanism would have to take as a given the supply-mix defined by the government.

5.226. Article 14(d) requires that the adequacy of remuneration in a benefit comparison be determined in relation to the prevailing market conditions for the good or service in question in the country of provision or purchase. Nevertheless, the Appellate Body has held in previous disputes that a benchmark other than private prices in the country of provision under Article 14(d) can be used "if it is first established that private prices in that country are distorted because of the government's predominant role in providing those goods".<sup>721</sup> The Appellate Body has stated that it is possible to resort to both out-of-country benchmarks and constructed benchmarks, provided adjustments are made "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)".<sup>722</sup>

5.227. We have considered above that the appropriate benchmark to establish whether the FIT remuneration confers a benefit within the meaning of Article 1.1(b) of the SCM Agreement should take into account that the Government of Ontario defines the energy supply-mix for electricity generation as including wind- and solar PV-generated electricity and the progressive phase-out of fossil fuels, in particular coal-based electricity generation. This is so because, as explained above, creating a market by defining the energy supply-mix as including windpower and solar PV generation cannot *in and of itself* be considered as conferring a benefit. Accordingly, an appropriate benefit benchmark for windpower and solar PV electricity generation in Ontario should be one that, within the parameters of the Government of Ontario's definition of the energy supply-mix, reflects what a market benchmark would yield for wind- and solar PV-generated electricity. Moreover, based on the guidelines contained in Article 14(d), an appropriate benchmark should first be sought in the windpower and solar PV generation markets in Ontario. If no suitable benchmark is available in Ontario, an appropriate benchmark outside Ontario or a proxy may also be considered.

5.228. Government-administered prices such as FIT may or may not reflect what a hypothetical market would yield. Thus, the fact that the government sets prices does not in itself establish the existence of a benefit. In challenging a benefit comparison under Article 1.1(b) of the SCM Agreement, a complainant would have to show that such prices do not reflect what a market outcome would be. An analysis of the methodology that was used to establish the administered prices may provide evidence as to whether the price does or does not provide more than adequate remuneration. There may be circumstances where there is no information about the methodology that was used or the methodology used does not assist in determining whether the administered price is or is not reflective of what a market would yield. If it becomes necessary to identify a market benchmark or to construct a proxy, such benchmark or proxy may be administered prices for the same product (in the country of purchase or in other countries, subject to adjustments), provided that it is determined based on a price-setting mechanism that ensures a market outcome. Alternatively, such benchmark may also be found in price-discovery mechanisms such as

<sup>720</sup> Appellate Body Report, *EC – Export Subsidies on Sugar*, fn 537 to para. 339.

<sup>721</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 90. (fn omitted)

<sup>722</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 106. See also Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 486, regarding the use of proxies under Article 14(b) of the SCM Agreement.

competitive bidding or negotiated prices, which ensure that the price paid by the government is the lowest possible price offered by a willing supply contractor.

5.229. With these considerations in mind, we turn to the relevant facts and arguments submitted by the participants and assess to what extent they are undisputed or the Panel has made pertinent factual findings. Evidence submitted by Canada before the Panel shows that "[t]he weighted average price for the winning projects [under RES II] was disclosed to be 8.64 cents per kWh" and that "the highest accepted bid could be in the range of 9.4 cents per kWh."<sup>723</sup> In responding to Panel question No. 4 following the second meeting with the parties, Canada stated that "[r]ates for wind projects under the [three] RES request[s] for proposal process range from \$0.08/kWh to \$0.11/kWh."<sup>724</sup>

5.230. In its second written submission to the Panel, the European Union submitted that, "even if the cost of generating wind and solar electricity would have to be taken into account, as Canada alleges, ... the structure of the FIT Programme leads to payments in excess of costs".<sup>725</sup> The European Union argued that the structure of the FIT Programme, and in particular the standardized rates, leads to payments in excess of the cost of production, as compared to RES I (2004), RES II (2005), and RES III (2008), which were administered based on the best prices offered by generators through a bidding process.<sup>726</sup> In its opening oral statement at the second meeting of the Panel, the European Union also submitted evidence regarding prices outside Ontario, namely, the prices for wind-generated electricity in Quebec. The European Union observed that competitive contracts for wind-generated electricity in Quebec in 2005 and 2008 showed average rates of 6.5 cents and 8.7 cents per kWh respectively, which it argued demonstrated that the FIT Programme did not reflect the costs of generation.<sup>727</sup>

5.231. In its closing oral statement at the second meeting of the Panel, Canada stated that "an analytical approach based on Appellate Body jurisprudence ... might have been used to arrive at an appropriate benchmark in this case" and that, "even if a private price for wind and solar electricity in Ontario could not be found, there might have been appropriate alternative in-jurisdiction benchmarks proposed in this case"<sup>728</sup>, but that no such evidence had been presented to the Panel. In its comments on the responses of Japan and the European Union to the Panel's questions following the second meeting with the parties, Canada contends that, while "both Japan and the European Union admit that the benchmark or comparator that should be used is one for renewable electricity", the complainants have not constructed "any benchmark for wind or solar electricity based on costs of production and other relevant prevailing market conditions in Ontario".<sup>729</sup>

5.232. The Panel found that, under the RES initiative, "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."<sup>730</sup> The parties did not seem to dispute the accuracy of the evidence concerning various prices under RES and in Quebec. The Panel, however, did not make any factual findings on this evidence, or draw conclusions on whether these prices can serve as appropriate benefit benchmarks for windpower and/or solar PV electricity generators in Ontario, or whether any adjustments within the meaning of Article 14(d) were necessary.

<sup>723</sup> OPA, 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 (Panel Exhibit CDA-55), p. 20.

<sup>724</sup> In the light of the Panel's question about "prices paid for electricity", we understand these rates to refer to the prices for wind-generated electricity resulting from the bidding process. (See Canada's response to Panel question No. 4 (second set), para. 16)

<sup>725</sup> European Union's second written submission to the Panel (DS426), para. 82.

<sup>726</sup> European Union's second written submission to the Panel (DS426), paras. 82-85.

<sup>727</sup> European Union's opening statement at the second Panel meeting (DS426), paras. 25 and 26. We further note that, in its response to Panel question No. 34 (second set), the European Union restated its views that the FIT standard rate overcompensated FIT generators, as compared to the terms and conditions available under the RES initiatives that were the result of a bidding process, or as compared to rates of wind-generated electricity in Quebec that also resulted from a bidding process. (European Union's response to Panel question No. 34 (second set), paras. 45-53)

<sup>728</sup> Canada's closing statement at the second Panel meeting, para. 27.

<sup>729</sup> Canada's comments on the European Union's and Japan's responses to Panel questions (second set), paras. 30 and 63.

<sup>730</sup> Panel Reports, para. 7.29.



5.233. The RES initiative, like the FIT Programme, reflects the Government of Ontario's choice of energy supply-mix as including renewable energy generation sources. Moreover, under the RES initiative, prices are not fixed by the government, but determined by a competitive bidding process, which is a market-based, price-discovery process. A bidding process that is competitive will ensure that the price paid by the government is the lowest possible price offered by a willing supply contractor. As we have noted above, market-based price discovery is not necessarily tied to a competitive bidding process. The methodology adopted to determine government-administered prices may also show that these do not provide more than adequate remuneration and thus reflect what a market would yield.

5.234. We have noted above that government-administered prices may or may not reflect what a hypothetical market would yield. In the case of FIT, however, while FIT prices were intended to cover costs plus a reasonable rate of return<sup>731</sup>, there are no undisputed facts on the record or factual findings by the Panel that would allow us to assess whether the methodology the OPA used to establish the FIT prices resulted in prices that provide more than adequate remuneration. Indeed, the only factual finding by the Panel regarding this methodology is that the FIT prices were determined using a discounted cash flow model taking into account "reasonable" capital costs, "reasonable" operating and maintenance costs, and "reasonable" connection costs.<sup>732</sup> Evidence adduced by Canada shows that the FIT Price Schedule was designed with a view to balancing several objectives. These objectives include promoting broad participation in the FIT Programme (e.g. different technologies, project sizes, and proponents), providing price stability necessary to promote the investment objectives of the Green Energy and Green Economy Act of 2009, and encouraging efficient project development.<sup>733</sup> Such evidence further indicates that the OPA used a cost-based price methodology to enable a wide range of technologies to participate in the FIT Programme.<sup>734</sup> Moreover, in order to develop the FIT Price Schedule, the OPA had to make assumptions about the costs and performance characteristics of a "typical" project.<sup>735</sup> For these reasons, we are not in a position to determine whether the FIT prices represent what a market would have yielded by analyzing the methodology by which they are established.

5.235. Turning to RES, while in principle RES I, II, and III prices, which resulted from competitive bidding, may represent a market outcome for renewable electricity generation, in order to carry out a meaningful comparison of the FIT Programme and the RES initiative, it is necessary to ensure that the comparison is made between prices referring to the same period, the same type of generation technology, the same overall supply-mix, projects of the same or similar scale, and supply contracts of the same duration.<sup>736</sup> If any of these conditions are not met by the proposed benchmark, adjustments in the light of the factors listed in Article 14(d) and of the supply-mix defined by the government may be necessary to ensure comparability. We believe that, on the basis of this approach, it should be possible to determine whether prices under RES constitute an appropriate benchmark for a comparison with FIT prices in order to establish the existence of benefit consistently with Article 1.1(b) of the SCM Agreement.

5.236. Although the RES initiative was also open to solar PV generators, there does not seem to be any evidence on the Panel record that solar PV generators were awarded contracts under any of the three RES initiatives. Rather, Canada's Hogan Report asserts that the RES experience demonstrates that solar PV generators cannot compete with other less-costly technologies. To promote investment in solar PV technology through the RESOP and the FIT Programme, prices for solar PV-generated electricity were cost-based and set by the OPA.<sup>737</sup> Japan submitted as an exhibit a "Progress Report on Electricity Supply" by the OPA that contains a table that sets out the different renewable energy contracts in force as of the fourth quarter 2010, which indicates that

<sup>731</sup> Panel Report, para. 7.202.

<sup>732</sup> Panel Report, para. 7.202 (referring to OPA Proposed FIT Price Schedule Presentation, slides 22-28). The Panel defined capital costs as "project development, construction and equipment costs"; operating and maintenance costs as "project staffing and maintenance costs, including on-going capital expenditures and property taxes"; and connection costs as "project connection costs, no significant upgrade costs assumed". (Ibid., para. 7.202)

<sup>733</sup> OPA Proposed FIT Price Schedule Presentation, slide 5.

<sup>734</sup> OPA Proposed FIT Price Schedule Presentation, slide 21.

<sup>735</sup> OPA Proposed FIT Price Schedule Presentation, slide 6.

<sup>736</sup> Canada did not make specific arguments as to what extent and in what manner adjustments would be necessary. The complainants submitted no evidence or arguments on adjustments that might have been necessary to ensure the comparability of the prices under the FIT and RES programmes.

<sup>737</sup> Hogan Report, p. 34.

there were no solar RES Contracts recorded as of that date.<sup>738</sup> Against this background, it does not appear that the FIT remuneration for solar PV generators can be compared to prices under the RES initiative to establish whether the FIT Programme confers a benefit in respect of solar PV energy generation.<sup>739</sup>

5.237. We note, in respect of windpower generation, that the requests for proposals under the three RES initiatives were issued in 2004 (RES I), 2005 (RES II), and 2008 (RES III). The European Union argued before the Panel that the costs of windpower generation had decreased in the years preceding the launch of the FIT Programme. The European Union submitted various documents suggesting that, due to technological advancements, costs of wind-generated electricity have decreased rather than increased in recent years.<sup>740</sup> While we have found no specific evidence on the record regarding the evolution of windpower generation costs in Ontario between 2004 and 2009, we note that the latest RES initiative was launched in 2008 – that is, only one year before the FIT Programme – and that the RES prices submitted by Canada for the period 2004 to 2008 range from 8 cents to 11 cents per kWh.<sup>741</sup> It is thus conceivable that RES III (2008) contracts for windpower generators, concluded less than a year before the launch of the FIT Programme in 2009, received a remuneration of 11 cents per kWh or less *versus* the lowest FIT remuneration for windpower generators of 13.5 cents per kWh.<sup>742</sup>

5.238. Several contracts for wind-generated electricity were awarded under the three RES initiatives, although, according to Canada, for "much smaller capacity than the capacity provided by wind projects under the FIT Programme".<sup>743</sup> While the RES initiative and FIT Programme overlap for projects between 500 kW and 200 MW, the FIT Programme has a broader scope than the RES initiative, covering also projects of smaller capacity than 500 kW and greater than 200 MW.<sup>744</sup> RES contracts, like FIT Contracts for windpower and solar PV generation, were concluded for the duration of 20 years<sup>745</sup> and, thus, significant overlap exists between the duration of the RES contracts awarded in 2004, 2005, and 2008 and the FIT Contracts awarded in 2009.

5.239. We do not consider that a comparison of FIT prices with the prices of wind-generated electricity in Quebec would be possible for the purposes of completing the analysis in this appeal, considering that the standard of comparability that would be required for such an out-of-province benchmark was not raised before the Panel, or before us. In this respect, we recall that the Appellate Body has considered in previous disputes that, while it may be possible to resort to external benchmarks, it is necessary to ensure that such benchmarks reflect the prevailing market conditions in the country of provision or purchase.<sup>746</sup> We, therefore, conclude that we are not able

<sup>738</sup> OPA, A Progress Report on Electricity Supply – Fourth Quarter 2010 (Panel Exhibit JPN-26), Table at p. 4.

<sup>739</sup> The Quebec prices referred to by the European Union are also only for windpower generation and not for solar PV generation.

<sup>740</sup> See European Wind and Energy Association, *The Economics of Wind Energy* (March 2009) (Panel Exhibit EU-20), pp. 13 and 15; and European Union's opening statement at the second Panel meeting (DS426), para. 26. See also Government of Ontario, *Ontario's Long-Term Energy Plan* (Queen's Printer for Ontario, 2010) (Panel Exhibit CDA-6); and Electricity Conservation & Supply Task Force, *Tough Choices: Addressing Ontario's Power Needs*, Final Report to the Minister of Energy (January 2004) (Panel Exhibit CDA-59), p. 50.

<sup>741</sup> Hogan Report, p. 32; Canada's response to Panel question No. 4 (second set), para. 16.

<sup>742</sup> Panel Reports, para. 7.30.

<sup>743</sup> Canada's response to Panel question No. 4 (second set), para. 16.

<sup>744</sup> RES I (2004) was open to renewable generators with a capacity range of 0.5 to 100 MW; RES II (2005) to generators with a capacity range of 20 to 200 MW; and RES III (2008) to generators with a capacity range of 10.1 to 199.9 MW. (Hogan Report, p. 32) We recall that, under the FIT Programme, FIT Contracts are for qualifying generators with capacity over 10 kW, while generators with capacity of up to 10 kW are eligible for microFIT Contracts. (Ibid.) It is not clear whether RES contracts of specific scale and prices can be matched with FIT Contracts of similar size, and thus we are not in a position to make a comparison of RES and FIT prices and contract size.

<sup>745</sup> Ontario Ministry of Energy, Request for Proposals for 300 MW of Renewable Energy Supply (RES I), issued 24 June 2004 (Panel Exhibit CDA-52), p. 41; Request for Proposals for 1,000 MW of Renewable Energy Supply (RES II), issued 17 June 2005 (Panel Exhibit CDA-53), p. 56; Request for Proposals for approximately 500 MW of Renewable Energy Supply (RES III), issued 22 August 2008 (Panel Exhibit CDA-54), p.2.

<sup>746</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 103. We observe that, while Ontario and Quebec are in the same "country", that is, Canada, they have separate regional markets for electricity. Thus, the "prevailing market conditions" in the country of purchase within the meaning of Article 14(d) of the SCM Agreement is to be read in this case as referring to the Ontario regional market as opposed to other out-of-province markets, within Canada or in another country.

to consider the prices for wind-generated electricity in Quebec in our attempt at completing the analysis under Article 1.1(b) of the SCM Agreement.

5.240. In contrast, we are of the view that it would be, in principle, possible to make a comparison of the FIT remuneration of windpower generators with the remuneration that windpower generators obtain under the RES initiative to determine whether the former confers a benefit. We observe that there are clearly no factual findings by the Panel or undisputed evidence on the Panel record that would allow us to complete the analysis with respect to the remuneration for solar PV electricity generation under the FIT Programme.

5.241. Nevertheless, while a comparison between prices under FIT and RES seems to suggest that the former confers a benefit, we do not consider that we are able to complete the analysis on that basis alone. We recall that both complainants' main line of argumentation with respect to benefit was focused on a single electricity market and on an approach that sought to establish the existence of benefit by reference to other electricity generation technologies. The complainants also submitted a number of in-province and out-of-province benchmarks based on a single electricity market definition. In other words, all these benchmarks were not based on the Government of Ontario's definition of the energy supply-mix. Only at the second Panel meeting, and especially in written responses and comments to questions after the second meeting, did the parties engage in argumentation on benefit benchmarks for renewable energy generation.

5.242. We further recall that the Panel made very limited findings regarding benchmarks that take into account the Government of Ontario's definition of the energy supply-mix. The Panel considered in its conclusions under Article 1.1(b) of the SCM Agreement that an appropriate benchmark could not, and should not, be found in the competitive wholesale electricity market, and then, after its finding under Article 1.1(b), it developed in its "observations on one approach to the question of benefit"<sup>747</sup> a benchmark that took into account the Government of Ontario's definition of the energy supply-mix. The Panel attempted to apply its alternative benchmark by comparing the FIT rates of return with the average cost of capital in Canada for projects having a comparable risk profile in the same period.

5.243. The Panel, however, did not make a finding on whether RES constituted an appropriate benchmark in the light of the Government of Ontario's definition of the energy supply-mix. Nor did it consider conducting a comparison of the FIT remuneration with the remuneration under the RES initiative. Indeed, the Panel's only finding in respect of RES was a factual finding concerning the price-discovery mechanism, which the Panel found was based on competitive bidding.<sup>748</sup> Finally, we observe that the applicability to the challenged measures of a benefit benchmark based on a supply-mix including wind- and solar PV-generated electricity was not sufficiently debated in this appeal, so as to provide us with further elements that would allow us to complete the analysis.

5.244. We recall that the Appellate Body has refrained from completing the legal analysis in the light of the complexity of the issues and in the absence of full exploration of the issues before the panel, which raised concerns about the parties' due process rights.<sup>749</sup> We believe that these elements are present in the benefit issues raised in this appeal. The identification of a benchmark that takes into account the government's definition of the energy supply-mix involves consideration of the fact that the government has created markets for wind- and solar PV-generated electricity, and is a more complex exercise than evaluating benchmarks in the wholesale electricity market as the Panel did. The Panel has made no findings on the adequacy of proposed benchmarks for wind- and solar PV-generated electricity. In these circumstances, completing the analysis would raise due process concerns for the parties.

5.245. In sum, we have found evidence on the Panel record that is relevant to a benefit analysis based on a benchmark that takes into account the Government of Ontario's definition of the energy supply-mix. Based on this evidence, we have considered that RES prices for windpower generation contracts awarded through competitive bidding may qualify as benchmarks for a benefit comparison and seem to suggest that benefit may exist in the case of FIT windpower generation contracts. We conclude, however, that such evidence was neither sufficiently debated

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<sup>747</sup> Panel Reports, para. 7.321. (emphasis omitted)

<sup>748</sup> Panel Reports, para. 7.29.

<sup>749</sup> Appellate Body Report, *EC – Export Subsidies on Sugar*, fn 537 to para. 339.

before the Panel, nor before us. Moreover, the Panel did not make factual findings on this evidence that would assist us in completing the analysis.

5.246. In the light of the above, we do not consider that there are sufficient factual findings by the Panel and uncontested evidence on the Panel record that would allow us to complete the legal analysis and conduct a benefit benchmark comparison between the prices of wind-generated electricity under the FIT Programme and the prices for wind-generated electricity under the RES initiative. Consequently, we cannot determine whether the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement and whether they constitute prohibited subsidies inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement.

## 6 FINDINGS AND CONCLUSIONS IN THE APPELLATE BODY REPORT WT/DS412/AB/R

6.1. In the appeal of the Panel Report, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* (WT/DS412/R) (Japan Panel Report), for the reasons set out in this Report, the Appellate Body:

- a. declines Japan's request to commence its evaluation with Japan's allegations of error relating to the SCM Agreement;
- b. as regards Article III:8(a) of the GATT 1994:
  - i. reverses the Panel's findings, in paragraphs 7.127, 7.128, and 7.152 of the Japan Panel Report, that the Minimum Required Domestic Content Levels of the FIT Programme and related FIT and microFIT Contracts are laws, regulations, or requirements governing the procurement by governmental agencies of electricity within the meaning of Article III:8(a) of the GATT 1994;
  - ii. declares moot and of no legal effect the other intermediate findings made by the Panel, in particular in paragraphs 7.136, 7.145, and 7.151;
  - iii. finds that the Minimum Required Domestic Content Levels prescribed under the FIT Programme and related FIT and microFIT Contracts do not meet the conditions of the derogation in Article III:8(a) of the GATT 1994; and
  - iv. in the light of this finding, does not find it necessary to address Canada's claim that the Panel failed to fulfil its obligations under Article 11 of the DSU by exercising judicial economy; and
  - v. finds that the FIT Programme and related FIT and microFIT Contracts are not covered by Article III:8(a) of the GATT 1994 and that, consequently, the Panel's conclusion, in paragraph 8.2 of the Japan Panel Report, that the Minimum Required Domestic Content Levels prescribed under the FIT Programme and related FIT and microFIT Contracts are inconsistent with Article 2.1 of the TRIMS Agreement and Article III:4 of the GATT 1994, stands;
- c. rejects Japan's claim that the Panel failed to fulfil its obligations under Article 11 of the DSU and exercised false judicial economy by declining to make a finding on Japan's stand-alone claim under Article III:4 of the GATT 1994;
- d. as regards Article 1.1(a) of the SCM Agreement:
  - i. declares moot and of no legal effect the Panel's finding, in paragraph 7.246 of the Japan Panel Report, that "government 'purchases [of] goods' could [not] also be legally characterized as 'direct transfer[s] of funds' without infringing [the] principle [of effective treaty interpretation]", inasmuch as it negates the possibility that a transaction may fall under more than one type of financial contribution under Article 1.1(a)(1) of the SCM Agreement;
  - ii. upholds the Panel's finding, in paragraphs 7.243 and 7.328(i) of the Japan Panel Report, that the FIT Programme and related FIT and microFIT Contracts are government "purchases [of] goods" within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement;
  - iii. rejects Japan's appeal that the FIT Programme and FIT and microFIT Contracts may also be characterized as "direct transfer[s] of funds" or "potential direct transfers of funds" under Article 1.1(a)(1)(i) of the SCM Agreement;

- iv. rejects Japan's claim that the Panel failed to fulfil its obligations under Article 11 of the DSU and exercised false judicial economy by declining to make a finding on Japan's claim that the measures at issue constitute "income or price support" under Article 1.1(a)(2) of the SCM Agreement; and
  - v. declines to make a finding on whether the FIT Programme and Contracts may be characterized as "income or price support" under Article 1.1(a)(2) of the SCM Agreement; and
- e. as regards Article 1.1(b) of the SCM Agreement:
- i. reverses the Panel's finding, in paragraphs 7.328(ii) and 8.3 of the Japan Panel Report, that Japan failed to establish that the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement and thereby that Canada acted inconsistently with Articles 3.1(b) and 3.2 of the SCM Agreement;
  - ii. in the light of these findings, does not find it necessary to address Japan's alternative claim that the Panel acted inconsistently with Article 11 of the DSU; and
  - iii. is unable to complete the analysis as to whether the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement and whether Canada acted inconsistently with Articles 3.1(b) and 3.2 of the SCM Agreement.

6.2. The Appellate Body recommends that the DSB request Canada to bring its measures found in this Report, and in the Japan Panel Report as modified by this Report, to be inconsistent with the TRIMs Agreement and the GATT 1994 into conformity with its obligations under those Agreements.

Signed in the original in Geneva this 20th day of April 2013 by:

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Ricardo Ramírez-Hernández  
Presiding Member

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Ujal Singh Bhatia  
Member

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David Unterhalter  
Member

## 6 FINDINGS AND CONCLUSIONS IN THE APPELLATE BODY REPORT WT/DS426/AB/R

6.1. In the appeal of the Panel Report, *Canada – Measures Relating to the Feed-in Tariff Program* (WT/DS426/R) (EU Panel Report), for the reasons set out in this Report, the Appellate Body:

- a. as regards Article III:8(a) of the GATT 1994:
  - i. upholds the Panel's finding, in paragraph 7.121 of the EU Panel Report, that paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement did not obviate the need for the Panel 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;
  - ii. reverses the Panel's findings, in paragraphs 7.127, 7.128, and 7.152 of the EU Panel Report, that the Minimum Required Domestic Content Levels of the FIT Programme and related FIT and microFIT Contracts are laws, regulations, or requirements governing the procurement by governmental agencies of electricity within the meaning of Article III:8(a) of the GATT 1994;
  - iii. declares moot and of no legal effect the other intermediate findings made by the Panel, in particular in paragraphs 7.136, 7.145, and 7.151;
  - iv. finds that the Minimum Required Domestic Content Levels prescribed under the FIT Programme and related FIT and microFIT Contracts do not meet the conditions of the derogation in Article III:8(a) of the GATT 1994; and
  - v. in the light of this finding, does not find it necessary to address Canada's claim that the Panel failed to fulfil its obligations under Article 11 of the DSU by exercising judicial economy; and
  - vi. finds that the FIT Programme and related FIT and microFIT Contracts are not covered by Article III:8(a) of the GATT 1994 and that, consequently, the Panel's conclusion, in paragraph 8.6 of the EU Panel Report, that the Minimum Required Domestic Content Levels prescribed under the FIT Programme and related FIT and microFIT Contracts are inconsistent with Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994, stands; and
- b. as regards Article 1.1(b) of the SCM Agreement:
  - i. reverses the Panel's finding, in paragraphs 7.328(ii) and 8.7 of the EU Panel Report, that the European Union failed to establish that the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement and thereby that Canada acted inconsistently with Articles 3.1(b) and 3.2 of the SCM Agreement;
  - ii. in the light of these findings, does not find it necessary to address the European Union's alternative claim that the Panel acted inconsistently with Article 11 of the DSU; and
  - iii. is unable to complete the analysis as to whether the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement and whether Canada acted inconsistently with Articles 3.1(b) and 3.2 of the SCM Agreement.

6.2. The Appellate Body recommends that the DSB request Canada to bring its measures found in this Report, and in the EU Panel Report as modified by this Report, to be inconsistent with the TRIMs Agreement and the GATT 1994 into conformity with its obligations under those Agreements.

Signed in the original in Geneva this 20th day of April 2013 by:

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Ricardo Ramírez-Hernández  
Presiding Member

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Ujal Singh Bhatia  
Member

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David Unterhalter  
Member



## ANNEX 1

WORLD TRADE  
ORGANIZATIONWT/DS412/10  
WT/DS426/9

6 February 2013

(13-0616)

Page: 1/1

Original: English

**CANADA – CERTAIN MEASURES AFFECTING THE RENEWABLE  
ENERGY GENERATION SECTOR****CANADA – MEASURES RELATING TO THE FEED-IN TARIFF PROGRAM****NOTIFICATION OF AN APPEAL BY CANADA  
UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES  
AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU),  
AND UNDER RULE 20(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW**

The following notification, dated 5 February 2013, from the Delegation of Canada, is being circulated to Members.

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Pursuant to Article 16.4 and Article 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and Rule 20 of the *Working Procedures for Appellate Review*, Canada notifies its appeal of certain issues in the Reports of the Panel in *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* (WT/DS412/R) and *Canada – Measures Relating to the Feed-In Tariff Program* (WT/DS426/R) and certain legal interpretations developed by the Panel in these Reports.

Canada seeks review by the Appellate Body of the Panel's findings and conclusion that the Government of Ontario's FIT Program, as implemented through the FIT and MicroFIT Contracts<sup>1</sup>, is not covered by the terms of Article III:8(a) of GATT 1994.<sup>2</sup> This conclusion is in error and is based on erroneous findings on issues of law and legal interpretation including the Panel's finding that the Government of Ontario purchases renewable electricity "with a view to commercial resale".<sup>3</sup>

Canada also requests the Appellate Body to find that the Panel acted inconsistently with Article 11 of the DSU by failing to make an objective assessment of the facts related to this issue, specifically with respect to the Panel's finding that the resale of electricity purchased under the FIT Program is "commercial" in nature, and by using this faulty factual finding to support its conclusion about the applicability of Article III:8(a) of GATT 1994 to the FIT Program.<sup>4</sup>

Canada also requests the Appellate Body to find that the Panel failed to find that the Government of Ontario does not purchase renewable electricity "with a view to use in the production of goods for commercial sale".

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<sup>1</sup> For a summary of the measure at issue, see paras. 7.6 and 7.7 of the Panel Reports.

<sup>2</sup> See e.g., para. 7.152 of the Panel Reports.

<sup>3</sup> See e.g., paras. 7.147-7.151 of the Panel Reports.

<sup>4</sup> *Ibid.*

## ANNEX 2



WORLD TRADE  
ORGANIZATION

WT/DS412/11

15 February 2013

(13-0863)

Page: 1/3

Original: English

**CANADA – CERTAIN MEASURES AFFECTING THE RENEWABLE  
ENERGY GENERATION SECTOR**

NOTIFICATION OF AN OTHER APPEAL BY JAPAN  
UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES  
AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU),  
AND UNDER RULE 23(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following notification, dated 11 February 2013, from the Delegation of Japan, is being circulated to Members.

Pursuant to Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 23(1) of the Working Procedures for Appellate Review ("Working Procedures"), Japan hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report in *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* (WT/DS412/R) ("Panel Report"), and certain legal interpretations developed by the Panel in this dispute.

For the reasons to be elaborated in its submissions to the Appellate Body, Japan appeals the following errors of law and legal interpretation contained in the Panel Report, and requests the Appellate Body to reverse, modify, or declare moot and of no legal effect the related findings, conclusions and recommendations of the Panel, and where indicated to complete the analysis.<sup>1</sup>

1. With respect to Japan's claims under the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"):
  - a. The Panel erred in its interpretation and application of Article 1.1(a) of the SCM Agreement in concluding that the appropriate legal characterization of the FIT Program and Contracts<sup>2</sup> is "government ... purchases [of] goods".<sup>3</sup> Japan requests the Appellate Body to reverse the Panel's finding in this regard, and complete the analysis to find instead that the FIT Program and Contracts are appropriately characterized as "a government practice [that] involves a direct transfer of funds ... [or] potential direct transfers of funds" or "any form of income or price support" or

<sup>1</sup> Pursuant to Rule 23(2)(c)(ii)(C) of the Working Procedures, this Notice of Other Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to the ability of Japan to refer to other paragraphs of the Panel Report in the context of its appeal.

<sup>2</sup> Throughout this Notice of Other Appeal, Japan uses the term "FIT Program and Contracts" to refer to the Government of Ontario's feed-in tariff program (including microFIT), and the FIT and microFIT contracts entered into by the Government of Ontario under that program, that are at issue in this dispute – i.e., the "challenged measures".

<sup>3</sup> Panel Report, paras. 7.220-7.249.

alternatively modify the Panel's finding in this regard to find that these measures may also be characterized as "direct transfer[s] of funds", "potential direct transfer of funds", or "income or price support" under Article 1.1(a) of the SCM Agreement.

- b. The Panel erred in its interpretation and application of Article 1.1(a)(1) of the SCM Agreement by concluding that government "purchases [of] goods" under Article 1.1(a)(1)(iii) could not also be legally characterized as "direct transfer[s] of funds" or "potential direct transfers of funds" under Article 1.1(a)(1)(i).<sup>4</sup> Japan requests that the Appellate Body declare this finding to be moot and of no legal effect, and to find that the Government of Ontario provides financial contributions in the form of "direct transfer[s] of funds" or "potential direct transfers of funds" through the FIT Program and Contracts, regardless of whether they may be characterized as government "purchases [of] goods".
- c. The Panel failed to make an objective assessment of the matter as required by Article 11 of the DSU by improperly exercising judicial economy, and failing to make findings with respect to Japan's claim that the FIT Program and Contracts may be legally characterized as "income or price support" under Article 1.1(a)(2) of the SCM Agreement.<sup>5</sup> Japan requests the Appellate Body to find that the Government of Ontario provides "income or price support" through the FIT Program and Contracts, regardless of whether they may be characterized as government "purchases [of] goods".
- d. The Panel erred in its interpretation and application of Article 1.1(b) of the SCM Agreement, and failed to make an objective assessment of the matter as required by Article 11 of the DSU, when it found that it cannot resolve whether the challenged measures confer a benefit by applying a benchmark derived from the conditions for purchasing electricity in a competitive wholesale electricity market, particularly in disregarding Japan's argument that the challenged measures confer a benefit because the objective design, structure and operation of the FIT Program demonstrates that solar PV and wind generators would not be present in Ontario's wholesale electricity market absent the FIT Program.<sup>6</sup> Japan requests the Appellate Body to reverse these findings by the Panel and instead to find that the challenged measures confer a "benefit".
- e. The Panel failed to make an objective assessment of the matter, including an objective assessment of the facts of the case, as required by Article 11 of the DSU, in failing to resolve the question of benefit under Article 1.1(b) of the SCM Agreement based on its preferred comparison between the relevant rates of return of the challenged FIT and microFIT Contracts with the relevant average cost of capital in Canada.<sup>7</sup> Japan requests the Appellate Body to complete the analysis, and find that the FIT Program and Contracts confer a benefit under the Panel's preferred approach. However, this appeal is conditional on the Appellate Body rejecting Japan's argument that the challenged measures confer a benefit pursuant to item 1.d above.
- f. Should the Appellate Body find the FIT Program and Contracts to be a subsidy within the meaning of Article 1.1 of the SCM Agreement, Japan requests the Appellate Body to complete the analysis, and find the FIT Program and Contracts to be inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement.
- g. In addition to its error in failing to find the FIT Program and Contracts to be prohibited subsidies, the Panel erred in failing to recommend, pursuant to Article 4.7 of the SCM Agreement, that Canada withdraw the subsidies without delay, by eliminating the domestic content requirement of the FIT Program and Contracts, and erred in failing to specify the time period within which the measures must be withdrawn. Accordingly, if the Appellate Body completes the analysis and makes the findings requested by Japan in item 1.f above, Japan further requests that the Appellate Body make the

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<sup>4</sup> Panel Report, paras. 6.83-6.85, 7.243-7.248, particularly paras. 7.246-7.247.

<sup>5</sup> Panel Report, paras. 6.88, 7.249.

<sup>6</sup> Panel Report, paras. 6.94-6.95, 7.271-7.313, 7.315, 7.317, and 7.319-7.320, particularly paras. 7.308-7.313.

<sup>7</sup> Panel Report, paras. 7.322-7.327.

recommendation, and specify the time period within which the measure must be withdrawn, pursuant to Article 4.7 of the SCM Agreement.

2. With respect to Japan's claims under the General Agreement on Tariffs and Trade 1994 ("GATT 1994"):
  - a. The Panel failed to make an objective assessment of the matter as required by Article 11 of the DSU by exercising false judicial economy and failing to separately examine Japan's claims under Article III:4 of the GATT 1994.<sup>8</sup> Japan requests the Appellate Body to complete the analysis, and find that the FIT Program and Contracts are inconsistent with the terms of Article III:4 independent of the Panel's findings under the Agreement on Trade-Related Investment Measures ("TRIMs Agreement").
  - b. The Panel erred in its interpretation and application of Article III:8(a) of the GATT 1994 in the following respects:
    - i. The Panel erred when it found the FIT Program and Contracts to involve "procurement by governmental agencies of products purchased" under Article III:8(a) of the GATT 1994, based on its conclusion that these measures are "government ... purchases [of] goods" under Article 1.1(a) of the SCM Agreement.<sup>9</sup>
    - ii. The Panel erred when it interpreted the term "governmental purposes" in isolation, rather than the entire term "purchased for governmental purposes", and failed to separately assess whether purchases under the FIT Program and Contracts were "for" governmental purposes.<sup>10</sup> Japan requests the Appellate Body to complete the analysis, and find that the FIT Program and Contracts are not "purchase[s] [by governmental agencies] for governmental purposes". However, this appeal is conditional on the Appellate Body rejecting Japan's argument pursuant to item 2.b.i above.
    - iii. The Panel erred when it found evidence of profit earned by the Government of Ontario and Ontario's municipal governments may be a relevant consideration in determining that the FIT Program is undertaken "with a view to commercial resale".<sup>11</sup> In this regard, Japan seeks only modification of the Panel's findings to conclude that the Government of Ontario's procurement of electricity under the FIT Program and Contracts is undertaken "with a view to commercial resale" by virtue of the fact that the electricity "is resold to retail consumers through Hydro One and the LDCs"<sup>12</sup>, without regard to whether those entities make profits. However, this appeal is conditional on the Appellate Body rejecting Japan's arguments pursuant to items 2.b.i and 2.b.ii above.

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<sup>8</sup> Panel Report, paras. 6.72, 7.155-7.167. *See also id.*, para. 7.70 ("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").

<sup>9</sup> Panel Report, paras. 7.129-7.136, particularly paras. 7.135-7.136.

<sup>10</sup> Panel Report, paras. 7.138-7.145, particularly paras. 7.140, 7.144-7.145.

<sup>11</sup> Panel Report, paras. 7.146-7.151, particularly paras. 7.149-7.151.

<sup>12</sup> Panel Report, para. 7.147.

## ANNEX 3



WORLD TRADE  
ORGANIZATION

WT/DS426/10

15 February 2013

(13-0866)

Page: 1/3

Original: English

**CANADA – MEASURES RELATING TO THE FEED-IN TARIFF PROGRAM**

NOTIFICATION OF AN OTHER APPEAL BY THE EUROPEAN UNION  
UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES  
AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU),  
AND UNDER RULE 23(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following notification, dated 11 February 2013, from the Delegation of the European Union, is being circulated to Members.

Pursuant to Article 16.4 and Article 17.1 of the *DSU* the European Union hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *Canada – Measures Relating to the Feed-In Tariff Program* (WT/DS426). Pursuant to Rule 23(1) of the *Working Procedures for Appellate Review*, the European Union simultaneously files this Notice of Other Appeal with the Appellate Body Secretariat.

For the reasons to be further elaborated in its submissions to the Appellate Body, the European Union appeals, and requests the Appellate Body to modify, reverse and/or declare moot and with no legal effect the findings and conclusions of the Panel and complete the analysis with respect to the following errors of law and legal interpretations contained in the Panel Report.<sup>1</sup>

- The European Union submits that the Panel erred in the interpretation and application of Articles 2.1 and 2.2 of the TRIMs Agreement read in conjunction with Paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement when finding that they do not preclude the application of Article III:8(a) of the GATT 1994 to the challenged measures.<sup>2</sup>
- The European Union requests the Appellate Body to reverse the Panel's finding in paragraph 7.121, complete the analysis and find that Article III:8(a) of the GATT 1994 was not applicable in the present case. As a consequence, the European Union requests the Appellate Body to uphold, although modifying the reasoning, the Panel's ultimate finding in paragraph 7.166 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.

<sup>1</sup> Pursuant to Rule 23(2)(c)(ii)(C) of the Working Procedures for Appellate Review this Notice of Other Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to the ability of the European Union to refer to other paragraphs of the Panel Report in the context of its appeal.

<sup>2</sup> Panel Report, paras. 7.114-7.121, and in particular, paras. 7.119 and 7.120.

- The Panel erred in its interpretation and application of Article III:8(a) of the GATT 1994 when finding that the "Minimum Required Domestic Content Level" contained in the FIT Programme should be properly characterised as one of the "requirements governing" the alleged procurement of electricity for the purpose of Article III:8(a) of the GATT 1994.<sup>3</sup>
- The European Union requests the Appellate Body to reverse such finding, complete the analysis and find instead that the "Minimum Required Domestic Content Level" are not "requirements governing the procurement ... of the products purchased" in the present case. As a consequence of the Appellate Body's reversal of the Panel's finding in paragraph 7.128, the European Union requests the Appellate Body to reverse the Panel's finding in paragraph 7.152 that "(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 find instead that the "Minimum Required Domestic Content Level" does not constitute "requirements governing the procurement ... of the products purchased" in the present case.
- The Panel erred in its interpretation of Article III:8(a) of the GATT 1994 when stating that the ordinary meaning of the terms "governmental purposes" is relatively broad and may encompass the meaning proposed by Canada, i.e., that a purchase for "governmental purposes" may exist whenever a government purchases a product for a stated aim of the government.<sup>4</sup> The European Union requests the Appellate Body to reverse this statement or, at the very least, to declare it moot and with no legal effect. In addition, should the Appellate Body reverse the Panel's finding that the Government of Ontario's procurement of electricity under the FIT Programme is undertaken "with a view to commercial resale",<sup>5</sup> the European Union requests the Appellate Body to modify and/or reverse the Panel's reasoning<sup>6</sup> as to the meaning of "governmental purposes" in view of the arguments raised by the European Union as to the proper interpretation of those terms, complete the analysis and find that the Government of Ontario's procurement of electricity under the FIT Programme is not undertaken for "governmental purposes". As a consequence, the Panel's findings in paragraph 7.152 should also be amended accordingly to reflect another reason why Canada could not 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".
- The Panel erred in its application of Article 1.1(b) of the SCM Agreement as well as did not make an objective assessment of the matter in accordance with Article 11 of the DSU when finding that the European Union had failed to establish that the FIT Programme and its related contracts confer a "benefit" under Article 1.1(b) of the SCM Agreement.<sup>7</sup> In particular:
  - (a) the Panel erred in the application of Article 1.1(b) of the SCM Agreement to the facts of this case.<sup>8</sup> The "prevailing market conditions" in Ontario, as evidenced by the purpose of the FIT Programme, showed that the FIT generators would not be able to obtain the necessary remuneration to be present in such marketplace;
  - (b) the Panel did not make an objective assessment of the matter in accordance with Article 11 of the DSU by failing to consider the totality of the evidence, by providing incoherent reasoning and exercising false judicial economy, when finding that, even on the basis of a hypothetical "market" counterfactual as the one suggested in its observations, the European Union had failed to establish the existence of "benefit".<sup>9</sup>

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<sup>3</sup> Panel Report, paras. 7.126-7.128, and 7.152.

<sup>4</sup> Panel Report, para. 7.139, first sentence (and the follow-up statement in para. 7.140, second sentence).

<sup>5</sup> Panel Report, para. 7.151.

<sup>6</sup> Panel Report, paras. 7.138-7.145.

<sup>7</sup> Panel Report, para. 7.328(ii).

<sup>8</sup> Panel Report, paras. 7.276-7.327.

<sup>9</sup> Panel Report, paras. 7.322-7.328(ii).

In view of these errors, the European Union requests the Appellate Body to *reverse* the Panel's finding in paragraph 7.328(ii) that the European Union failed to establish the existence of benefit in the present case, that the challenged measures conferred a "benefit" under Article 1.1(b) of the SCM Agreement, *complete the analysis* on the basis of the Panel's findings and uncontested facts on the record, and *find* that the challenged measures conferred a "benefit" under Article 1.1(b) of the SCM Agreement. As a consequence, the Panel's ultimate conclusion that the European Union had failed to establish that the FIT Programme and its related contracts constitute subsidies or envisage the granting of subsidies inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement is also in error.<sup>10</sup> The European Union requests the Appellate Body to also *reverse* such a conclusion, *complete the analysis* on the basis of the Panel's findings and uncontested facts on the record, and *find* that the challenged measures amount to subsidies prohibited under Articles 3.1(b) and 3.2. Accordingly, the European Union requests the Appellate Body to *recommend* that Canada withdraws 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. Should the Appellate Body be unable to complete the analysis under any of the requests made by the European Union, the European Union requests the Appellate Body to declare *moot and with no legal effect* the Panel's findings and conclusions in paragraphs 7.328(ii) and 8.7.<sup>11</sup>

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<sup>10</sup> Panel Report, para. 8.7.

<sup>11</sup> The European Union observes that on 11 February 2013 Japan appealed the panel report in *Canada – Certain Measures Affecting the Renewable Energy Generation Sector (WT/DS412)*. That report contains identical findings and conclusions as those contained in para. 7.328(ii) and para. 8.7 in the Panel Report in DS426. The European Union incorporates hereto Japan's Notice of Other Appeal dated 11 February 2013 with respect to the errors of law and legal interpretations, including any request for completing the analysis, made in connection with para. 7.328(ii) of the panel report in DS412.

## ANNEX 4

**ORGANISATION MONDIALE  
DU COMMERCE**

**ORGANIZACIÓN MUNDIAL  
DEL COMERCIO**

**WORLD TRADE ORGANIZATION**

**APPELLATE BODY**

*Canada – Certain Measures Affecting the Renewable Energy Generation Sector  
Canada – Measures Relating to the Feed-in Tariff Program*

AB-2013-1

Procedural Ruling

1. On 12 February 2013, we received letters from Canada, Japan, and the European Union requesting that the Appellate Body Division hearing the above appeal allow observation by the public of the oral hearing in these appellate proceedings.

2. Specifically, Canada requested that the Division allow public observation of the oral statements and answers to questions of the participants, as well as those of third participants that agree to make their statements and responses to questions public. Canada proposed that public observation be permitted via simultaneous closed-circuit television broadcasting with the option for the transmission to be turned off should the participants find it necessary to discuss confidential information, or if a third participant has indicated its wish to keep its oral statement confidential.

3. In its letter, Japan supported Canada's request, indicating that it also wished to make public its statements and answers to questions by the Division in the course of the Appellate Body hearing, and that it agreed with Canada's request that the Division hold an open hearing in this appeal. Japan further agreed that public observation be allowed by means of simultaneous closed-circuit video broadcasting. For its part, the European Union stated that it agreed and associated itself with Canada's request for an open hearing. The participants referred to the rulings by the Appellate Body in nine previous proceedings authorizing public observation of the oral hearing.<sup>1</sup>

<sup>1</sup>These proceedings are:

- *United States / Canada – Continued Suspension of Obligations in the EC – Hormones Dispute* (WT/DS320/AB/R / WT/DS321/AB/R);
- *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador* (WT/DS27/AB/RW2/ECU) and *Recourse to Article 21.5 of the DSU by the United States* (WT/DS27/AB/RW/USA);
- *United States – Continued Existence and Application of Zeroing Methodology* (WT/DS350/AB/R);
- *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities* (WT/DS294/AB/RW);
- *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan* (WT/DS322/AB/RW);
- *Australia – Measures Affecting the Importation of Apples from New Zealand* (WT/DS367/AB/R);
- *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft* (WT/DS316/AB/R);
- *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)* (WT/DS353/AB/R); and
- *United States – Certain Country of Origin Labelling Requirement* (WT/DS384/AB/R / WT/DS386/AB/R).



4. On 13 February 2013, we invited the third parties to comment in writing on the requests of the participants. On 18 February 2013, we received responses from Australia, Brazil, China, El Salvador, India, Mexico, Norway, the Kingdom of Saudi Arabia, Turkey, and the United States. No comments were received from Honduras, Korea, or the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu. In their respective comments, Brazil, China, India, Mexico, and Turkey stated that they do not object to allowing public observation of the oral hearing in these disputes, but emphasized that this is without prejudice to the systemic views each has on the issue of public observation of panel and Appellate Body hearings. India and China stated that they wished to keep their oral statements and responses to questions confidential. The Kingdom of Saudi Arabia stated that it does not object to allowing public observation of the oral hearing in these disputes, but also exercised its right to keep its oral statement and responses to questions confidential. El Salvador stated that it does not object to allowing public observation of the oral hearing in these disputes, based on the conditions and modalities set out in Canada's request.

5. Norway and Australia stated their support for the participants' request to allow public observation of the oral hearing, including their statements and answers to questions as third participants. The United States supported the participants' request to allow public observation of the oral hearing, arguing that opening hearings to public observation serves to strengthen the legitimacy of the WTO dispute settlement system and that increased confidence in the dispute settlement process can translate into a great acceptance of the outcome of a dispute settlement proceeding. It further noted that past experience in holding open Appellate Body hearings has been positive. The United States confirmed that, should the Appellate Body authorize public observation of the oral hearing in this appeal, the United States would make its oral statement and answers to questions open to observation by the public.

6. We recall that requests to allow public observation of the oral hearing have been made, and have been authorized, in nine previous appellate proceedings.<sup>2</sup> In its rulings, the Appellate Body has held that it may authorize such requests by the participants, provided that this does not affect the confidentiality in the relationship between the third participants and the Appellate Body, or impair the integrity of the appellate process. We consider that the reasons previously expressed by the Appellate Body, and its interpretation of Article 17.10 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) in this regard, apply equally to the circumstances prevailing in these appellate proceedings.

7. In this appeal, the participants have suggested that the Appellate Body allow observation by the public of the oral hearing by means of simultaneous closed-circuit television broadcasting. They have further suggested that provision be made for the transmission to be turned off should the participants find it necessary to discuss confidential information or if a third participant should wish to keep its oral statement or responses to questions confidential. We agree that such modalities would operate to protect confidential information in the context of a hearing that is open to public observation, and would not have an adverse impact on the integrity of the adjudicative function performed by the Appellate Body. We also consider that, during public observation in previous appeals, the rights of those third participants that did not wish to have their oral statements made subject to public observation were fully protected.

8. For these reasons, the Appellate Body Division in these appellate proceedings authorizes the public observation of the oral hearing on the terms set out below. Accordingly, pursuant to Rule 16(1) of the Working Procedures for Appellate Review, we adopt the following additional procedures for the purpose of this appeal:

- a. The oral hearing will be open to public observation by means of simultaneous closed-circuit television broadcast, shown in a separate room to which duly registered delegates of WTO Members and members of the general public will have access.
- b. Oral statements and responses to questions by the third participants that have indicated their wish to maintain the confidentiality of their submissions will not be subject to public observation.

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<sup>2</sup>See fn 1.

- c. Any request by a third participant – that has not already done so – wishing to maintain the confidentiality of its oral statements and responses to questions should be received by the Appellate Body Secretariat no later than 17:00 Geneva time on Thursday, 7 March 2013.
- d. An appropriate number of seats will be reserved for delegates of WTO Members in the room where the closed-circuit television broadcast will be shown. WTO delegates wishing to observe the oral hearing are requested to register in advance with the Appellate Body Secretariat.
- e. Notice of the oral hearing will be provided to the general public on the WTO website. Members of the general public wishing to observe the oral hearing will be required to register in advance with the Appellate Body Secretariat, in accordance with the instructions set out in the WTO website notice.

Geneva, 19 February 2013

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