In the World Trade Organization

CANADA – MEASURES RELATING TO THE FEED-IN TARIFF PROGRAM (DS426)

First Written Submission by the European Union

Geneva, 14 February 2012

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US – Upland Cotton	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Corr.1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, 299

TABLE OF ABBREVIATIONS

Abbreviation	Description
APEC	Asia-Pacific Economic Cooperation
FIT	Feed-in tariff
FIT Program	Ontario's Feed-In Tariff Program established on 24 September 2009 (including microFIT)
FIT Generator	Supplier of energy under the FIT Contract
GA	Global Adjustment
GATT 1994	General Agreement on Tariffs and Trade 1994
HOEP	Hourly Ontario Energy Price
IESO	Independent Electricity System Operator
kW	Kilowatts
LDC	Local Distribution Company
MCP	Market Clearing Price
OEB	Ontario Energy Board
OPA	Ontario Power Authority
PV	Photovoltaic
RESOP	Renewable Energy Standard Program
SCM Agreement	Agreement on Subsidies and Countervailing Measures
TRIM	Trade-Related Investment Measure(s)
TRIMs Agreement	Agreement on Trade-Related Investment Measures

EXHIBITS

Number	Title
EU-1	APEC, 2011 Leaders' Declaration, *The Honolulu Declaration - Toward a Seamless Regional Economy* (Hawaii, November 2011) Annex C – Trade and Investment in Environmental Goods and Services
EU-2	Press Release: Canadian Manufacturing – Canadian Plant "Group declares Ontario's FIT Program protectionist", 21 October 2010
EU-3	Press Release: Law Times "Critics assail domestic-content rules under FIT", 22 November 2010
EU-4	Ontario Power Authority, Feed-In Tariff Program Rules Version 1.5.1, 31 October 2011 ("FIT Rules")
EU-5	Ontario Power Authority, Feed-in Tariff Contract Version 1.5.1, 31 October 2011 ("FIT Contract")
EU-6	Ontario Power Authority, microFIT Contract Version 1.6.1, 31 October 2011 ("microFIT Contract")
EU-7	FIT Program Interpretations of the Domestic Content Requirements
EU-8	OED On-Line: "Form"
EU-9	OED On-Line: "Support"
EU-10	IESO Monthly Average Prices, Average Weighted Hourly Price ("IESO: Average Weighted Hourly Price")
EU-11	OED On-Line: "Procurement"
EU-12	OED On-Line: "For"
EU-13	OED On-Line: "Purpose"
EU-14	OED On-Line: "Governmental"
EU-15	Canada's General Notes, Appendix I, Government Procurement Agreement (WT/Let/672)

I. INTRODUCTION

1. The European Union regrets having to go through WTO dispute settlement proceedings in the present case on an issue which manifestly runs afoul of the basic national treatment principle as enshrined in several provisions of the covered agreements.

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

3. The European Union observes that the Government of Canada itself (at federal level) has, in the context of the APEC, recently agreed to "[e]liminate, consistent with our WTO obligations, *existing local content requirements that distort environmental goods* and services trade in the region *by the end of 2012*, and refrain from adopting new ones, including as part of any future domestic clean energy policy".[1] The European Union notes that the measures at issue in this dispute have been taken by one of Canada's provinces and, in particular by the Government of Ontario. This should not be construed as an obstacle for Canada to fully comply with its commitments with the WTO since the actions taken at provincial or local level are attributed to the State.[2] Likewise, any international obligation undertaken by Canada becomes binding at all governmental levels.

4. The European Union appreciates Canada's interest to terminate existing domestic content requirements in the area of environmental goods, and in particular Ontario's FIT Program. Domestic content requirements are completely unnecessary and even alter the proper achievement of the legitimate objectives pursuit by FIT programs. Indeed, by imposing a protectionist requirement to benefit from Ontario's FIT Program, Ontario is rendering it more difficult and expensive to generate electricity from renewable sources, as it curtails the ability of generators to install the best available equipment at competitive prices. This step – i.e. the trade barriers and distortions introduced by the Ontario measures –

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1 APEC, 2011 Leaders' Declaration, *The Honolulu Declaration - Toward a Seamless Regional Economy* (Hawaii, November 2011) (http://www.apec.org/Meeting-Papers/Leaders-Declarations/2011/2011_aelm.aspx), Annex C – Trade and Investment in Environmental Goods and Services, second bullet point (emphasis added) (Exhibit EU-1).

2 ILC, *Draft articles on Responsibility of States for Internationally Wrongful Acts*, Article 4, Commentary (6) ("[T]he reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level").

defeats the logic of favouring the deployment of renewable energy equipment, as a category of environmental goods.[3]

5. The present case is therefore one in which protectionist industrial policy considerations stand in the way of the efficient achievement of a laudable goal of energy and environmental policy. The domestic content requirements in the FIT Program only truly serve the purpose of securing investments in equipment and components for renewable energy generation facilities in Ontario, reinforcing the competitive position of Ontario's industry to the detriment of other foreign producers, no matter the negative impact that those requirements have on the availability and choice of technologies for the installation of renewable electricity generation plants.

6. The European Union considers that the domestic content requirements in Ontario's FIT Program, and the protectionist interest they serve, are contrary to the fundamental national treatment principle and, thus, are inconsistent with the covered agreements.

7. In the present submission, after going through the procedural background, the measures at issue and the factual background of this dispute, most of them identical to the dispute in DS412, the European Union will examine its claims under the SCM Agreement, the TRIMs Agreement and the GATT 1994.

8. For the reasons explained below in more detail, the European Union requests the Panel to examine and provide recommendations and rulings on all fundamental aspects of this dispute, that is, the prohibited subsidy and the national treatment aspects. The European Union also invites the Panel to examine the EU claims in the order as presented in this submission. First, the European Union will show that the measures at issue are prohibited subsidies under Article 3.1(b) of the SCM Agreement and thus Canada violates its obligations under Article 3.2 of the SCM Agreement. Second, the European Union will demonstrate that the measures at issue are TRIMs falling under the scope of the TRIMs Agreement as well as requirements affecting the internal sale, purchase or use of products falling under Article III:4 of the GATT 1994. Third, the European Union will show that Article III:8 of the GATT 1994 does not apply in the present dispute. Fourth, once the European Union has shown that the TRIMs Agreement and the GATT 1994 are applicable to the measures at issue, the European Union will demonstrate that they fall under paragraph 1(a) of the Annex to the TRIMs Agreement and, therefore, that Canada violates Article 2.1 of the TRIMs Agreement. Finally, the European Union will show that, as a consequence of the violation of the TRIMs Agreement or in view of the requirements under Article III:4 of the GATT 1994, the measures at issue are also inconsistent with the national treatment principle included in Article III:4 of the GATT 1994.

[3] Ontario's FIT Program and, more in particular, its domestic content requirements, have also received other criticisms from several sources within Canada. See Press Release: Canadian Manufacturing – Canadian Plant "Group declares Ontario's FIT Program protectionist", 21 October 2010, http://d-bits.com/wp-content/uploads/2010/10/Press-Release-Manufacturing-Consortium.pdf (Exhibit EU-2); and Press Release: Law Times "Critics assail domestic-content rules under FIT", 22 November 2010, http://www.lawtimesnews.com/Focus-On/Critics-assail-domestic-content-rules-under-FIT (Exhibit EU-3).

II. PROCEDURAL BACKGROUND

9. On 11 August 2011, the European Union requested consultations with the Government of Canada ("Canada") pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), Article 8 of the Agreement on Trade-Related Investment Measures (the "TRIMs Agreement"), and Articles 4 and 30 of the Agreement on Subsidies and Countervailing Measures (the "SCM Agreement"), regarding Canada's measures relating to domestic content requirements in the feed-in tariff program (the "FIT Program").[4] The request was circulated on 16 August 2011 as document WT/DS426/1, G/sL/959, G/TRIMS/D/28, G/SCM/D87/1.2.[5]

10. Consultations were held on 7 September 2011 with a view to reaching a mutually satisfactory solution. Unfortunately, the consultations failed to resolve the dispute.

11. On 9 January 2012, the European Union requested that a Panel be established to examine this matter pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of the GATT 1994, Article 8 of the TRIMs Agreement, and Articles 4.4 and 30 of the SCM Agreement.

12. On 20 January 2012, the Dispute Settlement Body ("DSB") established a panel with the standard terms of reference of Article 7.1 of the DSU. On 23 January 2012, the Panel was composed pursuant to the agreement between the European Union and Canada on the following panellists:

Chairman:	Mr. Thomas Cottier
Members:	Mr. Alexander Erwin
	Mr. Daniel Moulis

13. On 7 February 2012, the Chairman announced that, pursuant to Article 9.3 of the DSU, the disputes DS412 and DS426 would be dealt with together and their timetables harmonised.

III. MEASURES AT ISSUE

14. The measures that are the subject of these proceedings are those relating to the FIT Program (including the microFIT Program) established by the Canadian province of Ontario in 2009 providing for guaranteed, above-market, long-term pricing for the output of renewable energy generation facilities[6] that contain a minimum percentage of domestic content. These measures include the following:

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4 By using the terms "FIT Program", the European Union includes both projects over 10 kilowatts (kW) and projects of 10 kW or less (microFIT). See http://fit.powerauthority.on.ca/. Thus, any reference to the FIT Program in the present submission should be understood as including the microFIT Program.

5 An addendum to the European Union's request for consultations was circulated on 24 August 2011 since the statement of available evidence with regard to the existence and nature of the subsidies in question was erroneously omitted from the request for consultations.

6 In particular, facilities utilising windpower with a contract capacity greater than 10 kW, and facilities utilising solar (PV).

- the *Electricity Act, 1998*, as amended,[7] including in particular Part II (Independent Electricity System Operator), Part II.1 (Ontario Power Authority) and Part II.2 (Management of Electricity Supply, Capacity and Demand) thereof, including in particular Section 25.35 (Feed-in tariff program);

- an Act to enact the *Green Energy Act, 2009* and to build a green economy, to repeal the *Energy Conservation Leadership Act, 2006* and the *Energy Efficiency Act* and to amend other statutes (the "*Green Energy and Green Economy Act, 2009*"),[8] including in particular Schedule B amending the *Electricity Act, 1998*;

- an Act to amend the *Electricity Act, 1998* and the *Ontario Energy Board Act, 1998* and to make consequential amendments to other Acts (the "*Electricity Restructuring Act, 2004*"),[9] including in particular Schedule A, Sections 29-32, enacting Part II.1 of the *Electricity Act, 1998*, and Sections 33-38, enacting Part II.2 of the *Electricity Act, 1998*, and Schedule B, Sections 17-18, enacting Sections 78.3-78.4 of the *Ontario Energy Board Act, 1998*;

- *Ontario Regulation 578/05* made under the *Ontario Energy Board Act, 1998* entitled "Prescribed Contracts Re Sections 78.3 and 78.4 of the Act";[10]

- Independent Electricity System Operator ("IESO") Market Manual, including in particular Part 5.5 ("Physical Markets Settlement Statements");[11]

- IESO Market Rules, including in particular Chapter 7 ("System Operations and Physical Markets"), Chapter 9 ("Settlements and Billing") and Chapter 11 ("Definitions");[12]

- FIT Direction dated 24 September 2009, from George Smitherman, Deputy Premier and Minister of Energy and Infrastructure, to Colin Andersen,

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7 *Electricity Act, 1998*, S.O. 1998, Chapter 15, Schedule A, as amended, http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_98e15_e.htm ("Electricity Act, 1998") (Exhibit JPN-005).

8 *Green Energy and Green Economy Act, 2009*, S.O. 2009, c. 12, Schedule B, http://www.ontla.on.ca/bills/bills-files/39_Parliament/Session1/b150ra.pdf ("Green Energy Act, 2009") (Exhibit JPN-101).

9 *Electricity Restructuring Act, 2004*, S.O. 2004, Chapter 23, http://www.e-laws.gov.on.ca/html/source/statutes/english/2004/elaws_src_s04023_e.htm ("Electricity Restructuring Act, 2004") (Exhibit JPN-008).

10 *Ontario Regulation 578/05*, as amended, http://www.canlii.org/en/on/laws/regu/o-reg-578-05/latest/o-reg-578-05.html ("Ontario Regulation 578/05") (Exhibit JPN-154).

11 IESO Market Manual Part 5.5: Physical Markets Settlement Statements, Issue 44.0, 12 October 2011, http://www.ieso.ca/imoweb/pubs/settlements/se_RTEStatements.pdf ("IESO Market Manual Part 5.5") (Exhibit JPN-082).

12 Independent Electricity System Operator, Market Rules for the Ontario Electricity Market, 12 October 2011, http://www.ieso.ca/imoweb/pubs/marketRules/mr_marketRules.pdf ("IESO Market Rules") (Exhibit JPN-079).

Chief Executive Officer, Ontario Power Authority ("OPA"), directing the OPA to develop a FIT Program and include a requirement that the applicant submit a plan for meeting the domestic (*i.e.*, Ontario) content goals in the FIT rules;[13]

- the FIT Rules, Version 1.5.1 (31 October 2011),[14] and the microFIT Rules, Version 1.6.1 (10 August 2011), issued by the OPA;[15]

- the FIT Contract, Version 1.5.1 (31 October 2011),[16] including General Terms and Conditions, Exhibits, and Standard Definitions, the microFIT Contract, Version 1.6.1 (31 October 2011), including Appendices,[17] and the Conditional Offer of microFIT Contract, Version 1.6.1, issued by the OPA;[18]

- the FIT Application Form (1 December 2009), and online microFIT Application, issued by the OPA;

- the FIT Price Schedule (3 June 2011),[19] and the microFIT Price Schedule (13 August 2010),[20] issued by the OPA;

- the FIT Program Interpretations of the Domestic Content Requirements (14 December 2009, as updated on 4 October 2010 and 26 April 2011), issued by the OPA;[21] and

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13 Directive from Minister of Energy and Infrastructure to Ontario Power Authority Regarding FIT Program, 24 September 2009, http://www.powerauthority.on.ca/sites/default/files/page/15420_FIT_Directive_Sept_24_09.pdf ("Minister's FIT Directive of 24 September 2009") (Exhibit JPN-102).

14 Ontario Power Authority, Feed-In Tariff Program Rules Version 1.5.1, 31 October 2011, http://fit.powerauthority.on.ca/sites/default/files/FIT%20Rules%20Version%201%205%201_Program%20Review.pdf ("FIT Rules") (Exhibit EU-4). See also Exhibit JPN-119 (identical on substance as to the matter at issue).

15 Ontario Power Authority, microFIT Rules Version 1.6.1, 10 August 2011, http://microfit.powerauthority.on.ca/sites/default/files/microFIT%20Rules%20Version%201.6.1.pdf ("microFIT Rules") (Exhibit JPN-157).

16 Ontario Power Authority, Feed-in Tariff Contract Version 1.5.1, 31 October 2011, http://fit.powerauthority.on.ca/sites/default/files/FIT%20Contract%20Version%201.5.1.pdf ("FIT Contract") (Exhibit EU-5). See also Exhibit JPN-127 (identical on substance as to the matter at issue).

17 Ontario Power Authority, microFIT Contract Version 1.6.1, 31 October 2011, http://microfit.powerauthority.on.ca/sites/default/files/Conditional%20Offer%20of%20microFIT%20Contract_Version%201.6.1_Program%20Review_0.pdf ("microFIT Contract") (Exhibit EU-6). See also Exhibit JPN-164 (identical on substance as to the matter at issue).

18 Ontario Power Authority, Conditional Offer of microFIT Contract Version 1.6.1, http://microfit.powerauthority.on.ca/sites/default/files/Conditional%20Offer%20of%20microFIT%20Contract_Version%201.6.1.pdf ("Conditional Offer of microFIT Contract") (Exhibit JPN-171).

19 FIT Price Schedule, 3 June 2011, http://fit.powerauthority.on.ca/sites/default/files/FIT%20Price%20Schedule_June%203%202011.pdf ("FIT Price Schedule, 3 June 2011") (Exhibit JPN-030).

20 microFIT Price Schedule, 13 August 2010, http://microfit.powerauthority.on.ca/pdf/microFIT-Program-price-schedule.pdf ("microFIT Price Schedule, 13 August 2010") (Exhibit JPN-031).

21 FIT Program Interpretations of the Domestic Content Requirements, http://fit.powerauthority.on.ca/table-final-interpretations (Exhibit EU-7).

- individual FIT and microFIT contracts executed by the OPA since the inception of the FIT Program on 24 September 2009.[22]

15. In brief, this dispute focuses on specific features of the above measures which, in view of the European Union, are in violation of several provisions of the covered agreements. In particular, at issue in the present dispute are the domestic content requirements included in the FIT Program with respect to wind and solar PV energy generation facilities, the domestic content requirements included in the microFIT Program for solar PV energy generation facilities as well as the individual contracts executed pursuant to the operation of the FIT and microFIT Programs including domestic content requirements (collectively referred hereinafter as "the FIT Program and its related contracts").

IV. FACTUAL BACKGROUND

16. The European Union observes that in DS412 Japan addresses the same measures as the ones before the Panel in the present dispute. The European Union also notes that, pursuant to paragraph 21 of the Working Procedures for the Panel, the parties can refer to evidence and arguments already submitted in the other dispute without the need to provide an equivalent exhibit or repeat them in their entirety.

17. Thus, in order to avoid repetition and with a view to conducting these proceedings in an efficient manner,[23] the European Union incorporates hereto the factual description, including all exhibits, of Japan's first written submission in DS412.[24]

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22 Although the European Union has not obtained copies of these contracts, there is evidence of their existence and content in the website of the OPA. In particular, as of 20 January 2012, there are 1,789 and 77 contracts executed relating to solar PV and wind respectively (see Bi-weekly FIT and microFIT report: 20 January 2012 (http://fit.powerauthority.on.ca/sites/default/files/Bi-Weekly%20FIT%20and%20microFIT%20Report%20January%2020%2C%202012.pdf). That these contracts contain local content requirements can be seen from their standard models available at the OPA's website
(FIT:
http://fit.powerauthority.on.ca/sites/default/files/FIT%20Contract%20Version%201.5.1_%20Program%20Review_0.pdf
microFIT:
http://microfit.powerauthority.on.ca/sites/default/files/Conditional%20Offer%20of%20microFIT%20Contract_Version%201.6.1_Program%20Review_0.pdf).

23 Appellate Body Report, *EC – Hormones*, para. 153 ("We can see a relation between timetable harmonization within the meaning of Article 9.3 of the DSU and economy of effort. In disputes where the evaluation of scientific data and opinions plays a significant role, the panel that is established later can benefit from the information gathered in the context of the proceedings of the panel established earlier. Having access to a common pool of information enables the panel and the parties to save time by avoiding duplication of the compilation and analysis of information already presented in the other proceeding. Article 3.3 of the DSU recognizes the importance of avoiding unnecessary delays in the dispute settlement process and states that the prompt settlement of a dispute is essential to the effective functioning of the WTO. In this particular case, the Panel tried to avoid unnecessary delays, making an effort to comply with the letter and spirit of Article 9.3 of the DSU").

24 This includes Japan's first written submission in DS412, paras. 11 – 180, together with Appendix I and Appendix II, and Exhibits JPN-001 to JPN-207.

V. LEGAL ARGUMENT

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

19. The European Union considers that the **root of the problem** in the present dispute is the inclusion of domestic content requirements in the FIT Program. The Government of Ontario, through the FIT Program, requires the utilisation of domestic equipment and components for certain renewable energy generation facilities[25] in order to obtain guaranteed, above-market, long-term pricing for the output of those facilities. The need to counter this blatant discrimination between domestic and imported products crystallised as the national treatment principle in several provisions of the covered agreements and is at the centre of non-tariff barriers that must be eliminated in the context of the WTO's multilateral trading system.[26] The pernicious effects on trade of such discrimination are multiplied by the provision of subsidies in the present dispute. Thus, the European Union considers that the relevant national treatment provisions of the SCM Agreement, the TRIMs Agreement and the GATT 1994 cited in the EU's Panel Request are applicable in this case.

20. In the European Union's view, the Panel should examine **both** fundamental and distinct aspects of this case,[27] i.e., the prohibited subsidy aspect and the national treatment aspect in itself, since only by examining both issues would the Panel be "giving the rulings provided for in the covered agreements"[28] in accordance with the aim of the dispute settlement mechanism "to secure a positive solution to a

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25 In particular, facilities utilizing wind power with a contract capacity greater than 10 kW, and facilities utilizing solar (PV).

26 GATT 1994, Preamble ("Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and *other barriers to trade* and to the *elimination of discriminatory treatment in international commerce*"). (emphasis added)

27 Panel Report, *Indonesia – Autos*, para. 14.33 ("As was the case under GATT 1947, we think that Article III of GATT 1994 and the WTO rules on subsidies remain focused on *different problems*. Article III continues to prohibit discrimination between domestic and imported products in respect of internal taxes and other domestic regulations, including local content requirements. It does not 'proscribe' nor does it 'prohibit' the provision of any subsidy *per se*. By contrast, the SCM Agreement prohibits subsidies which are conditional on export performance and on meeting local content requirements, provides remedies with respect to certain subsidies where they cause adverse effects to the interests of another Member and exempts certain subsidies from actionability under the SCM Agreement. In short, Article III prohibits discrimination between domestic and imported products while the SCM Agreement regulates the provision of subsidies to enterprises") (emphasis added).

28 Appellate Body Report, *Philippines – Taxes on Distilled Spirits*, para. 192 ("In erroneously abstaining from making findings under Article III:2, second sentence, and in failing to make recommendations that the Philippines bring itself into conformity with that provision in its Report addressing the complaint by the European Union (DS396), the Panel failed to 'make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements' in the dispute in DS396, as required under Article 11 of the DSU").

dispute".[29] Indeed, should the Panel make findings only with respect to the subsidy claims, Canada could withdraw the subsidy and keep the local content requirements in place at the implementation stage.[30] Likewise, should the Panel make findings only with respect to the national treatment discrimination, either under the TRIMs Agreement or the GATT 1994, the Panel would be affecting the EU's rights for the quick and effective remedy against prohibited subsidies.[31] Moreover, should the Panel examine one of these fundamental aspects and exercise judicial economy on the other, the Appellate Body could be called upon to examine those findings and, in the event of reversal, this would leave the European Union without a remedy.[32]

21. Based on these considerations, the European Union requests the Panel to examine the European Union's claims in the order followed in the present submission with a view to achieving a satisfactory settlement of the matter.[33]

22. First, the European Union will show that the measures at issue, which provide for guaranteed, above-market, long-term pricing for the output of certain renewable energy generation facilities that contain a minimum percentage of domestic content, are subsidies contingent upon the use of domestic over imported goods, namely contingent upon the use of equipment and components for renewable energy generation facilities produced in Ontario over such equipment and components imported from other WTO Members, including the European Union.

23. Second, the European Union will show that the measures at issue are trade-related investment measures (TRIMs) and requirements affecting the internal sale, purchase or use of products in the sense of Article 1 of the TRIMs Agreement and Article III:4 of the GATT 1994 respectively.

24. Third, in order to clarify whether the relevant national treatment provisions (Article 2.1 of the TRIMs Agreement, in conjunction with paragraph 1(a) of its Annex, and Article III:4 of the GATT 1994) are applicable in view of their explicit interrelationship, as a preliminary issue the European Union will examine whether the measures at issue fall within the scope of application of Article III of the GATT 1994, as provided by Article III:8 of the GATT 1994.

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29 DSU, Articles 11 ("… a panel should make … such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements") and 3.7 ("The aim of the dispute settlement mechanism is to secure a positive solution to a dispute").

30 E.g. simply by requiring a minimum domestic content for renewable energy generation facilities based in Ontario.

31 SCM Agreement, Article 4.7 ("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").

32 Panel Report, *China – Auto-Parts*, para. 7.371, footnote 641; Appellate Body Report, *China – Auto-Parts*, para. 208 ("We note that none of the participants have appealed the Panel's decision *to make* these alternative findings, or suggested that the Panel acted inappropriately in doing so. It is not unprecedented for panels to make alternative findings, and indeed this may be useful in resolving a dispute, particularly when, on appeal, the Appellate Body reverses other findings made by a panel").

33 DSU, Article 3.4 ("Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements").

25. Finally, once shown that Article III:8 of the GATT 1994 does not apply in the present case, the European Union will examine first the claims under the TRIMs Agreement since the TRIMs Agreement is more specific than Article III:4 of the GATT 1994 as far as the claims under consideration (i.e., domestic content requirements) are concerned.[34] In this respect, the European Union will show that, because the measures at issue require the purchase or use by the FIT Generators of equipment and components for renewable energy generation facilities of Ontario origin or source, these measures fall under paragraph 1(a) of the Annex to the TRIMs Agreement providing for an illustrative list of measures that are inconsistent with Article III:4 of the GATT 1994 and, thus, are inconsistent with Article 2.1 of the TRIMs Agreement. Then, the European Union will show that the measures at issue are also inconsistent with Article III:4 of the GATT 1994, both as a consequence of the violation of the TRIMs Agreement, and also because the measures accord less favourable treatment to imported equipment and components for renewable energy generation facilities than accorded to like products originating in Ontario.

A. The measures at issue are subsidies contingent upon the use of domestic over imported goods: Articles 3.1(b)and 3.2 SCM Agreement

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

27. In this section, first the European Union will show that the FIT Program amounts to a subsidy under Article 1.1 of the SCM Agreement. In particular, the European Union will show that the FIT Program provides a form of income or price support to the FIT Generators through guaranteed prices in the sense of Article 1.1(a)(2). The European Union will also demonstrate that, no matter how regarded, either as a direct transfer of funds, a potential direct transfer of funds or a purchase of goods, the FIT Program implies a financial contribution by the Government of Ontario, through its public agencies (and, in particular, through the OPA) and/or through private bodies entrusted or directed by the government to make FIT payments (i.e. LDCs) in the sense of Article 1.1(a)(1). Further, the European Union will establish that the FIT Program confers a benefit on the recipient.

28. Second, the European Union will show that the subsidy is "contingent … upon the use of domestic over imported goods" in the sense of Article 3.1(b) of the SCM Agreement.

29. Finally, the European Union will establish that the subsidy is specific and contrary to Canada's obligations under Article 3.2 of the SCM Agreement.

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[34] Panel Report, *Indonesia – Autos*, para. 14.63.

1. Subsidy: Article 1.1 SCM Agreement

30. Article 1.1 of the SCM Agreement provides that:

> For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> > (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
> >
> > (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)[1];
> >
> > (iii) a government provides goods or services other than general infrastructure, or purchases goods;
> >
> > (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;
>
> or
>
> (a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;
>
> and
>
> (b) a benefit is thereby conferred.

31. The European Union considers that the FIT Program amounts to a subsidy since it provides for a financial contribution or income/price support conferring a benefit on the recipient.

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

32. In the first place, the European Union argues that the FIT Program falls under the category of income or price support in Article 1.1(a)(2) of the SCM Agreement.

33. In this respect, the European Union considers that the term "or" between Articles 1.1(a)(1) and 1.1(a)(2) is used in an alternative manner, implying that the first element of the definition of subsidy can be met by either alternative.[35] In other

[35] Panel Report, *US – Upland Cotton*, paras 7.1494 ("With respect to the second question, we consider the meaning of the phrase '... serious prejudice to the interests of any other Member is caused or threatened by any such subsidization' (emphasis added) in Article XVI:1 of the GATT 1994. The main question is whether to read the 'or' inclusively, or exclusively. That is, are we to read this phrase

words, both categories (financial contribution and income/price support) are not mutually exclusive and have a meaning on their own. Indeed, although both alternatives may overlap,[36] they also apply to distinct situations. For instance, suppose that an industry is suffering losses throughout several years. Suppose that the government imposes an export restriction on an input which represents 90% of the variable costs of that industry. Such an export restriction would not amount to a financial contribution, at least on the basis of the current case law.[37] However, assuming constant demand of the product produced by that industry, because of the measure the industry would be available to increase its revenue out of the lower costs of production. In this sense, the government measure could be considered to "support" the income of the industry in question which, otherwise, would have continued its negative trend.[38]

34. Moreover, the purpose of Article 1.1(a)(2) was to incorporate the disciplines of the GATT 1947 into the SCM Agreement, in view of the negotiators' mandate to include the GATT provisions as much as possible into the new Uruguay Round Agreements.[39] For the purpose of the definition of subsidy, the negotiators

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in the sense of either one ('caused') or the other ('threatened'), but not both would be adequate to trigger the remedies in Article 7 of the SCM Agreement? Or should we read this phrase rather as 'caused or threatened' in the sense of either one or the other, or both in combination ('caused or threatened [to be caused]') would be adequate?") and 7.1497 ("The text of the cited legal provisions leads us to conclude that either serious prejudice, or threat of serious prejudice, or both in combination, may trigger the remedies available in Article 7 of the SCM Agreement. The existence of either one, or the other, is both a necessary and sufficient condition, in and of itself, to achieve this"); Panel Report, *US – Textile and Apparel Products*, para. 6.141 ("Turning to the prohibited effects - i.e., 'restrictive, distorting, or disruptive effects' - the Panel notes that these effects constitute alternative bases for a claim under the first sentence of Article 2(c), as is confirmed by the use of the disjunctive 'or'. Accordingly, independent meaning and effect should be given to the concepts of 'restriction', 'distortion' and 'disruption'. In this regard, we note that the ordinary meaning of the term 'restrict' is to 'limit, bound, confine'; that of the term 'distort' is to 'alter to an unnatural shape by twisting'; and that of the term to 'disrupt' is to 'interrupt the normal continuity of'. Thus, the first sentence of Article 2(c) prohibits rules of origin which create the effect of limiting the level of international trade ('restrictive' effects); of interfering with the natural pattern of international trade ('distorting' effects); or of interrupting the normal continuity of international trade ('disruptive' effects)"); and Panel Report, *US – Shrimp (Thailand)*, para. 7.136 ("We consider that an interpretation of the word 'or' to permit the combined use of bonds and cash deposits is consistent with the Appellate Body's interpretation of the word 'or' in *US - FSC (Article 21.5 - EC II)*. In that case, the Appellate Body found that the word 'or' in respect of the phrase 'existence or consistency' in Article 21.5 of the DSU should be interpreted to permit Article 21.5 proceedings addressing both the 'existence' and the 'consistency' of implementation measures, not only one or the other. Since the Appellate Body was interpreting a similar use of the word 'or' in *US - FSC (Article 21.5 - EC II)*, the Appellate Body's findings regarding that matter offer useful guidance that we consider it appropriate to follow in these proceedings").

36 E.g., a payment of 100 by the government to an enterprise could be a direct transfer of funds or income support in the sense of Article XVI of the GATT 1994.

37 Panel Report, *US – Export Restraints*, para. 8.75.

38 Panel Report, *China – Raw Materials*, para. 7.430 ("An export restriction on an exhaustible natural resource, by reducing the domestic price of the materials, works in effect as a subsidy to the downstream sector, with the likely result that the downstream sector will demand over time more of these resources than it would have absent the export restriction").

39 Negotiating Group on Subsidies and Countervailing Measures, Checklist of issues for negotiations, Note by the Secretariat, MTN.GNG/NG10/W/9, 7 September 1987, pp. 4 and 5 ("The mandate of the Negotiating Group is to strengthen disciplines on all subsidies. The negotiations therefore do not start from scratch. There exists a certain degree of discipline and this existing discipline needs to be

incorporated the language of Article XVI:1 of the GATT 1947 that covered "any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory". The first reference to income and price support as an element of the definition of subsidy appeared in Cartland's first draft: "there is any form of income or price support in the sense of Article XVI of the General Agreement".[40] This element remained constant in the definition of subsidy until its final version of what today is the SCM Agreement. Thus, there was a conscious decision by the negotiators to provide for an alternative to meet the first element of the definition of subsidy.

35. The terms "any form" indicate the broad scope of this category, in the sense that it includes all forms that directly or indirectly provide income or price support. In this sense, the dictionary meaning of "form" refers to "one of the different modes in which a thing exists or manifests itself; a species, kind, or variety" also a "manner, method, way".[41] Thus, "any form" includes any way or manner in which the government provides income or price support to someone.

36. "Support" denotes "the action of contributing to the success or maintaining the value of something".[42] The term "support" is often used in the context of agriculture, as referring to government support programmes.[43] In this case, the meaning of "support" in Article 1.1(a)(2) refers to the action of the government that contributes to the success or maintaining the value of prices or of the income received by someone.

37. Finally, "in the sense of Article XVI of the GATT 1994" implies all forms of income or price support that directly or indirectly increase exports of "any product" from a WTO Member's territory or reduce imports of this product within its territory. This effect, potential or actual, is explicitly contemplated in Article XVI:1 of the GATT 1994: "…including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory".

38. In sum, the European Union considers that Article 1.1(a)(2) of the SCM Agreement covers government measures of any form that directly or indirectly provide income or price support to someone and that has as an effect, potential or actual,[44] increasing exports of any product from a WTO Member's territory or reducing imports of this product within its territory. This interpretation is also

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respected and strengthened. (…) It is necessary to recognize the primacy of addressing trade distorting subsidies, i.e. as defined in Article XVI:1, 'any subsidy ... which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into its territory'").

40 Article 3.1(a)(2), MTN/GNG/NG10/W/38/Rev.1 (4 September 1990).

41 OED On-line, entries I.5.b and I.10 (Exhibit EU-8).

42 OED On-line, entry I.3.b (Exhibit EU-9).

43 SCM Agreement, Article 15.4 ("…whether there has been an increased burden on government support programmes"); see also Agreement on Agriculture, Article 6 and Annexes II and III ("domestic support").

44 By "potential" the European Union refers to those effects which naturally follow from the overall architecture, design and structure of the measure, without the need of "observed" or actual effects on the market.

consistent with the object and purpose of the SCM Agreement, i.e., "to increase and improve GATT disciplines relating to the use of both subsidies and countervailing measures".[45]

39. In view of this interpretation, the European Union considers that the measures at issue amount to a form of income or price support in the sense of Article XVI of the GATT 1994 and thus fall under Article 1.1(a)(2) of the SCM Agreement. The European Union incorporates hereto the arguments raised by Japan in its first written submission in DS412 in this respect.[46]

40. The FIT Program is a measure designed by the Government of Ontario to guarantee the price of the electricity supplied by the FIT Generators for a long period of time (20 years). As explained by Japan in its first written submission in DS412[47] and by the European Union elsewhere in this submission, the FIT Program operates as a price support system whereby the Government of Ontario, through its agency, the OPA,[48] contractually agrees with the FIT Generators a rate and then pays such a rate directly (through another agency, the IESO)[49] or indirectly (through LDCs) to the FIT Generators. The ultimate cost of the measure is borne by consumers, which contribute to the Global Adjustment when paying the electricity bills. Only in the rare case that the market rate (i.e. MCP/HOEP) goes above the guaranteed rates, the FIT Generator will receive payments for the supply of electricity under market conditions without the additional financial incentive created by the FIT Program. In the other (vast majority of) cases, the FIT Generator will obtain an above-market rate. Thus, the FIT Program provides "price" support (in the sense that agreed rates will always be above or at least at market rates) to electricity generated by the FIT Generators. At the same time, the guaranteed, above-market rates provide for "income" support of FIT Generators. Without those rates, the income or proceeds of the FIT Generators from the same amount of generated electricity supplied into the grid would be lower, following the lower and unsupported market rates.

41. Moreover, there is income or price support "in the sense of Article XVI of GATT 1994". In the present case, the FIT Program contains local content requirements which, by their own nature, reduce or even eliminate imports of equipment and components for renewable energy generation facilities into Ontario.

42. Consequently, the European Union submits that the FIT Program and its related contracts provide a form of income or price support to the FIT Generator through long term, guaranteed, above-market rates[50] in the sense of Article 1.1(a)(2) of the SCM Agreement.

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45 Appellate Body Report, *US – Carbon Steel*, para. 73, footnote 65.

46 Japan's first written submission in DS412, paras. 205 – 214.

47 Japan's first written submission in DS412, paras. 113 – 156.

48 Japan's first written submission in DS412, paras. 60 – 64.

49 Japan's first written submission in DS412, paras. 65 – 68.

50 Generally, the European Union employs the term "rate" to refer to the rate *received* by a generator, and the term "price" to refer to the price *paid* by a consumer. The monies collected from the prices paid by consumers are used to settle the rates owed to generators.

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

43. The European Union also argues that the guaranteed electricity rates that the OPA contractually commits to under the FIT Program and its related contracts result in a "financial contribution by a government or any public body" as defined under Article 1.1(a)(1) because they involve a "direct transfer of funds" from the Government of Ontario. The financial contribution is granted once the OPA signs the FIT Contract with the FIT Generator and agrees to provide the guarantee rates, either through disbursements made by the IESO or through LDCs.

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

i) Direct transfer of funds

45. As explained by Japan it its first written submission in DS412,[51] there are two components of the FIT Contract rates: (i) the market rate (i.e., MCP/HOEP); and (ii) a Global Adjustment that reflects the difference between the market rate and the FIT Contract rate. The FIT Generators are entitled to both components – i.e., their entire contract rate – for the amount of electricity supplied to a distribution or transmission system up to the project's contracted capacity.

46. According to the FIT Rules and the FIT Contract, the OPA commits to paying the guaranteed electricity rates.[52] The manner in which the payments to the FIT Generators are made (or, said in other words, how the OPA "settles" the payments with the FIT Generators) varies depending on whether the project is connected to the transmission system or the distribution system. The primary difference is that FIT Generators that are connected to the transmission system settle the HOEP with the IESO and the Global Adjustment with the OPA, while FIT Generators connected to the distribution system settle their entire contract rate (*i.e.*, HOEP and the GA) with their local distributor (LDC), which in turn settles the GA with the OPA through the IESO.[53] In any event, the ultimate liability for payments under the FIT Contract lies with the OPA, regardless of whether a project is

51 See in particular Japan's first written submission in DS412, paras. 142 – 150, 156 and 189 – 191, which are incorporated by reference into this submission.

52 FIT Rules, Sections 8.1 and 8.2 (Exhibit EU-4); FIT Contract, Articles 4.2 and 4.3 (Exhibit EU-5); and microFIT Rules, Section 5.2 (Exhibit JPN-157).

53 IESO Market Manual Part 5.5, Section 1.6.11.2 (Exhibit JPN-082).

transmission-connected or distribution-connected.[54] FIT projects with capacity greater than 10 MW typically connect to the transmission system, and FIT projects with capacity less than or equal to 10 MW (including microFIT projects) typically connect to the distribution system.[55]

47. The OPA exercises its governmental authority to collect the Global Adjustment from electricity consumers through the IESO.[56] The OPA, which is a public body,[57] directly transfers (out of the revenue collected for the GA) the difference between the market rate of electricity that a generator would receive through the standard operation of the market (i.e., MCP/HOEP) and the rate enjoyed by a generator under a FIT Contract. Thus, the transfer of that sum to the FIT Generator amounts to "a government practice [that] involves a direct transfer of funds" in the sense of Article 1.1(a)(1)(i) of the SCM Agreement.

48. The European Union considers that the contractual commitments undertaken by the OPA pursuant to the FIT Contract are better characterised as a "direct transfer of funds" in the sense of Article 1.1(a)(1)(i) of the SCM Agreement because future payments are made unconditionally (other than the nature of the contract, i.e. the expected delivery of electricity in exchange of the payment).[58] Indeed, under the FIT Contract, the FIT Generators commit to supply the generated electricity into the grid in exchange of a payment at the agreed rates. Such generation electricity is expected in order to obtain the advantageous guaranteed rate. Thus, for the purpose of the financial contribution determination, the payments committed under legally binding contracts should be considered as "granted" or "transferred", even though physically those payments have not yet occurred or have not been made.[59]

49. Importantly, in the European Union's view, the existence of the financial contribution can be found in the FIT Program as such, as explained in the FIT Rules, but also in every contract executed pursuant to the FIT Program. Indeed, the FIT Rules and the FIT Contract contain the binding commitment by the OPA to pay the guaranteed rates if and when the FIT Generator supplies the electricity into the grid.[60] Moreover, no matter what happens, the OPA is ultimately liable to

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54 FIT Rules, Section 8.4.

55 *See* FIT Program Overview, p. 18 (Exhibit JPN-037); microFIT Program Overview, p. 8 (Exhibit JPN-038).

56 See Japan's first written submission in DS412, paras. 101, 107, 143, 190 and 191.

57 See Japan's first written submission in DS412, paras. 195 – 204.

58 Panel Report, *Brazil – Aircraft*, para. 7.71 ("…payments may be 'granted' where the unconditional legal right of the beneficiary to receive the payments has arisen, even if the payments themselves have not yet occurred"), as confirmed by the Appellate Body Report, *Brazil – Aircraft*, para. 158.

59 Panel Report, *Australia – Automotive Leather II*, para. 9.39 ("The ordinary meaning of the term 'provision' is 'the act or an instance of providing'. The act or instance of providing the grant payments in this case was the grant contract, which established the conditions for the disbursement of the grant funds. Thus, the language of the request for establishment specifically includes the grant contract. Moreover, the ordinary meaning of the term 'grant' means 'the process of granting or a thing granted', and therefore includes both the government's commitment to make payments (that is, the grant contract), and the grant payments themselves, including all possible disbursements, whether past or future").

60 FIT Rules, Section 8.1(b) and 8.2(a) (Exhibit EU-4); FIT Contract, Articles 4.2 and 4.3 (Exhibit EU-5); and microFIT Rules, Section 5.2 (Exhibit JPN-157).

make those payments. This is laid out in Section 8.4 of the FIT Rules which, while reserving the right of the OPA to make alternate arrangements for settlement, nonetheless states that, "[n]otwithstanding other parties being involved in the settlement process, the OPA shall remain liable to the Supplier for the Contract Payments".[61] The existence of a binding legal commitment thus proves the granting of the financial contribution. Something different is how the payments are actually made later on, i.e. directly by the OPA or indirectly through IESO/LDCs. The European Union considers that the fact that the OPA uses IESO/LDCs as vehicles to make the agreed payments under the FIT Contracts does not imply that the financial contribution only exists at that moment. Further, the fact that the OPA uses LDCs as vehicles to make the agreed payments under the FIT Contracts does not imply that LDCs have been entrusted or directed to provide the financial contribution.[62] In this respect, the financial contribution is "granted" pursuant to the existence of the legal commitments undertaken by the OPA whereas the "payments" made later on by the OPA or other operators are payments or disbursements carried out as a consequence of the existence of the financial contribution (i.e. the legal commitment undertaken by the OPA as contained in each related contract).

50. Consequently, the European Union submits that the legal commitment to transfer the difference between the market rate of electricity that a generator would receive through the standard operation of the market (i.e., MCP/HOEP) and the rate enjoyed by a generator under a FIT Contract to the FIT Generator amounts to "a government practice [that] involves a direct transfer of funds" in the sense of Article 1.1(a)(1)(i) of the SCM Agreement.

ii) Potential direct transfer of funds

51. As mentioned before, the European Union considers that the contractual commitments undertaken by the OPA pursuant to the FIT Contract are better characterised as a "direct transfer of funds" in the sense of Article 1.1(a)(1)(i) of the SCM Agreement, rather than as a "potential direct transfer of funds". The panel in *EC – Large Civil Aircraft* elaborated on the distinction between "direct transfer of funds" and "potential direct transfer of funds" as follows:

61 FIT Rules, Section 8.4 (Exhibit EU-4).

62 The European Union observes that, for the purpose of determining whether there is a financial contribution by the government under Article 1.1(a)(1), whether payments are made directly by the OPA or indirectly by the IESO, through the IESO settlement system is irrelevant. Both payments are made by government agencies. See Japan's first written submission, paras. 60 – 68.

> [W]hen assessing whether a transaction involves a "potential direct transfer{} of funds", the focus should be on the existence of a government practice that involves an obligation to make a direct transfer of funds which, *in and of itself*, is claimed and capable of conferring a benefit on the recipient that is separate and independent from the benefit that might be conferred from any future transfer of funds. This can be contrasted with financial contributions in the form of direct transfers of funds, which will result in a benefit being conferred on a recipient when there is a government practice that involves a direct transfer of funds.[63]

52. In the present case, the obligation to make the committed payments and thus pay the agreed electricity rates in and of itself does not appear to confer a benefit on the recipient that is separate and independent from the benefit that is conferred from any actual transfer of funds occurring in the future. Thus, the European Union considers that it is more appropriate to characterise the FIT Program and its related contracts as providing for direct transfers of funds (and, in particular, "grants") within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.[64]

53. In any event, in the alternative, the European Union incorporates hereto the arguments made by Japan in its first written submission in DS412 in this respect.[65]

iii) Purchase of goods

54. The European Union considers that in the present case the OPA does not purchase electricity[66] from the FIT Generators. The FIT Contract is **not** a purchasing agreement. Otherwise, the terms of the FIT Contract would have been different. Notably, Article 3.3(c) of the FIT Contract states that:

> The Supplier shall *sell, supply or deliver* all Future Contract Related Products *as requested, directed or approved by the OPA*, provided that the OPA shall not require the Supplier to sell, supply or deliver any Future Contract Related Product where the Approved Incremental Costs in relation to such Future Contract Related Product are reasonably expected to exceed the total revenues received by the Supplier from the sale, supply or delivery of such Future Contract Related Product. (*emphasis added*)

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63 Panel Report, *EC – Large Civil Aircraft*, para. 7.304.

64 Panel Report, *EC – Large Civil Aircraft*, para. 7.379 ("[A]lthough a number of the disbursements have not yet been effected, it is more appropriate to characterize the relevant LA/MSF contracts as direct transfers of funds (and in particular 'loans') within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement").

65 Japan's first written submission in DS412, paras. 192 – 193.

66 The European Union considers that the electricity generated through the FIT Contracts amounts to a "product", rather than a service. This becomes evident when examining the FIT Contracts, which repeatedly refers to "Capacity Products", "Related Products" and "Future Contract Related Products" as defined terms (see FIT Contract, Appendix I – Standard Definitions). Moreover, the FIT Generators do not provide the service of distributing electricity. They generate electricity which is the product concerned.

55. It is quite telling that the FIT Contract does not establish right away that "the Supplier shall sell its products to OPA" or that the "OPA commits to purchase the Supplier's Products". In contrast, the FIT Contract is drafted so that there is an obligation for the FIT Generator to "sell, supply or deliver" the generated electricity "as requested, director or approved by OPA".

56. Indeed, based on their capacity, the electricity generated by the FIT Generators goes into the transmission system (i.e., the IESO-controlled grid) or the distribution system. Both State-owned and private operators[67] in the transmission system pay (and thus purchase) the electricity supplied by the FIT Generators at the market rate (MCP/HOEP), and these operators sell the electricity to consumers (at OEB's regulated prices).[68] Consumers also pay the GA which is used by the OPA to settle the payments with the FIT Generators. Similarly, both municipally owned operators and private operators in the distribution system pay (and thus purchase) the electricity supplied by the FIT Generators at the market rate (MCP/HOEP) plus the agreed rate. The OPA settles that "extra" payment with those operators which sell the electricity to consumers (who pay for it including the GA). In other words, the purchaser of the electricity (once plugged into the grid) is the distributor who ultimately resells it to consumers.

57. Thus, the OPA's role is more of the nature of an intermediary (like an agent or a clearing house) where the OPA does **not** actually purchase electricity. Rather, electricity is purchased by other market operators (either at market rates or above, i.e., at "regulated" rates), while the OPA pays the above-market rates agreed contractually with the FIT Generator.[69] This tallies with the OPA's statutory role "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".[70] Such a promotion does not require purchasing electricity from the FIT Generators, but to support the electricity generated by the FIT Generators by providing guaranteed, above-market and long-term rates. Thus, in the European Union's view, the transfer of the guaranteed, above-market rates to the FIT Generators is better characterised as a "direct transfer of funds".

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

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67 Japan's first written submission in DS412, paras. 47, 50 – 53.

68 Japan's first written submission in DS412, paras. 4, 69 – 73 and 224.

69 In other words, the situation of the present case is not that Government A purchases product X from Company A and then Government A gives the purchased product to Company B. Rather, in this case Government A directs Company A to sell product X at 5 (market price) to Company B and then Government A pays 5 as the difference between the market price and the agreed price between the Government A and Company A. Thus, Government A transfers funds to Company A in order to honour the commitment of paying the extra amount.

70 *Electricity Act, 1998*, Section 25.2(1)(d) (Exhibit JPN-005).

iv) Entrustment or direction

59. In the alternative, the European Union also argues that the disbursements made by other private operators (LDCs) paying the guaranteed electricity rates that the OPA contractually commits itself to pay under the FIT Program result in a "financial contribution by a government" as defined under Article 1.1(a)(1), in any of the forms discussed above, because they involve entrustment or direction in the sense of Article 1.1(a)(1)(iv) of the SCM Agreement.

60. As Japan explained in detail in its first written submission in DS412, for distribution-connected projects, the FIT Generator settles the entire contract rate (i.e., the full amount owed to the FIT Generator under the contract) with the LDC, which then settles with the OPA through the IESO-settlement system to ensure that the LDC ends up paying only the wholesale price for electricity.[71] In other words, it is the LDC who pays the agreed electricity rates to the FIT Generator and thus transfers the funds in the sense of Article 1.1(a)(1)(i).[72] However, it does so under the entrustment or direction of the OPA.[73] Transmitters and distributors are obliged to grant priority connection access to the FIT Generators.[74] Moreover, transferring the agreed electricity rate (rather than paying the market rate or HOEP) amounts to one of the functions that would normally be vested in the OPA (as the market regulator)[75] and in practice, in no real sense, differs from what the OPA does with respect to FIT projects connected to the transmission system in pursuit of its statutory functions.

61. Consequently, the European Union considers that the disbursements made by other private operators (LDCs) paying the guaranteed electricity rates that the OPA contractually commits itself to pay under the FIT Program result in a "financial contribution by a government" in the sense of Article 1.1(a)(1)(iv) of the SCM Agreement.

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71 Japan's first written submission in DS412, paras. 145 – 147.

72 In the alternative, the European Union also argues that the type of government function entrusted or directed on LDCs amounts to a "potential direct transfer of funds" or purchases of goods in the sense of items (i) and (iii) of Article 1.1(a)(1) of the SCM Agreement.

73 Japan's first written submission in DS412, paras. 52 ("…the majority of LDCs are owned by Ontario municipal governments…") and 147 (referring to the Retail Settlement Code by the LDC, Section 3.2 ("A distributor shall purchase energy from an embedded retail generator within its service area (…) [A] distributor shall settle all applicable payments or charges associated with the contract [between the OPA and the embedded retail generator]"). See also Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 110, 111 and 116.

74 *Electricity Act, 1998*, Section 26(1)(1.1) (Exhibit JPN-005) ("[A] transmitter or distributor shall provide, in accordance with its licence, priority connection access to its transmission system or distribution system for a renewable energy generation facility").

75 *Electricity Act, 1998*, Section 25.2(1)(d) (Exhibit JPN-005).

v) Conclusion: the FIT Program and its related contracts amount to a financial contribution

62. In sum, no matter how the Panel addresses this question,[76] the European Union considers that the FIT Program and its related contracts amount to a "financial contribution" in the sense of Article 1.1(a)(1) of the SCM Agreement.

(c) Benefit: Article 1.1(b) of the SCM Agreement

63. Under Article 1.1(b) of the SCM Agreement, the financial contribution must confer a "benefit" in order to constitute a subsidy. In *Canada – Aircraft*, the Appellate Body clarified what must be demonstrated in order to establish that a "benefit is ... conferred" within the meaning of Article 1.1(b). First, a benefit must be shown to have been conferred on a "recipient".[77] In support, the Appellate Body referred to Article 14, which requires the calculation of a subsidy in terms of the "benefit *to the recipient*".[78] Accordingly, the focus of the inquiry under Article 1.1(b) of the SCM Agreement "should be on the recipient and not on the granting authority".[79]

64. Second, whether a "benefit" has been "conferred" requires a panel to determine whether the recipient has been made "better off" than it would have been absent the financial contribution. In *Canada – Aircraft*, the Appellate Body stated that the "marketplace provides an appropriate basis for comparison in determining whether a 'benefit' has been 'conferred', because the trade-distorting potential of a 'financial contribution' can be identified by determining whether the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market".[80]

65. The context provided by Article 14 of the SCM Agreement confirms that the marketplace is the appropriate basis for comparison. Article 14(a)-(d) sets out various guidelines and benchmarks for determining whether a "benefit" arises from a government's provision of equity capital, loans, loan guarantees, goods or services, and its purchase of goods. Under a "benefit" analysis, a comparison is made between the terms and conditions of the financial contribution when it is granted with the terms and conditions that would have been offered on the market at that time. That benchmark entails a consideration of what a market participant would have been able to secure on the market at that time. Consequently, the determination of benefit under Article 1.1(b) of the SCM Agreement is an *ex ante*

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76 The European Union invites the Panel to make alternative findings with respect to its determination as to whether the FIT Program and its related contracts amount to income or price support or any of the different types of financial contribution. Indeed, should the Panel choose only one, the lack of alternative findings would prevent that, in case of reversal, the Appellate Body could complete its analysis.

77 Appellate Body Report, *Canada – Aircraft*, paras. 155 and 156.

78 Appellate Body Report, *Canada – Aircraft*, para. 155. (original emphasis)

79 Appellate Body Report, *Canada – Aircraft*, para. 154.

80 Appellate Body Report, *Canada – Aircraft*, para. 157.

analysis that does not depend on how the particular financial contribution actually performed after it was granted.[81]

66. Third, in determining whether a financial contribution confers a benefit on the recipient there is no need to quantify the amount of such a benefit.[82]

67. Fourth, the European Union considers that the principles developed around the concept of financial contribution to establish the existence of a benefit to a recipient equally apply *mutatis mutandi* in cases where there is income or price support in the sense of Article 1.1(a)(2) of the SCM Agreement. Thus, in order to show whether the income or price support confers a benefit on the recipient, a proper market benchmark has to be identified.

68. Applying these principles to the facts of the present case, the European Union submits that the FIT Program and its related contracts provide a benefit to the recipient, i.e. the FIT Generator.

i) Benefit: income or price support

69. The European Union submits that, for the same reasons as explained by Japan it its first written submission in DS412,[83] the income or price support provided by the FIT Program and the relevant contracts confer a benefit on the FIT Generators.

70. The Government of Ontario (through the OPA) guarantees rates for the FIT Generators that the market would not have provided. In the European Union's view, the proper market benchmark in the present case is the market for wholesale electricity in Ontario administered by the IESO.[84] Indeed, absent the FIT Program and the FIT Contracts, the FIT Generator would sell the electricity and compete with other generators on the wholesale electricity market. In its first written submission in DS412, Japan has accurately described how this market operates and thus the European Union will not repeat it in full.[85] It results that the FIT Generators would obtain the MCP/HOEP absent the FIT Program. The annual weighted average HOEP was 3.16 cents/Kw in 2009, 3.79 cents/Kw in 2010 and 3.15 cents/Kw in 2011.[86]

71. Japan has already provided a table with the relevant "FIT Price Schedule" showing a range between 13.5 cents/Kw and 80.2 cents/Kw depending on the type of

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81 Appellate Body Report, *EC – Large Civil Aircraft*, para. 706.

82 Appellate Body Report, *US – Upland Cotton*, paras. 463 – 467.

83 Japan's first written submission in DS412, paras. 243 – 247.

84 Japan's first written submission in DS412, para. 68. See also Independent Electricity System Operator, Marketplace Training: Introduction to Ontario's Physical Markets, October 2010, http://www.ieso.ca/imoweb/pubs/training/IntroOntarioPhysicalMarkets.pdf ("IESO: Ontario's Physical Markets") (Exhibit JPN-080).

85 Japan's first written submission in DS412, paras. 79 – 89 and Appendix II.

86 IESO Monthly Average Prices, Average Weighted Hourly Price, http://www.ieso.ca/imoweb/siteshared/monthly_prices.asp ("IESO: Average Weighted Hourly Price") (Exhibit EU-10).

renewable energy produced.[87] Since in determining whether a financial contribution confers a benefit on the recipient there is no need to quantify the amount of such benefit,[88] the European Union considers that a comparison between annual weighted average HOEP and the "FIT Price Schedule" suffices to demonstrate the existence of benefit in this case.[89] No commercial entity, i.e. no private entity acting pursuant to commercial considerations, would provide payments to the FIT Generators on the same basis as those agreed pursuant to the FIT Program. Consequently, the FIT Program confers a benefit on the FIT Generators.

72. Moreover, the European Union considers that the structure of the Ontario electricity market (where many operators, including generators, are owned and controlled by the government of the province, where how the market operates is conducted by the IESO, and where transmission, distribution and retail rates for electricity are regulated by the OEB) does not imply that the MCP/HOEP is not an appropriate market benchmark. In other words, even if regulated rates, including those of some generators as well as prices at the retail level, could not be considered as representative, the MCP/HOEP is established by market forces and thus is an appropriate market benchmark.[90] The MCP/HOEP is determined by supply and demand on the basis of the bids and offers received from participants; the MCP/HOEP is thus set at the point at which supply and demand meet, and this is consequently the market price for the purpose of Article 1.1(b) of the SCM Agreement. Even Ontario describes its wholesale electricity market as a "competitive market" in which the prices paid by consumers are based on supply and demand and reflect the cost of producing electricity.[91] The European Union also observes that the IESO explicitly acknowledges that the "market price" for electricity in Ontario, the one based on supply and demand is the MCP/HOEP.[92] It also recognises that the MCP/HOEP are taken as the reference for making settlement payments when different generators receive any regulated rates.[93] This

87 Japan's first written submission in DS412, para. 141. Guaranteed rates for mircroFIT projects are identical (Exhibit JPN-031).

88 Appellate Body Report, *US – Upland Cotton*, paras. 463 – 467.

89 See also Japan's first written submission in DS412, paras. 219 – 220.

90 In its first written submission in DS412, Japan describes the different types of generators in Ontario and how some, even if they are owed by the Government of Ontario (e.g. OPG), they also participate in the wholesale market for electricity ("unregulated assets"). See Japan's first written submission in DS412, paras. 29 – 45.

91 Quick Takes: Electricity Pricing, p. 1 (Exhibit JPN-003). See also Japan's first written submission in DS412, para. 79.

92 See Quick Takes: Electricity Pricing, p. 1 (Exhibit JPN-003) ("**1. Market Prices**. The wholesale market price for electricity is based on supply and demand. Suppliers submit offers to sell electricity and wholesale buyers submit bids to buy electricity. Our software then uses these offers and bids to match electricity supply with demand, and establishes the five-minute Market Clearing Price (MCP), as well as the Hourly Ontario Energy Price (HOEP)").

93 See Quick Takes: Electricity Pricing, p. 2 (Exhibit JPN-003) ("OPG offers energy from these regulated generators into the market. If their net revenue is less than the regulated price, they receive whatever extra payments are needed to meet that price. If their revenue is more than the contract price, they pay back the excess. The difference (either plus or minus) is factored into the global adjustment. (…) As with the regulated OPG generators, the difference between what OEFC receives through market payments and the contract amounts paid for NUG generation is factored into the global adjustment").

is also reflected on the basic settlement system in the FIT Contracts as well.[94] In other words, contractual rates have as a reference the market price for electricity (MCP/HOEP), which in this case, the European Union considers as the proper market benchmark.

73. Thus, the fact that the government of the province can be considered as a major supplier of electricity in Ontario or the fact that electricity rates and prices for consumers are heavily regulated are irrelevant for establishing the appropriate market benchmark in this case. Put simply, the MCP/HOEP is not disqualified as a market benchmark because of the government's involvement in the electricity market; rather, the MCP/HOEP is the result of a "competitive market" in the process of full liberalisation.

74. Furthermore, the relevant market benchmark for the purpose of determining the existence of a benefit under Article 1.1(b) of the SCM Agreement does not need to take into account the higher costs of generating electricity from renewable energy sources in comparison to other sources. In this respect, the Appellate Body in *EC – Large Civil Aircraft* stated that:

> The marketplace to which the Appellate Body referred in *Canada–Aircraft* reflects a sphere in which goods and services are exchanged between willing buyers and sellers. A calculation of benefit in relation to prevailing market conditions thus demands an examination of behaviour on both sides of a transaction, and in particular in relation to the conditions of supply and demand as they apply to that market. A market price is not determined solely by reference to either supply-side or demand-side considerations without reference to the other. Even where a market is limited for a particular good or service, that market price is not dictated solely by the price a seller wishes to charge, or by what a buyer wishes to pay. Rather, the equilibrium price established in the market results from the discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in that market. The costs to the government of an investment in creating a particular good or service cannot itself determine the market price because actual expenditures by the government may not necessarily be redeemed, or be redeemable, on the market.

94 FIT Contract, Articles 4.2 and 4.3 (Exhibit EU-5).

> The Panel's analysis does not adhere to this market logic. For example, the Panel stated in respect of the Mühlenberger Loch site that, "in {its} view, a market actor who invested {€}750 million in land, whether by purchasing it or by creating it through reclamation, would, in renting the property, *seek a return on that investment*". The fact that a market actor would *seek* a return on its investment does not mean that it could necessarily obtain that return on the market. Indeed, the rent a market actor can charge will be constrained by market conditions *even if* the rent does not cover its costs. Accordingly, we do not consider that it is consistent with Articles 1.1(b) and 14(d) to establish a market benchmark for a good or service by referring to the demands or expectations only of a seller or lessor, or, alternatively, only of a buyer or lessee. The price of a good or service must reflect the interaction between the supply-side and demand-side considerations under prevailing market conditions.[95]

75. Thus, while generators of renewable electricity might seek a return on their investment to cover their costs, this does not mean that they could actually obtain it in the market. The FIT Generators cannot obtain such a return on their investments in the market. They need some form of support. That is one of purposes of the FIT Program, as explained in Section 7.1 of the FIT Rules: "The prices in the Price Schedule are intended to cover development costs plus a reasonable rate of return for Projects meeting certain assumptions relating to cost and efficiency". Further, the fact that the OPA imposes fees and charges on consumers (through the Global Adjustment) to recoup the high costs involved in generating electricity through the FIT Program shows that the electricity generated from renewable energy sources would not be sold in the market absent the FIT Program or, at least, it would not be sold at the rates guaranteed by the FIT Program.

76. Consequently, the European Union submits that the relevant market benchmark in the present case is the competitive market for electricity administered by the IESO. A comparison between the MCP/HOEP and the rates guaranteed pursuant to the FIT Price Schedule and each specific FIT Contract show that the FIT Program and its related contracts confer a benefit on the FIT Generators in the sense of Article 1.1(b) of the SCM Agreement.

ii) Benefit: Financial Contribution

77. The European Union also considers that the FIT Program and its related contracts confer a benefit on the recipient, no matter how the financial contribution is characterised.

(a) Market benchmark: MCP/HOEP

78. As explained before, the FIT Program can be characterised as a government practice that involves a direct transfer of funds. In particular, the European Union

[95] Appellate Body Report, *EC – Large Civil Aircraft*, paras. 981 – 982.

considers that the portion of the guaranteed rates exceeding the market rates for electricity that is transferred to the FIT Generators amounts to a grant (since the OPA does not obtain anything in return). The European Union considers that a comparison between annual weighted average HOEP (i.e., the proper market benchmark in this case) and the "FIT Price Schedule" suffices to demonstrate the existence of benefit in this case.[96] No commercial entity, i.e. no private entity acting pursuant to commercial considerations, would provide payments to the FIT Generators on the same basis as those agreed pursuant to the FIT Program (i.e., with nothing in return).

79. Consequently, the FIT Program and its related contracts confer a benefit on the FIT Generators.

(b) Alternative market benchmarks

80. The European Union observes that in its first written submission in DS412, Japan has provided three alternative market benchmarks: (1) the weighted average wholesale rate received by all generators in Ontario other than FIT and RESOP generators; (2) the average wholesale rate for electricity in competitive wholesale markets outside of Ontario; and (3) the "commodity charge" portion of retail prices for electricity in Ontario.[97] Those alternative benchmarks show that, even if comparisons were made on a different basis from MCP/HOEP, as the appropriate market benchmark, the FIT rates provide a "benefit". The Panel may thus consider those scenarios as further confirmation of the existence of a benefit. Should the Panel examine or consider any of those alternatives as the appropriate market benchmark in this case, the European Union incorporates hereto the relevant paragraphs of Japan's first written submission in DS412 into the present submission.[98] Moreover, the European Union observes that in its first written submission in DS412, Japan has provided an analysis of the benefit considering the FIT Program as providing for "potential direct transfer of funds". Should the Panel consider that Japan's arguments have merit, the European Union incorporates hereto the relevant paragraphs of Japan's first written submission in DS412 into the present submission.[99]

81. In addition, as explained before,[100] the European Union considers that the FIT Program does not involve a purchase of goods by the OPA and, thus, it does not fall under Article 1.1(a)(1)(iii) of the SCM Agreement. In any event, should the Panel consider that the FIT Program and its related contracts amount to a purchase of goods, the European Union considers that it would provide a benefit as well.

82. According to Article 14(d), in cases of purchase of goods by the government the benefit is to be found when "the purchase is made for more than adequate remuneration", and such adequacy is to be evaluated in relation to "prevailing market conditions" for the good in question in the country of purchase. In *US* –

96 See also Japan's first written submission in DS412, paras. 219 – 220.
97 Japan's first written submission in DS412, paras. 221 – 225.
98 Japan's first written submission in DS412, paras. 219 – 226.
99 Japan's first written submission in DS412, paras. 227 – 242.
100 See paras. 54 – 57 above of this submission.

Softwood Lumber IV, the Appellate Body confirmed that, in the context of provision of goods by the government, "private prices in the market of provision will generally represent an appropriate measure of the 'adequacy of remuneration'".[101] However, the Appellate Body noted that the use of private prices in the country of provision may not always be appropriate, in particular in cases where those prices are distorted by the predominance of the government as a provider of the goods in question. Indeed, in those cases, "the comparison contemplated by Article 14 would become circular".[102] The Appellate Body concluded that the reference to "prevailing market conditions" indicates the possibility of using as a benchmark other than private prices if the benchmark chosen relates or refers to, or is connected with the conditions prevailing in the market of the country in question.[103] The Appellate Body repeated these principles in *US – Anti-Dumping and Countervailing Duties (China)*.[104]

83. The European Union considers that these principles similarly apply in the context of government's purchases of goods. Thus, in order to establish whether the government acquired a product for "more than adequate remuneration", private prices in the country of purchase should generally be used. Should these prices be distorted in the market in question, then the benchmark chosen should relate or refer to, or be connected with the conditions prevailing in the market of the country in question.

84. First, the European Union considers that the product purchased by the government is electricity.[105] The FIT Generator supplies electricity in Kw into the grid. The manner how electricity has been generated (i.e. through the use of wind and solar PV technologies) is irrelevant in order to determine the adequacy of the remuneration in this case. Absent the FIT Program, no buyer would purchase the electricity generated by the FIT Generators at the rates established by the Government of Ontario. The mere existence of the FIT Program shows this.

85. In this respect, the relevant prices that a buyer would pay in the market are those of wholesale electricity in Ontario. There, generators of electricity make their offers and compete on prices regardless of how the electricity was generated (i.e., from renewable sources or not). As explained by Japan, the wholesale electricity market is driven by offers containing prices and quantities of electricity, and "dispatching" of electricity is triggered by the offer with the lowest price, which is often generated by nuclear facilities.[106] Thus, any generator falling outside the scope of rates regulated by the Government of Ontario would get the MCP/HOEP

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101 Appellate Body Report, *US – Softwood Lumber IV*, paras. 89 – 90.

102 Appellate Body Report, *US – Softwood Lumber IV*, para. 93.

103 Appellate Body Report, *US – Softwood Lumber IV*, para. 96.

104 Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 438 – 440.

105 To be clear, the European Union does **not** consider that the product purchased by the Government of Ontario is electricity produced from particular renewable energy sources. In this respect, the electricity produced by any other source and the electricity produced by the FIT Generators are "like" in the sense that the difference in the method of production leaves "fundamentally unchanged the competitive relationship among the final products". See Appellate Body Report, *Philippines – Taxes on Distilled Spirits*, para. 125.

106 Japan's first written submission in DS412, Appendix II, para. 8.

and, thus, would constitute "adequate remuneration".[107] As explained before, having those private prices as the benchmark for the purchase of goods, the FIT Program would result in granting a benefit to the FIT Generators.[108]

86. Second, the European Union considers that the MCP/HOEP (i.e., the private prices in the market in question) are not distorted. Even if a large number of electricity generators in Ontario may be entitled to rates regulated by the Government of Ontario, or to a minimum revenue guaranteed by the Government of Ontario, the fact remains that there is a competitive wholesale market for electricity where operators compete on the basis of commercial considerations and prices are established on a fair-market, arm's-length transaction basis. Thus, in the European Union's view, there is no need to examine other alternative benchmarks.

87. Third, even if Canada could show that consideration of the MCP/HOEP is not appropriate for the purposes of determining what is "adequate remuneration", the European Union considers that any of the three alternative benchmarks provided by Japan in its first written submission in DS412 would be appropriate to show that the government's purchase of electricity from FIT Generators confers a benefit.[109] Indeed, the first alternative market benchmark provided by Japan is the weighted average price of all electricity market excluding the FIT and RESOP generators (i.e., other prices in the market excluding those of the FIT Program and its predecessor). Those would amount to the "prevailing market conditions" for electricity in Ontario, if one were to consider that regulated rates could serve the purpose of establishing the existence of a benefit.[110] The second alternative (i.e., the average wholesale rate for electricity in competitive wholesale markets outside of Ontario) also provides for a benchmark that relates or refers to, or is connected with the conditions prevailing in Ontario's market. The third alternative looks into the Ontario's retail prices since no producer of electricity, no matter how such electricity is produced,[111] can expect to obtain rates in excess of the price paid by retail consumers in the commodity portion of their bills.

88. Consequently, the European Union submits that the FIT Program provides the FIT Generators with more than adequate remuneration in view of the prevailing market conditions for electricity in Ontario and, thus, confers a benefit under Article 1.1(b) of the SCM Agreement.

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107 Appellate Body Report, *US – Softwood Lumber IV*, para. 90 ("[T]he starting-point, when determining adequacy of remuneration, is the prices at which *the same or similar goods* are sold by private suppliers in arm's length transactions in the country of provision. This approach reflects the fact that private prices in the market of provision will generally represent an appropriate measure of the "adequacy of remuneration" for the provision of goods"). (emphasis added)

108 See paras. 70 – 71 above of this submission.

109 Japan's first written submission in DS412, paras. 221 – 226.

110 Appellate Body Report, *US – Softwood Lumber IV*, para. 87 ("Turning first to the text of Article 14(d), we consider the submission of the United States that the term 'market conditions' necessarily implies a market undistorted by the government's financial contribution. In our view, the United States' approach goes too far. We agree with the Panel that '[t]he text of Article 14 (d) [of the] SCM Agreement does not qualify in any way the 'market' conditions which are to be used as the benchmark … [a]s such, the text does not explicitly refer to a 'pure' market, to a market 'undistorted by government intervention', or to a 'fair market value'"').

111 Indeed, electricity is a product with identical physical characteristics regardless of how it has been generated.

iii) Conclusion

89. In sum, no matter how the Panel addresses this question,[112] the European Union considers that the FIT Program and its related contracts confer a benefit on the FIT Generators under Article 1.1(b) of the SCM Agreement.

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

90. For the same reasons as those mentioned by Japan in its first written submission in DS412, the European Union submits that the FIT Program is a subsidy contingent upon the use of domestic over imported goods, in the sense of Article 3.1(b) of the SCM Agreement.[113]

91. Indeed, the subsidy is "contingent" in the sense that compliance with the domestic content requirements is mandatory: if the FIT Generator does not show that it has met the domestic content requirements before starting its operations, the contract will be in default.[114]

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

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

3. Specificity: Article 2.3 SCM Agreement

94. Article 1.2 of the SCM Agreement states that: "[a] subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions

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112 The European Union invites the Panel to make alternative findings with respect to its determination as to whether the FIT Program and its related contracts confer a benefit. Indeed, should the Panel choose only one market benchmark, the lack of alternative findings would prevent that, in case of reversal, the Appellate Body could complete its analysis.

113 Japan's first written submission in DS412, paras. 249 – 260.

114 Japan's first written submission in DS412, para. 254.

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

4. Violation of Article 3.2 SCM Agreement

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

5. Conclusion and relief requested

96. The European Union requests the Panel to find that through the FIT Program as well as individually executed FIT and microFIT contracts for wind and solar PV projects, Canada grants and maintains prohibited subsidies that are contingent upon the use of domestic over imported goods, in violation of Articles 3.1(b) and 3.2 of the SCM Agreement.

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

B. The measures at issue are trade-related investment measures and requirements affecting the internal sale, purchase or use of products in the sense of Article 1 of the TRIMs Agreement and Article III:4 of the GATT 1994 respectively

98. Once the European Union has demonstrated that the FIT Program and its related contracts are inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement, the European Union will address how the domestic content requirements included in the FIT Program violate other relevant provisions of the covered agreements containing the fundamental principle of national treatment. In particular, in this section the European Union will show that the measures at issue are trade-related investment measures and requirements affecting the internal sale, purchase or use of products in the sense of Article 1 of the TRIMs Agreement and Article III:4 of the GATT 1994 respectively.

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

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

100. First, the FIT Program and its related contracts are "investment measures" in that they aim at encouraging the development of a local manufacturing capability for equipment and components for renewable energy generation facilities in Ontario. In its first written submission in DS412, Japan has referred to abundant evidence showing that the Ontario government's motivation for instituting domestic content requirements in the FIT Program was to encourage investment in Ontario in facilities that manufacture equipment and components for renewable energy generation facilities.[115] This evidence includes the legislative debates, press releases as well as statements of operators in the market. Moreover, the Minister's Directive to the OPA establishing the FIT Program listed the objectives of the FIT Program to include, *inter alia*, "[e]nable new green industries through new investment and job creation" and "[p]rovide incentives for investment in renewable energy technologies".[116] He also noted that he was establishing domestic content requirements in the FIT Program to "provide an opportunity for Ontario manufacturers to participate in the economic benefits that will flow from the program".[117] The panel in *Indonesia – Autos* found similar evidence compelling in finding the existence of an "investment measure".[118]

101. Second, the domestic content requirements included in the FIT Program and its related contracts are undoubtedly "related to trade". The panel in *Indonesia – Autos* found that domestic content requirements are "necessarily … 'trade-related' because such requirements, by definition, always favour the use of domestic products over imported products, and therefore affect trade".[119]

102. Finally, the domestic content requirements contained in the FIT Program and its related contracts affect trade in goods, in particular in wind and solar energy generation equipment and components. The FIT Program creates an incentive to purchase or use Ontario's products to the detriment of imported like products.[120]

103. Consequently, the European Union submits that the FIT Program and its related contracts fall within the scope of the TRIMs Agreement.

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

104. Article III:4 of the GATT 1994 provides that:

> The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

115 See Japan's first written submission in DS412, paras. 121 – 128.
116 Minister's FIT Directive of 24 September 2009, p. 1 (Exhibit JPN-102) (emphasis added).
117 Minister's FIT Directive of 24 September 2009, p. 2 (Exhibit JPN-102).
118 *See* Panel Report, *Indonesia – Autos*, paras. 14.73 – 14.81.
119 Panel Report, *Indonesia – Autos*, para. 14.82.
120 Japan's first written submission in DS412, paras. 127 – 128.

105. Thus, Article III:4 applies to laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

106. In its first written submission in DS412, Japan has demonstrated that the domestic content rules of the FIT Program and its related contracts are "requirements"[121] that affect the "internal sale, … purchase, … or use"[122] of renewable energy generation equipment and components in Ontario within the meaning of Article III:4. The European Union incorporates those arguments in the present submission, and consequently, submits that the FIT Program and its related contracts fall under the scope of application of these provisions.

3. Conclusion

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

C. Article III:8 of the GATT 1994 does not apply in the present case

108. Before applying the relevant national treatment provisions contained in the TRIMs Agreement and the GATT 1994 to the facts of this case, as a preliminary issue, the European Union will examine whether Article III:8 of the GATT 1994 applies in the present dispute.

109. Indeed, although the TRIMs Agreement and the GATT 1994 are separate covered agreements,[123] the scope of Article 2.1 of the TRIMs Agreement, in conjunction with paragraph 1(a) of its Annex, and Article III:4 of the GATT 1994 overlaps. Article 2.1 of the TRIMs Agreement restates the obligation not to apply any trade-related investment measure (as opposed to any of the measures referred to in Article III:4) that is inconsistent with the provisions of Article III of the GATT 1994. Paragraph 1(a) of the Annex to the TRIMs Agreement provides an illustrative example of measures that are inconsistent with Article III:4 of the GATT 1994.[124] In other words, Article 2.1 of the TRIMs Agreement and paragraph 1(a) of its Annex do not add to the national treatment obligation already contained in Article III:4 of the GATT 1994. If anything, they are more specific

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121 Japan's first written submission in DS412, paras. 271 – 274.

122 Japan's first written submission in DS412, paras. 275 – 277.

123 Panel Report, *Indonesia – Autos*, para. 14.61 ("In this regard, we note first that on its face the TRIMs Agreement is a fully fledged agreement in the WTO system. The TRIMs Agreement is not an 'Understanding to GATT 1994', unlike the six Understandings which form part of the GATT 1994. The TRIMs Agreement and Article III:4 prohibit local content requirements that are TRIMs and therefore can be said to cover the same subject matter. But when the TRIMs Agreement refers to 'the provisions of Article III', it refers to the substantive aspects of Article III; that is to say, conceptually, it is the ten paragraphs of Article III that are referred to in Article 2.1 of the TRIMs Agreement, and not the application of Article III in the WTO context as such. Thus if Article III is not applicable for any reason not related to the disciplines of Article III itself, the provisions of Article III remain applicable for the purpose of the TRIMs Agreement. This view is reinforced by the fact that Article 3 of the TRIMs Agreement contains a distinct and explicit reference to the general exceptions to GATT. If the purpose of the TRIMs Agreement were to refer to Article III as applied in the light of other (non Article III) GATT rules, there would be no need to refer to such general exceptions)".

124 TRIMs Agreement, Article 2.2.

provisions applicable in cases of trade-related investment measures. This implies that if a measure does not fall under the scope of application of Article III:4 of the GATT 1994 by reason related to the disciplines of Article III itself (i.e., by the application of Article III:8), such a measure does not fall within the more specific scope of application of the TRIMs Agreement.

110. As the European Union will show below, Article III:8 is not applicable to this dispute.[125]

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

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

> The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

112. Thus, in order to fall within this provision, there should be (1) a purchase (or procurement) of a product by a governmental agency; (2) that the purchase is made for governmental purposes; and (3) that the purchase is not (a) either with a view to commercial resale or (b) with a view to being used in the production of goods for commercial sale.

113. The FIT Program and its related contracts do not meet any of these requirements.

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

114. Article III:8(a) requires "the procurement by [the government] of products". The term "procurement" means "the action of obtaining something; an acquisition".[126] This meaning also stands out from the different language versions of the same provisions which refer to "acquisition".[127] Likewise, the context also indicates that the conduct (i.e. procurement) of the actor (i.e. governmental agencies) refers to

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125 The European Union incorporates hereto Japan's first written submission in DS412, paras. 284 – 294, with respect to the inapplicability of Article III:8 of the GATT 1994.

126 OED on-line, entry 2.a (Exhibit EU-11).

127 French: "Les dispositions du présent article ne s'appliqueront pas aux lois, règlements et prescriptions régissant *l'acquisition*, par des organes gouvernementaux, de produits achetés pour les besoins des pouvoirs publics et non pas pour être revendus dans le commerce ou pour servir à la production de marchandises destinées à la vente dans le commerce". (emphasis added)
Spanish: "Las disposiciones de este artículo no se aplicarán a las leyes, reglamentos y prescripciones que rijan *la adquisición*, por organismos gubernamentales, de productos comprados para cubrir las necesidades de los poderes públicos y no para su reventa comercial ni para servir a la producción de mercancías destinadas a la venta comercial". (emphasis added)

"products purchased". Thus, Article III:8(a) requires that a "purchase" (or procurement) of a product is made.[128]

115. As explained before,[129] the FIT Program and its related contracts do not involve an actual purchase or acquisition of electricity by the OPA. The OPA acts as "clearing house" where the settlements between the sellers (electricity generators, including the FIT Generator) and buyers (transmission and distribution operators) take place. In other words, the OPA acts as a market regulator that ensures that the generated electricity will be plugged into the grid on the basis of the rates agreed for each category of generators. Consequently, there is no "purchase" (or procurement) involved.

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

116. Article III:8(a) requires "the procurement by [the government] of products purchased for governmental purposes". The European Union considers that the terms "governmental purposes" under Article III:8(a) are properly interpreted with reference to government use or benefit.[130]

117. The term "for" means "in favour of".[131] The term "purpose" means "the reason for which something is done or made, or for which it exists; the result or effect intended or sought; the end to which an object or action is directed; aim".[132] The term "governmental" means "of or pertaining to government".[133] Thus, the dictionary meaning of the terms "for governmental purposes" would imply that the acquisition is "in favour of a reason pertaining to the government".

118. The use of the dictionary seems to imply that the acquisition by the government is made in view of "any" reason that the government itself considers appropriate. Such a broad interpretation does not follow when examining the French and Spanish versions of the same terms, which explicitly refer to the "acquisition, by governmental entities, of products purchased to cover needs of the government" ("*l'acquisition*, par des organes gouvernementaux, de produits achetés *pour les besoins des pouvoirs publics*" / "*la adquisición*, por organismos gubernamentales, de productos comprados *para cubrir las necesidades* de los poderes públicos").[134]

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128 For the sake of clarity, the European Union observes that the terms "purchase" or "acquisition" do not refer exclusively to situations where the government acquires the *property* of the product. They also include situations where the government acquires the *possession and use* of a product for its own benefit, e.g., pursuant to a lease agreement.

129 See para. 55 above of this submission.

130 Japan's first written submission, para. 287.

131 OED on-line, entry III.7.a (Exhibit EU-12).

132 OED on-line, entry 2 (Exhibit EU-13).

133 OED on-line (Exhibit EU-14).

134 Article XVI of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) provides that the legal texts of the WTO are equally authentic in the English, French and Spanish language versions. Accordingly, and in accordance with Article 33 of the Vienna Convention, in case of discrepancy between the language contained in the text of each of the different versions, the Panel must seek the meaning which simultaneously gives effect to all the terms of the treaty as used in each of the authentic languages. See, for example, Appellate Body Reports, *Chile* –

In other words, they clarify that the purchase is made to cover the needs of the government.[135] That is "the reason" for the purchase.

119. This interpretation is also confirmed from the context of the terms in Article III:8(a), which contrasts "governmental purposes" with "use in the production of goods for commercial sale", thus requiring consideration of how the purchased products are used.

120. Similarly, the European Union considers that the Government Procurement Agreement also provides for context to interpret the notion of procurement "for governmental purposes". In particular, the European Union observes that in Canada's General Notes to Appendix I of the Government Procurement Agreement, Canada defines procurement as follows:

> Procurement in terms of Canadian coverage is defined as contractual transactions to acquire property or services *for the direct benefit or use of the government*. The procurement process is the process that begins after an entity has decided on its requirement and continues through to and including contract award. It does not include non-contractual agreements or any form of government assistance, including but not limited to, cooperative agreements, grants, loans, equity infusions, guarantees, fiscal incentives, and government provision of goods and services, given to individuals, firms, private institutions, and sub-central governments. It does not include procurements made with a view to commercial resale or made by one entity or enterprise from another entity or enterprise of Canada. (emphasis added)[136]

121. In other words, the acquisition is made "for the direct benefit or use of the government". This is, again, the reason for the government's purchase.

122. This interpretation is also in accordance with the object and purpose of Article III of the GATT 1994.[137] In *Japan – Alcoholic Beverages*, the Appellate Body noted that:

Price Band System, para. 271; *EC – Bed Linen (Article 21.5 – India)*, para. 123, footnote 153; *US – Softwood Lumber IV*, para. 59, footnote 50; *EC – Tariff Preferences*, para. 147; and *US – Upland Cotton*, para. 424, footnote 510.

135 Appellate Body Report, *US – Softwood Lumber IV*, para. 59 ("[I]n accordance with the customary rule of treaty interpretation reflected in Article 33(3) of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*"), the terms of a treaty authenticated in more than one language—like the *WTO Agreement*—are presumed to have the same meaning in each authentic text. It follows that the treaty interpreter should seek the meaning that gives effect, simultaneously, to all the terms of the treaty, as they are used in each authentic language").

136 Canada's General Notes, Appendix I, Government Procurement Agreement, para. 2 (WT/Let/672) (Exhibit EU-15).

137 Appellate Body Report, *EC – Chicken Cuts*, para. 238 ("It is well accepted that the use of the singular word 'its' preceding the term 'object and purpose' in Article 31(1) of the Vienna Convention indicates that the term refers to the treaty as a whole; had the term 'object and purpose' been preceded by the word 'their', the use of the plural would have indicated a reference to particular 'treaty terms'. Thus, the term 'its object and purpose' makes it clear that the starting point for ascertaining 'object and purpose' is the treaty itself, in its entirety. At the same time, we do not believe that Article 31(1) excludes taking into account the object and purpose of particular treaty terms, if doing so assists the

> The broad and fundamental purpose of Article III is to *avoid protectionism* in the application of internal tax and regulatory measures. … Toward this end, Article III obliges Members of the WTO to *provide equality of competitive conditions* for imported products in relation to domestic products. … Moreover, it is irrelevant that the "trade effects" of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent; Article III *protects expectations* not of any particular trade volume but rather of the *equal competitive relationship* between imported and domestic products. (emphasis added).[138]

123. The objectives of avoiding protectionism, requiring equality of competitive conditions and protecting expectations of equal competitive relationships could not be achieved if the terms "for governmental purposes" were to be interpreted as referring to the acquisition in favour of "any" reason pertaining to the government. Indeed, the consequence of the government adducing any reason (no mater how unfounded)[139] to purchase goods which would directly or indirectly discriminate against imported products would be that such a discrimination would not fall under the scope of Article III of the GATT 1994, thereby permitting a wide range of protectionist measures. This would also trump the balance between the rule in Article III and the exceptions under Article XX, where the reasons for the government's measure are examined.

124. Finally, the negotiating history indicates that Article III was intended to refer to the same type of government procurement as Article XVII:2 of the GATT 1994, which defines "procurement" as requiring "immediate or ultimate consumption in governmental use".[140]

125. In sum, the purchase under Article III:8(a) is destined for the direct use or benefit of the government.

126. The European Union considers that there is no procurement or purchase "for governmental purposes" in the present case because the OPA is not acquiring any products for its own use or benefit under the FIT Program. The electricity delivered pursuant to the FIT Contracts is plugged into the grid for sale to Ontario consumers and not retained for the use or benefit of the government of Ontario.[141] This is evident from the definition of Hourly Delivered Electricity as electricity that is successfully injected into the IESO-grid, a distribution system, or a host

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interpreter in determining the treaty's object and purpose on the whole. We do not see why it would be necessary to divorce a treaty's object and purpose from the object and purpose of specific treaty provisions, or vice versa. To the extent that one can speak of the 'object and purpose of a treaty provision', it will be informed by, and will be in consonance with, the object and purpose of the entire treaty of which it is but a component").

138 Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16.

139 E.g., because on Mondays the government only buys domestic goods.

140 See Council for Trade in Services, Background Note by the Secretariat: Interpretation of Procurement Related Provisions in GATT, Possible Application to Article XIII of GATS, S/WPGR/W/29, 31 March 1999 (citing John H. Jackson, WORLD TRADE AND THE LAW OF GATT 291, 359 (1969).

141 In fact, the Government of Ontario purchases electricity directly from LDCs like all other retail consumers in Ontario. See Japan's first written submission in DS412, para. 100.

facility's electrical system.[142] It is for this hourly delivered electricity supplied to a distribution or transmission system that a FIT Generator receives guaranteed payment under the FIT Program.

127. Consequently, the FIT Program does not amount to a purchase "for governmental purposes" in the sense of Article III:8(a) of the GATT 1994.

(c) Any alleged purchase of electricity through the FIT Program is with a view to commercial resale and/or use in the production of goods for commercial sale.

128. In any event, even assuming that the FIT Program and its related contracts could be considered as a purchase for governmental purposes in the present case, the European Union maintains that the FIT Program would fall short of the last two requirements under Article III:8(a), i.e., (i) that the purchased product is not with a view to commercial resale and (ii) that the purchased product is not used in the production of goods for commercial sale.

129. At the outset, it is important to note that the two additional requirements stated at the end of Article III:8(a) are meant to avoid circumvention of the disciplines in Article III of the GATT 1994. Indeed, pursuant to Article III:8(a), governments can purchase goods for their own consumption, benefit or use and, for that purpose, they agreed not to be committed to the national treatment obligation contained in Article III of the GATT 1994. In other words, the products purchased by the government do not belong to the "market" as the place where supply and demand freely meet. They belong to a separate market, a "public market" ("*marches publics*"/"*contratación pública*"). However, Article III:8(a) is meant to ensure that the national treatment principle is not circumvented by permitting a government purchase on a discriminatory basis in cases where the purchased product will go back to the actual market directly (because the government resells the product) or indirectly (because the purchased product is used in the production of goods for commercial sale).

130. With respect to (i), in the European Union's view, the terms "commercial resale" do not necessarily require that the product in question is resold with a profit. It merely requires that the purchased product is sold or introduced into the market. To this effect, the French version refers to "*revendus dans le commerce*". Similarly, ordinarily "sales at a loss" by e.g. supermarkets are no less commercial than other transactions; and reselling a product at a price lower than the price at which it was purchased (e.g. because in the meantime the market conditions changed) does not make the transaction "non-commercial". Contextually, and in view of the object and purpose of Article III, interpreting "commercial resale" as requiring a profit does not make sense since it would permit WTO Members to circumvent the disciplines of Article III as explained before. A government could discriminate against imported products and then introduce the purchased domestic product into the market, thereby causing the effects that the national treatment principle is aiming to avoid.

[142] See FIT Standard Definitions, p. 5 (Exhibit JPN-135).

131. In the present case, the electricity produced by the FIT Generators is introduced into the market and sold to all consumers at commercial prices. The government of Ontario does not consume the electricity produced by the FIT Generators since, once plugged into the grid, it becomes fungible and impossible to distinguish it from other electricity generated from other sources. Consequently, the FIT Program does not meet this requirement since it is introduced into the market and not directly consumed by the Government of Ontario.

132. Similarly, with respect to (ii), since the electricity produced by the FIT Generators is fed into the grid, the purchased product is used in the production of goods for commercial sale. All consumers, including industrial and manufacturing producers, use electricity to produce their goods. In this respect, the purpose in view of which the electricity is purchased by the government would be irrelevant if, ultimately, the electricity purchased ends up being used in the production of other goods for commercial resale. Thus, the FIT Program does not meet this requirement either.

(d) Conclusion

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

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

134. Article III:8(b) of the GATT 1994 states that:

> The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

135. The purpose of Article III:8(b) is to clarify that the payment of subsidies exclusively to domestic producers (and thus excluding foreign producers) does not fall under the scope of the national treatment disciplines under Article III. In other words, governments can provide subsidies to their producers without being accused of discrimination because other foreign producers do not have access to them. The Panel in *Indonesia – Autos* explained the relationship between Article III and Article XVI as follows:

> Article III has always been a provision that is concerned with (and prohibits) discrimination between imported and domestic products. By contrast, the provisions of Article XVI of GATT 1947 have dealt generally with the regulation of subsidies to producers. Article XVI of GATT 1947 did not address the issue of discrimination between imported and domestic products that may occur when using such subsidies. When such discrimination arose, it was prohibited by the relevant provisions of Article III. Subsidies which discriminated in favour of domestic products fell within the prohibition of the provisions of Article III by virtue of such discrimination. In this sense we agree with the 1992 *Malt Beverages* panel which discussed the relationship between the GATT rules on Article III and XVI and the related purpose of Article III:8(b):
>
> > "5.8 The Panel noted that in contrast to Article III:8(a), where it is stated that "this Article shall not apply to ... [government procurement]", the underlined words are not repeated in Article III:8(b). The ordinary meaning of the text of Article III:8(b), especially the use of the words "shall not prevent", *therefore suggests that Article III does apply to subsidies*, and that Article III:8(b) only clarifies that the product-related rules in paragraphs 1 through 7 of Article III "shall not prevent the payment of subsidies exclusively to domestic producers (emphasis added)". [Panel Report on *United States - Measures Affecting Alcoholic Malt Beverages*, BISD 39S/206, adopted on 19 June 1992, hereafter called *Malt Beverages*]. (emphasis in the original)[143]

136. The Panel in *Indonesia – Autos* also noted that:

> We consider that the purpose of Article III:8(b) is to confirm that subsidies to producers do not violate Article III, so long as they do not have any component that introduces discrimination between imported and domestic products. In our view the wording "payment of subsidies exclusively to domestic producers" exists so as to ensure that only subsidies provided to producers, and not tax or other forms of discrimination on products, be considered subsidies for the purpose of Article III:8(b) of GATT. This is in line with previous GATT panels and WTO Appellate Body reports.[144]

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143 Panel Report, *Indonesia – Autos*, para. 14.30.

144 Panel Report, *Indonesia – Autos*, para. 14.43. See also paras. 14.119 – 14.122. See also GATT Panel Report, *EEC – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, Report of the Panel adopted on 25 January 1990 (L/6627 - 37S/86), para. 137 ("The Panel noted that Article III:8(b) applies only to payments made exclusively to domestic producers and considered that it can reasonably be assumed that a payment not made directly to producers is not made 'exclusively' to them. It noted moreover that, if the economic benefits generated by the payments granted by the Community can at least partly be retained by the processors of Community oilseeds, the payments generate a benefit conditional upon the purchase of oilseeds of domestic origin inconsistently with Article III:4. Under these circumstances Article

137. Thus, Article III:8(b) of the GATT 1994 does not apply where the subsidy in question introduces discrimination between imported and domestic products.

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

139. Consequently, the FIT Program and its related contracts do not fall under the scope of Article III:8(b).

3. Conclusion

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

D. The measures at issue are trade-related investment measures inconsistent with Article 2.1 of the TRIMs Agreement, in conjunction with paragraph 1(a) of its Annex

141. The European Union submits that the measures at issue are inconsistent with Article 2.1 of the *TRIMs Agreement*, in conjunction with paragraph 1(a) of its Annex, because the measures are trade-related investment measures that require the purchase or use by enterprises of equipment and components for renewable energy generation facilities of Ontario origin or source. In this section, at the outset, the European Union will explain why the Panel should examine first the claims under the TRIMs Agreement. Then, the European Union will apply the TRIMs Agreement to the facts of this case.

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

142. At the outset, the European Union considers its claims under the TRIMs Agreement to be more specific than its claim under Article III:4 of the GATT 1994.[145] In *EC – Bananas III*, the Appellate Body enunciated a test to be applied

III:8(b) would not be applicable because in that case the payments would not be made exclusively to domestic producers but to processors as well").

[145] Panel Report, *Indonesia – Autos*, para. 14.63 ("As to which claims, those under Article III:4 of GATT or Article 2 of the TRIMs Agreement, to examine first, we consider that we should first examine the claims under the TRIMs Agreement since the TRIMs Agreement is more specific than Article III:4 as far as the claims under consideration are concerned. A similar issue was presented in *Bananas III*, where the Appellate Body discussed the relationship between Article X of GATT and Article 1.3 of the Licensing Agreement and concluded that the Licensing Agreement being more specific it should

in order to decide the Panel's order of analysis where two or more provisions from different covered agreements appear *a priori* to apply to the measure in question. According to the Appellate Body, the provision from the agreement that "deals specifically, and in detail" with the measures at issue should be analysed first.[146]

143. As explained before, the core of the matter in this dispute is the domestic content requirements included in the FIT Program and its related contracts. In particular, in order for solar PV (FIT and microFIT) or wind (FIT) Generators to receive the guaranteed, long-term rates under the FIT Program, they must purchase or use a sufficient proportion of goods manufactured, formed or assembled in Ontario and that are listed in the applicable Domestic Content Grid to satisfy the applicable Minimum Required Domestic Content Level.[147] This establishes an incentive for the FIT Generators to utilise goods of Ontario origin in preference to goods of other origins in their solar PV or wind generation facilities, because goods of Ontario origin count toward the Domestic Content Level of a project while goods of other origins do not.[148] In other words, the FIT Program discriminates against imported products because the FIT Generators have to purchase or use at least some products of domestic origin or source in order to benefit from the FIT Program.

144. The language of paragraph 1(a) of the Annex to the TRIMs Agreement speaks directly to this issue:

> *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; (emphasis added)

145. In contrast, the language of Article III:4 of the GATT 1994 is more general, even though the same situation (as the one contained in the FIT Program) is covered by the same provision:

have been applied first. This is also in line with the approach of the panel and the Appellate Body in the *Hormones* dispute, where the measure at issue was examined first under the SPS Agreement since the measure was alleged to be an SPS measure").

146 Appellate Body Report on *EC – Bananas III* , para. 204.

147 See FIT Rules, Section 6.4 (Exhibit EU-4), FIT Contract, Exhibit D (Exhibit EU-5), and microFIT Contract, cover page (Exhibit EU-6).

148 Japan's first written submission in DS412, paras. 157 – 173.

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

146. Moreover, as explained before, the measures at issue can be more specifically characterised as a TRIM.[149]

147. In view of the more specific language of the claim under the TRIMs Agreement to the facts at issue in the present dispute and the nature of the measures at issue as a TRIM, the European Union will examine its claims under the TRIMs Agreement first.

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

148. Article 2.1 of the TRIMs Agreement provides that:

> 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.

149. Paragraph 2 of Article 2 in turn states that:

> 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.

150. Paragraph 1(a) of the Annex to 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, 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;

[149] See paras. 99 – 103 above of this submission.

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

152. As explained before,[150] the European Union considers that there is sufficient evidence that the FIT Program and its related contracts are TRIMs explicitly addressed in paragraph 1(a) of the Annex to the TRIMs Agreement. Indeed, the FIT Program is a TRIM "compliance with which is necessary to obtain an advantage" since failure to comply with Minimum Required Domestic Content Level denotes that the generators will not benefit from the FIT Program. Moreover, the FIT Program requires the purchase or use of domestic equipment and components in order to satisfy the applicable Minimum Required Domestic Content Level.[151]

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

3. Conclusion and relief requested

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

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

E. The measures at issue are inconsistent with Article III:4 of the GATT 1994

156. The European Union argues that the FIT Program and its related contracts are inconsistent with Article III:4 of the GATT 1994 because they are TRIMs falling under paragraph 1(a) of the Annex to the TRIMs Agreement. Alternatively, the European Union argues that the FIT Program and its related contracts are inconsistent with Article III:4 of the GATT 1994 because they impose domestic content requirements on wind and solar PV electricity generators that affect the

[150] See paras. 99 – 103 above of this submission.
[151] See para. 143 above of this submission.

internal sale, purchase or use of renewable energy generation equipment and components, according less favourable treatment to like products of EU origin.

1. The FIT Program is inconsistent with Article III:4 of the GATT because it falls under paragraph 1(a) of the Annex to the TRIMs Agreement

157. As shown before, the FIT Program and its related contracts fall within the illustrative list of measures that are deemed to be inconsistent with Article III:4 of the GATT in accordance with the Annex to the TRIMs Agreements.[152] Thus, the European Union considers that, on this basis alone, the Panel can find that the FIT Program and its related contracts are also, consequently, inconsistent with Article III:4 of the GATT.

2. The FIT Program is inconsistent with Article III:4 of the GATT 1994 on its own

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

159. Indeed, the renewable energy generation equipment and components manufactured domestically in Ontario and imported from the European Union are "like products" within the meaning of Article III:4 of the GATT 1994. A number of panels have held the view that where a difference in treatment between domestic and imported products is based exclusively on the products' origin, it is correct to treat products as "like" within the meaning of Article III:4. In that case, there is no need to establish the likeness between imported and domestic products in terms of the traditional criteria – that is, their physical properties, end-uses and consumers' tastes and habits.[153] In other words, it is sufficient for purposes of satisfying the "like product" test for a complaining party to demonstrate that there can or will be domestic and imported products that are "like".[154] In the case at hand, the sole criterion distinguishing the products is that of the origin.[155] The Domestic Content Grid does not refer to any substantial difference between domestic and imported equipment in terms of their physical properties, end-users,

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152 See paras. 148 – 153 above of this submission.

153 Panel Report, *Turkey – Rice*, para. 7.214 and the cases cited therein.

154 Panel Report, *China – Publications and Audiovisual Products*, paras. 7.1444 – 7.1447.

155 See FIT Contract, Domestic Content Grid in Exhibit D (Exhibit EU-5), and microFIT Contract, Appendix C (Exhibit EU-6).

consumer perceptions and tariff classifications.[156] Thus, both products, domestic and imported, are like.

160. Moreover, as explained before, the FIT Program and its related contracts are requirements affecting the internal sale, purchase or use of products in the sense of Article III:4 of the GATT 1994.[157]

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

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

3. Conclusion and relief requested

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

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

VI. CONCLUSIONS AND REQUEST FOR RELIEF

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

- Canada violated Articles 3.1(b) and 3.2 of the SCM Agreement since the FIT Program and its related contracts established by the Government of Ontario are subsidies within the meaning of Article 1.1 of the SCM Agreement that are provided contingent upon the use of domestic over

156 Japan's first written submission in DS412, para. 268.
157 See paras 104 – 106 above of this submission.

imported goods, namely contingent upon the use of equipment and components for renewable energy generation facilities produced in Ontario over such equipment and components imported from other WTO Members, including the European Union;

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

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

166. Accordingly, the European Union requests the Panel 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; and

- Canada brings the FIT Program and its related contracts into conformity with the covered agreements as required by Article 19.1 of the DSU.