WTO DISPUTE ANALYSIS*

Centre for WTO Studies
Indian Institute of Foreign Trade
New Delhi

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Reports of the Appellate Body

CANADA – CERTAIN MEASURES AFFECTING THE RENEWABLE ENERGY GENERATION SECTOR

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

(WT/DS412/AB/R; WT/DS426/AB/R)
(Circulated on 6 MAY 2013)[1]

Parties:

Appellant/Appellee:	Canada
Other Appellant/Appellee/Third Participant:	Japan, European Union (EU)
Third Participants	Australia, Brazil, China, El Salvador, Honduras (only in WT/DS412), India, Korea, Mexico, Norway, Kingdom of Saudi Arabia, Chinese Taipei, Turkey (only in DS426), United Sates.

Appellate Body Division:

Ramirez-Hernandez (Presiding Member), Bhatia (Member), Unterhalter (Member)

I. BACKGROUND

These appeals concern certain issues of law and legal interpretations developed in the Panel Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*[2] and *Canada – Measures Relating to the Feed – in – Tariff Program*[3] (Panel Reports). The Panel was established to consider complaints by Japan and the EU (complainants) with respect to certain domestic content requirements attached to the FIT and microFIT contracts, granted under the feed-in tariff programme (the "FIT Programme") for certain wind and solar photovoltaic ("PV") electricity generation projects established by

* This issue has been prepared by *Shailja Singh*, Legal Consultant (Assistant Professor), Centre for WTO Studies, Indian Institute of Foreign Trade, New Delhi.

**This issue can also be accessed online at http://wtocentre.iift.ac.in/DisputeAnalysis.asp . Queries and comments are most welcome and may be directed to disputes_cws@iift.ac.in.

[1] The Appellate Body issued these Reports in the form of a single document constituting two separate Appellate Body Reports WT/DS412/R and WT/DS426/R.
[2] WT/DS412/R, 19 December 2012 (Japan Panel Report)
[3] WT/DS426/R, 19 December 2012 (EU Panel Report)

the Canadian Province of Ontario. The complainants challenged, *inter alia*, the WTO consistency of the following measures:

(i) the Electricity Act of 1998;
(ii) the Green Energy and Green Economy Act of 2009;
(iii) the Electricity Restructuring Act of 2004;
(iv) the Ontario Regulation 578/05;
(v) the Independent Electricity System Operator (the "IESO") Market Manual;
(vi) the IESO Market Rules;
(vii) the FIT direction dated 24 September 2009 from the Deputy Premier and Minister of Energy and Infrastructure;
(viii) individual FIT and microFIT Contracts executed by the Ontario Power Authority (the "OPA");
(ix) the FIT Rules and microFIT Rules issued by the OPA;
(x) the FIT and microFIT Contracts issued by the OPA;
(xi) the FIT Application Form and the online microFIT Application issued by the OPA;
(xii) the FIT and microFIT Price Schedules issued by the OPA;
(xiii) the FIT Programme Interpretations of the Domestic Content Requirements; and
(xiv) any amendments or extensions of the foregoing, any replacement, renewal, implementing or related measures.

The FIT Programme is a scheme implemented by the Government of the Province of Ontario and agencies in 2009, through which generators of electricity produced from certain forms of renewable energy are paid a guaranteed price per kilowatt hour (kWh) of electricity delivered into the Ontario electricity system under 20-year or 40-year contracts. Under the FIT stream of the FIT Programme, electricity generation facilities utilizing windpower and solar PV technologies must comply with a Minimum Required Domestic Content Levels, in the development as well as the construction of these facilities. On the other hand, the microFIT stream also imposes Minimum Required Domestic Content Levels, but only on generation facilities utilizing solar PV technology. (Paras. 1.2-1.4)

The Panel found that the Minimum Required Domestic Content Levels prescribed under the FIT Programme, placed Canada in breach of its obligations under Article 2.1 of the Agreement on Trade Related Investment Measures (TRIMs Agreement) and Article III:4 of the General Agreement on Tariffs and Trade, 1994 (GATT 1994). The Panel also concluded that Japan and EU had failed to establish that the FIT Programme, and the individual solar PV and windpower FIT and microFIT Contracts (together "Contracts") executed since the FIT Programme's inception constituted subsidies, or even envisaged the granting of subsidies, within the meaning of Article 1.1 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), and thereby that Canada had acted inconsistent with Article 3.1(b) and 3.2 of the SCM Agreement. (Paras. 1.11-1.25)

On 5 February 2013, Canada notified the Dispute Settlement Body (DSB), of its intention to appeal certain issues of law covered in the Panel Reports and certain legal interpretations developed by the Panel and filed a Notice of Appeal. On 11 February 2013, Japan and EU notified the DSB of their intention to appeal certain issues of law covered in the Panel Reports and filed a Notice of Other Appeal.

II. KEY ISSUES AND APPELLATE BODY FINDINGS

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

Japan argued before the Appellate Body that the Panel had erred in the proper sequence of analysis of its claims under GATT 1994 and TRIMs Agreement, on the one hand, and the SCM Agreement, on the

other. Thus, Japan requested the Appellate Body to commence its own analysis with the allegations or error relating to the SCM Agreement.

The Panel had noted that compared to the SCM Agreement and Article III:4 of the GATT 1994, it was the TRIMs Agreement that dealt directly, specifically and in detail, with the aspects of the FIT Programme, and the FIT and microFIT Contracts. It also noted that Canada had not contested the complainant's assertion that the measures at issue were trade-related investment measures (TRIMs) affecting imports of renewable energy generation equipment and components. Thus, on this basis, the Panel had decided to commence its evaluation of the claims by focusing on those made under the TRIMs Agreement. (Paras. 5.1-5.3)

(***Key Question:*** *Is there a particular order of analysis that needs to be followed when claims are made* under Article III:4 *of the GATT 1994 and the TRIMS Agreement, on the one hand, and Article 3.1(b) of the SCM Agreement on the other hand)*

According to the Appellate Body, both the national treatment obligations in Article III:4 of the GATT 1994 and the cumulative TRIMs Agreement, and the disciplines in Article 3.1(b) of the SCM Agreement, were cumulative obligations. There was nothing in these provisions that indicated an obligatory sequence of analysis to be followed when claims were made under Article III:4 of the GATT 1994 and the TRIMS Agreement, on the one hand, and Article 3.1(b) of the SCM Agreement on the other hand. The Appellate Body also noted that while difference in remedy would be relevant to a decision as to whether or not there would be a need to address the claims under the SCM Agreement, having made findings under the GATT 1994 and the TRIMs Agreement, it did not see relevance in this case for the question of which claims to address first. **Therefore, the Appellate Body declined Japan's request that it commence its evaluation with the allegations of error relating to the SCM Agreement.** (Paras. 5.4-5.8)

B. The applicability of Article III:8(a) of the GATT 1994 to measures falling under Article 2.2 of the TRIMs Agreement and Illustrative List annexed thereto

The European Union on appeal asserted that the Panel had erred in the interpretation and application of Articles 2.1 and 2.2 of the TRIMs Agreement, read in conjunction with paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement, when finding that it did not preclude the application of Article III:8(a) of the GATT 1994 to the challenged measures. The EU distinguished the text of Articles 2.1 and 2.3 of the TRIMs Agreement and noted that while Article 2.1 referred to Article III of the GATT 1994, Article 2.2 set out an Illustrative List of measures that were 'necessarily inconsistent with Article III:4'. Thus, according to the EU, for those measures that fall within the scope of the Illustrative List, the question of whether they could escape a violation through the applicability of Article III:8 of the GATT 1994 no longer presented itself, because the TRIMs Agreement had conclusively settled the issue. (Paras. 5.14-5.16)

Canada argued that the Panel's findings were correct and explained that, by describing the measures in the Illustrative List of TRIMs as inconsistent with "the obligation of national treatment provided for in paragraph 4 of Article III", instead of "Article III", Article 2.2 did not address the consistency of the measures listed in the Annex with Article III, as a whole, including Article III:8(a).(Paras. 5.17-5.18)

(***Key Question:*** *Is Article III:8(a) of the GATT 1994 relevant when a measures falls under Article 2.2 of the TRIMs Agreement and the Illustrative List annexed thereto?*)

The Appellate Body observed that the EU position was that TRIMs that fell within the scope of Article 2.2 and the Illustrative List of the TRIMs Agreement were inconsistent with Article III:4 of the GATT

1994, irrespective of whether they also fell within Article III:8(a) of the GATT 1994. However, according to the Appellate Body, while Article 2.2 and the Illustrative List focussed on the specific provisions where the national treatment obligation was reflected, that is – Article III:4 of the GATT 1994, it did not believe it responded to the question of whether such measures were inconsistent with Article III of the GATT 1994 in its entirety. Where a measure fell within the scope of Article III:8, the measure was not inconsistent with Article III overall. Thus, the Appellate Body concluded:

> "...we agree with the Panel that Article 2.2 and the Illustrative List must be understood as clarifying to which TRIMs the general obligation in Article 2.1 applies. Furthermore, we understand the absence of a reference to Article III:8(a) of the GATT 1994 in Article 2.2 of the TRIMs Agreement and in the Illustrative List as indicating that these provisions are neutral as to the applicability of the former provision. This results in a harmonious interpretation of Articles 2.1 and 2.2 of the TRIMs Agreement and Articles III:4 and III:8(a) of the GATT 1994. By contrast, the interpretation advocated by the European Union would result in different obligations for those TRIMs that fall within the Illustrative List and those that do not." (Para. 5.26)

The Appellate Body found additional support for this interpretation in the opening clause of Article 2.1, which reads 'without prejudice to other rights and obligations under GATT 1994' and Article 3 of the TRIMs Agreement, entitled 'Exceptions', which states that '[a]ll exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement'. The Appellate Body also looked into the negotiating mandate of the Punta del Este Declaration, that called for negotiations to "elaborate, as appropriate, further provisions that may be necessary to avoid such adverse effects on trade". According to the Appellate Body, looking at the TRIMs Agreement as a whole, it considered that the "further" provisions that it contains mainly clarify the application of Articles III and XI of the GATT 1994 to a specific set of measures – namely TRIMs. In doing so, however, there was little, if any, indication that the provisions of the TRIMs Agreement were intended to override rights, recognised in the GATT, such as the right provided in Article III:8(a). **Thus, the Appellate Body found no basis to entertain the EU's request that it complete the analysis and find that Article III:8(a) of the GATT 1994 was not applicable in the present case because the measures fell within Article 2.2 and the Illustrative List of the TRIMs Agreement.** (Paras. 5.27-5.33)

Article III:8(a) of the GATT 1994

The three participants challenged, on appeal, different aspects of the Panel's interpretation and application of Article III:8(a). Canada alleged that the Panel erred in finding that the FIT Programme and related FIT and microFIT Contracts were not covered by Article III:8(a) and that, consequently, Canada could not rely on that provision to exclude the application of Article III:4 of the GATT 1994 to the Minimum Required Domestic Content Levels. The European Union and Japan requested the Appellate Body to uphold the Panel's finding that the FIT Programme and Contracts were not covered by Article III:8(a). However, in their other appeals, they each appealed several aspects of the Panel's interpretation and application of Article III:8(a) of the GATT 1994 and requested the Appellate Body to modify certain intermediate findings by the Panel. (Paras. 5.34-5.37)

The Appellate Body noted that this was the first time that it was called upon to interpret Article III:8(a) of the GATT 1994, which stipulates:

> The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by government 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.

(***Key Question:*** *Do the terms "procurement" and "purchased" mentioned in Article III:8(a)of the GATT 1994 have the same essential meaning?)*

The Appellate Body then proceeded to interpret the different terms used in Article III:8(a). Importantly, it noted that in a technical sense, "*procurement*" referred to formal procedures used by governments to acquire goods or services. It also noted that in Article III:8(a), the term "procurement" was related to the words "products purchased". The Panel had found that the word "procurement" in Article III:8(a) should be given the "same essential meaning" as the word "purchased" and vice versa. However, according to the Appellate Body, the concepts of "procurement" and "purchased" are not to be equated. It noted that "procurement" was the operative word in Article III:8(a) describing the process and conduct of the government agency, while the word "purchased" was used to describe the type of transaction used to put into effect that procurement. Thus, not every procurement needs to be effectuated by way of a purchase, and not every purchase is part of a process of government procurement. Thus, the Appellate Body concluded that the word "procurement" refers to the process pursuant to which a government acquires products. (Para. 5.59)

On the meaning of the term "*governmental agency*", the Appellate Body considered Articles XVII:1 and XVII:2 of the GATT 1994 to be providing relevant context for the interpretation, and concluded that the term refers to those entities acting for or on behalf of government in the public realm within the competences that have been conferred on them to discharge governmental functions. (Paras. 5.60-5.61)

(***Key Question:*** *What is the scope of the term "product" in "product purchased", as it appears in Article III:8(a) of GATT 1994?*)

Next, the Appellate Body turned to the word "*product*" in "product purchased", and stated that because Article III:8(a) is a derogation from the obligations contained in other paragraphs of Article III, the scope of the terms "product purchased" in Article III:8(a) is informed by the scope of "products" referred to in the obligations set out in other paragraphs of Article III. Thus, the coverage of Article III:8 extends not only to products that are identical to the products that are purchased, but also to "like products" and products that are directly competitive to or substitutable with the product purchased under the challenged measure. (Paras. 5.62-5.63)

On the term "*governmental purposes*", the Appellate Body referred to the French and Spanish versions of the text and found that the French and Spanish terms for "purposes" corresponded closely to the English term "needs". Furthermore, the Appellate Body found relevant context in Article XVII:2 of the GATT 1994, which refers to "imports of products for immediate or ultimate consumption in governmental use", which according to the Appellate Body was phrased more narrowly than Article III:8(a), as the former provision referred to "immediate or ultimate consumption in government use". Therefore, the Appellate Body was of the view that Article III:8(a) does not require that where products purchased are consumed in governmental use, this be "immediate or ultimate". Thus, the Appellate Body was of the view that the phrase "products purchased for governmental purposes" in Article III:8(a) referred to what was consumed by government or what was provided by government to recipients in the discharge of its public functions, where the scope of these functions was to be decided on a case by case basis. (Paras. 5.64-5.68)

(***Key Question:*** *Does "commercial resale" under Article III:8(a) of the GATT 1994, necessarily involve sale for profit?)*

The Appellate Body then turned to analyse the last elements of the text of Article III:8(a), namely, the phrase "*and not with a view to commercial resale or with a view to use in the production of goods for commercial sale*". According to the Appellate Body, "*commercial resale*" is a resale of a product at arm's

length between a willing seller and a willing buyer. It noted that much of the debate in this case had focussed on whether procurement "with a view to commercial resale" must involve profit. The Appellate Body stated that whether a transaction constitutes a "commercial resale" must be assessed having regard to the entire transaction. In doing so, the assessment must look at the transaction from the seller's perspective and at whether the transaction is oriented at generating a profit for the seller. The Appellate Body noted that profit orientation is generally an indication that a resale is at arm's length. In circumstances where a seller enters into a transaction without making a profit, it may be useful to look at the seller's long term strategy. Furthermore, the transaction must also be assessed from the perspective of a buyer. Thus, a "commercial resale" would be one in which the buyer sought to maximise his or her own interest. It was an assessment of the relationship between the seller and the buyer in the transaction in question that allowed a judgment to be made whether a transaction was made at arm's length. (Paras. 5.69-5.71)

Application of Article III:8(a) of the GATT 1994 to the facts of these disputes

The Appellate Body next turned to consider whether the Panel had erred in finding that the FIT Programme and rebated FIT and microFIT Contracts were not covered by Article III:8(a) and they were therefore subject to the disciplines of Article III:4 of the GATT 1994. The Appellate Body noted that the product that was subject to the Minimum Required Domestic Content Levels of the FIT Programme and Contracts challenged by the complainants as discriminatory under Article III:4 of the GATT 1994 and the TRIMs Agreement was certain renewable energy generation equipment. The product purchased by the Government of Ontario under the FIT Programme and Contracts, however, was electricity and not generation equipment. The generation equipment was purchased by the generators themselves. Accordingly, the product being purchased by a governmental agency for purposes of Article III:8(a) – namely, electricity – was not the same as the product that was treated less favourably as a result of the Minimum Required Domestic Content Levels of the FIT Programme and Contracts. (Para. 5.75)

The Appellate Body further observed that in the present case, the product being procured was electricity, whereas the product discriminated against for reason of its origin was generation equipment. These two products were not in a competitive relationship. Accordingly, the discrimination relating to generation equipment contained in the FIT Programme and Contracts was not covered by the derogation of Article III:8(a) of the GATT 1994. The Appellate Body, therefore reversed the Panel's findings that the Minimum Required Domestic Content Levels of the FIT Programme and related FIT and microFIT Contracts were laws, regulations, or requirements governing the procurement by governmental agencies of electricity within the meaning of Article III:8(a) of the GATT 1994. Instead, it found that the Minimum Required Domestic Content Levels could not be characterized as "laws, regulations or requirements governing the procurement by governmental agencies" of electricity within the meaning of Article III:8(a) of the GATT 1994. (Paras. 5.76-5.84)

Thus, according to the Appellate Body, in the light of its finding that the Minimum Required Domestic Content Levels do not fall within the ambit of Article III:8(a), and in the light of the fact that Canada had not appealed the Panel's findings that the FIT Programme and Contracts are inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement, the Panel's conclusion, in paragraph 8.2 of the Japan Panel Report and in paragraph 8.6 of the EU Panel Report, that the Minimum Required Domestic Content Levels prescribed under the FIT Programme and related FIT and microFIT Contracts are inconsistent with Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994 stands. (Para. 5.85)

C. Did the Panel properly exercise judicial economy when it declined to make a finding under Japan's 'stand-alone' claim under Article III:4 of the GATT 1994?

Next, the Appellate Body looked into Japan's allegation that the Panel had failed to comply with its duties under Article 11 of the DSU and exercised false judicial economy by failing to make a finding with respect to Japan's claim under Article III:4 of the GATT 1994, which was independent of Japan's claim involving both Article III:4 of the GATT 1994 and the TRIMs Agreement. Thus, the question before the Appellate Body was whether the Panel's exercise of judicial economy in this case was proper. At the outset, the Appellate Body emphasized that this was not a case in which the panel had failed to make a finding under a provision alleged by the complainant to have been violated. The Panel in this case had made a finding of violation of Article III:4 of the GATT 1994. It was true that this finding of violation rested on an assessment of the measures at issue under the Illustrative List of TRIMs annexed to the TRIMs Agreement, and in particular on paragraph 1(a). Japan had argued that a stand-alone finding under Article III:4 would result in broader implementation obligations. However, the Appellate Body noted that:

> "Different implementation obligations have been one of the factors used in the past to assess whether the exercise of judicial economy was proper or improper. However, this is not a case like *EC – Export Subsidies on Sugar*, where the remedy available as a result of a finding of violation of the SCM Agreement was different to the remedy available in relation to a finding of violation of the Agreement on Agriculture. There is no difference here between the remedy that would be available under Article 19.1 of the DSU in the case of a stand-alone Article III:4 finding of violation and the TRIMs–Article III:4 finding of violation entered by the Panel." (Paras. 5.86-5.95)

Japan also relied on the Appellate Body Report in *US – Tuna II (Mexico)*[4] where the Appellate Body had faulted the panel for failing to make findings on Mexico's claims under Articles I and III of the GATT 1994, having assessed the measure under Article 2.2 and 2.4 of the Agreement on Technical Barriers to Trade (TBT Agreement). The Appellate Body however noted that there was a key difference between the situation that was before the Appellate Body in *US – Tuna II (Mexico)* and in the present disputes. In this case, the Panel made findings of violation under both Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994, while in *US – Tuna II (Mexico)*, the panel had made no findings of violation under Articles I:1 and III:4 of the GATT 1994 or Article 2.1 of the TBT Agreement. Thus, the situation in this case and the situation in *US – Tuna II (Mexico)* were the diametrical opposite. According to the Appellate Body, the circumstance in the present dispute more closely resembled *US – Upland Cotton*, as both the cases involved findings of inconsistency that proceeded on the basis of the application of an illustrative list, and the Panel's decision to exercise judicial economy in the present case with respect to Japan's stand-alone Article III:4 claim was consistent with the Panel's approach in *US-Upland Cotton*, which the Appellate Body had found *not* to have been an improper exercise of judicial economy. (Paras. 5.99-5.103)

In sum, the Appellate Body was not persuaded that the Panel's failure to make a finding on Japan's stand-alone Article III:4 claim provided only a "partial resolution of the matter at issue" or that an additional finding on Japan's stand-alone Article III:4 claim was "necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance" by Canada with those recommendations and rulings. Therefore, it rejected Japan's claim that the Panel failed to fulfil its obligations under Article 11 of the DSU and exercised false judicial economy by declining to make a finding on Japan's stand-alone Article III:4 claim. (Para. 5.104)

[4] Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, Para. 405

D. Claims under the SCM Agreement

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

Japan appealed several aspects of the Panel's findings under Article 1.1(a) of the SCM Agreement. In particular, Japan argued that the Panel erred in its interpretation and application of Article 1.1(a) in finding that the FIT Programme and related FIT and microFIT Contracts constituted government "purchases [of] goods" under Article 1.1(a)(1)(iii). With respect to the Panel's interpretation of Article 1.1(a)(1), Japan also contended that the Panel was wrong in finding that subparagraphs (i) and (iii) of Article 1.1(a)(1) were mutually exclusive. (Paras 5.106-5.108)

(a) Whether the Panel erred in finding that the FIT Programme and Contracts are government "purchase [of] goods" under Article 1.1(a)(1)(iii) of the SCM Agreement"?

(***Key Question:*** *Is the coverage of subparagraphs (i) to (iv) of Article 1.1(a)(1) of the SCM Agreement mutually exclusive?)*

The Appellate Body examined Japan's claim regarding the Panel's interpretation of Article 1.1(a)(1) and then turned to address its claim regarding the Panel's application of the provision. Starting with the Panel's interpretation of Article 1.1(a)(1)(iii), the Appellate Body observed that the Panel had noted that it saw no way of reading Articles 1.1(a)(1)(i) and (iii) in a way that could enable it to conclude that government purchase of goods could also be legally characterized as 'direct transfer of funds'. The Appellate Body disagreed with the Panel that the coverage of subparagraphs (i) and (iii) of the Article 1.1(a)(1) was mutually exclusive. It recalled that the Appellate Body in *US – Large Civil Aircraft (2nd complaint)*[5] had found that Article 1.1(a)(1) "does not explicitly spell out the intended relationship between the constituent subparagraphs" and that the structure of this provision "does not expressly preclude that a transaction could be covered by more than one subparagraph". The Appellate Body noted that when determining the proper legal characterization of a measure under Article 1.1(a)(1) of the SCM Agreement, a panel must assess whether the measure may fall within any of the types of the financial contributions set out in that provision. In doing so, a panel should scrutinize the measure, both as to its design and operation and identify its principles characteristics. According to the Appellate Body, the fact that a transaction may fall under more than one type of financial contribution does not mean that the types of financial contribution set out in Article 1.1(a)(1) are the same or that the distinct legal concepts set out in this provision would become redundant. (Paras. 5.116-5.120)

In the light of these considerations, the Appellate Body believed that the Panel's finding that subparagraphs (i) and (iii) were mutually exclusive was not consistent with the Appellate Body's interpretations in *US – Large Civil Aircraft (2nd complaint)*. Consequently, it declared and moot and of no legal effect the Panel finding in paragraph 7.246 of the Panel Reports. (Para. 5.121)

On the *application* of Article 1.1(a)(1) of the SCM Agreement, the Panel had found that the FIT Programme and Contracts were government "purchase [of] goods" within the meaning of Article 1.1(a)(1)(iii). Japan requested the Appellate Body to reverse the finding and to find instead that the measures at issue were appropriately characterized as "direct transfer[s] of funds", "potential direct transfers of funds", or "income or price support" under Article 1.1(a) of the SCM Agreement, or alternatively modify the Panel finding in this regard to find that the measures at issue may *also* be characterized as one of these three. In particular, Japan claimed that the Panel had overlooked the

[5] Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012, fn 1287 to Para. 613

Government of Ontario's policy decision to unbundle the generation, transmission, and distribution of electricity to achieve its goal of ensuring stable supply of electricity in Ontario, as well as the design and operation of the FIT Programme and Contracts within the framework of the Ontario electricity market. (Paras. 5.122-5.123)

The three main arguments made by Japan in furtherance of its claim, and the Appellate Body finding on the same are provided below:

(i) First, Japan argued that given the Government of Ontario's policy choice of unbundling the different functions of electricity supply, the role of OPA should be central for the proper characterization of the FIT Programme and Contracts under Article 1.1(a)(1). In particular, the characterization of the measures should be informed by the fact that one government entity (the OPA) makes the payments for electricity, while a different government entity (Hydro One) receives and transmits electricity delivered by suppliers, thus making the OPA a financing entity and not a purchasing entity, because it never takes possession of electricity. According to the Appellate Body, since Japan had not appealed the Panel's findings that the OPA, Hydro One and the IESO were public bodies under Article 1.1(a)(1), Japan's argument that the OPA did not itself take possession over electricity, did not undermine the Panel's finding that the Government of Ontario purchased electricity through the FIT Programmes and Contracts, through the "combined actions" of the above stated public bodies. (Para. 5.124)

(ii) Japan's second argument was that the Government of Ontario's goals of achieving a stable supply of electricity and stimulating renewable energy was not addressed through the purchases of electricity by the government, but rather through the allocation of distinct roles to entities operating in Ontario's electricity system. The Appellate Body, however, noted that this did not change the fact that the Government of Ontario purchased electricity pursuant to the FIT Programme and Contracts. Additionally, Japan also argued that the existence of private supplying electricity to consumers in Ontario showed that it was unnecessary for a governmental agency to take possession (i.e purchase) electricity in order to achieve its objectives. The Appellate Body however disagreed that this was of any particular relevance for the proper characterization of FIT programme and Contracts under the SCM Agreement. (Paras. 5.125-5.126)

(iii) Finally, Japan suggested that the Panel had erred in assuming that if a measure is characterized in a particular manner under domestic law (i.e. government purchase), it can never be characterized in a different manner under WTO law. The Appellate Body, however, noted that it did *not* consider that, in reaching its conclusion as to the proper characterization of the measure at issue under the SCM Agreement, the Panel relied exclusively on their characterization under Ontario law. On the contrary, the panel recognised that characterisation under the domestic law was not dispositive of the analysis under the WTO law, and identified separate reasons for its determination. (Paras. 5.127)

Having upheld the Panel's finding that the measures at issue were properly characterized as government "purchases [of] goods" under Article 1.1(a)(1)(iii), the Appellate Body turned to examine Japan's alternative claim that it modify the Panel's finding in this regard to find that these measures may *also* be characterized as "direct transfer[s] of funds" or "potential direct transfers of funds" under Article 1.1(a)(1)(i) of the SCM Agreement. The Appellate Body noted that although different characterizations of a measure may lead to different *methods* for determining whether a benefit has been conferred, the issue to be resolved under Article 1.1(b) remains to ascertain whether a "financial contribution" or "any form of income or price support" has conferred a benefit to the recipient. According to the Appellate Body, arguments advanced by Japan were not sufficient to demonstrate that the measures at issue were "direct transfer[s] of funds" or "potential direct transfers of funds". (Paras. 5.128 – 5.131)

For these reasons, the Appellate Body rejected Japan's appeal that the FIT Programme and FIT and microFIT Contracts may also be characterized as "direct transfer[s] of funds" or "potential direct transfers of funds" under Article 1.1(a)(1)(i) of the SCM Agreement. (Para. 5.132)

(b) Did the Panel err in exercising judicial economy with respect to the allegations that the measures at issue constitute "income or price support"?

Japan argued that the Panel improperly exercised judicial economy with respect to Japan's claim that the that the FIT Programme and FIT and microFIT Contracts constituted "income or price support" under Article 1.1(a)(2) of the SCM Agreement, and thereby, failed to make an objective assessment of the matter as required by Article 11 of the DSU. The Appellate Body noted that the thrust of Japan's claim concerned the existence of prohibited subsidies and the specific remedy associated with such finding, rather than the specific characterization of the challenged measures as financial contribution and/or income or price support. Moreover, although the characterization of a transaction under Article 1.1(a) may have implications for the manner in which the determination of benefit under Article 1.1(b) of the SCM Agreement is conducted, Japan had not elaborated whether and in which way the benefit analysis would have been different, or would have led to a different outcome, if the Panel had characterized the FIT Programme and Contracts as "income or price support" instead of as a "financial contribution". (Paras. 5.133-5.137)

Thus, given that the basis of Japan's benefit arguments in both instances was "essentially the same", and that the Panel rejected Japan's benefit arguments as they related to Article 1.1(a)(1), the Appellate Body believed that an additional finding by the Panel that the challenged measures constituted "income or price support" within the meaning of Article 1.1(a)(2) was not necessary to resolve fully the dispute. **Accordingly, the Appellate Body rejected Japan's claim that the Panel exercised false judicial economy in the particular instance, and declined to make a finding on whether the FIT Programme and Contracts may be characterized as "income or price support" under Article 1.1(a)(2) of the SCM Agreement**. (Paras. 5.138-5.139)

Article 1.1(b) – "Benefit"

The EU and Japan requested the Appellate Body that it reverse the Panel's finding that the complainants failed to establish that the challenged measures conferred a benefit, within the meaning of Article 1.1(b) of the SCM Agreement, and it also complete the legal analysis and find that the challenged measures conferred a benefit, based on the factual findings made by the Panel and uncontested facts on the Panel record. In particular, Japan argued, first, that the Panel erred in interpreting Article 1.1(b) because it failed to analyze the question of benefit from a perspective other than the framework of Article 14(d) of the SCM Agreement, and second, Japan claimed that the Panel erred because it wrongly rejected benchmarks of the current Ontario electricity market and chose an improper benchmark for its alternative counterfactual analysis, which was based on costs and ignored the demand-side of the market. The EU claimed that the Panel wrongly applied Article 1.1(b) of the SCM Agreement to the facts of this case by engaging into the examination of market counterfactuals when it was an uncontested fact that FIT generators would not have obtained any remuneration from the market in Ontario, absent the FIT Programme. (Paras. 5.140-5.143)

(a) Whether the Panel erred in finding that the European Union and Japan failed to establish that the challenged measures conferred a benefit within the meaning of Article 1.1(b) of the SCM Agreement?

i. The legal standard for the determination of benefit under Article 1.1(b) of the SCM Agreement

(***Key Question:*** *Does Article 14 of the SCM Agreement provide relevant context for determining the existence of benefit under Article 1,1(b) of the SCM Agreement?*)

The Appellate Body began its analysis of the Panel's finding under Article 1.1(b) of the SCM Agreement by reviewing the legal standard adopted by the Panel for the determination of benefit. According to the Panel, *one way* to assess whether the challenged measures conferred a benefit within the meaning of Article 1.1(b) was to examine whether, under the benchmark provided in Article 14(d) of the SCM Agreement, the remuneration obtained by windpower and solar PV generators under the FIT Programme was "more than adequate" when compared to the remuneration the same generators would, in the light of the "prevailing market conditions", otherwise receive on the relevant "market" for electricity in Ontario. Japan argued that the Panel erred in interpreting Article 1.1(b) because it failed to analyze the question of benefit from a perspective other than the framework of Article 14(d) of the SCM Agreement. However, according to the Appellate Body, it was not persuaded that, by analyzing whether a benefit is conferred on the basis of the guidelines contained in Article 14(d), the Panel erred in the interpretation of Article 1.1(b) of the SCM Agreement. It noted that although Article 14 is in Part V of the SCM Agreement, the Panel was correct in pointing out that it is relevant context to the interpretation of Article 1.1(b) for the purpose of Part II of the SCM Agreement, and that it can be used as relevant context to determine whether a subsidy exists. (Paras. 5.159-5.163)

The Appellate Body further stated that:

> "We do not think that a different approach should be adopted when, as in the case of prohibited subsidies, one has to determine whether a benefit exists as opposed to its precise quantification. A market benchmark can tell us whether a benefit exists and usually its size. However, in the absence of a market benchmark, it will not be possible to establish if a subsidy exists at all. That a financial contribution confers an advantage on its recipient cannot be determined in absolute terms, but requires a comparison with a benchmark, which, in the case of subsidies, derives from the market. This is so, in our view, regardless of whether the advantage needs to be precisely quantified or not." (Para. 5.164)

The Appellate Body thus considered that the Panel's interpretative approach to the question of benefit under Article 1.1(b) of the SCM Agreement, including the reliance on the context found in Article 14(d), was the correct one. It did not consider that the determination of the mere existence, as opposed to the amount, of the subsidy called for a different interpretation of how to determine benefit under Article 1.1(b). Thus, in the light of the above, it did not consider that Panel committed an error in the interpretation of the legal standard for the determination of benefit under Article 1.1(b) of the SCM Agreement. (Paras. 5.165-5.166)

ii. The relevant market

On the subject of the relevant market, the Panel had reviewed the economics of wholesale electricity markets and the Ontario 2002 market opening experience to conclude that "competitive wholesale electricity markets would only rarely attract sufficient investment in the generation capacity needed to secure a reliable supply of electricity" and that this "could not have been achieved in Ontario in 2002 solely on the basis of the operation of a competitive wholesale electricity market". Then the Panel reviewed several in-province and out-of-province benchmarks that were put forward by the complainants and which were all based on the assumption that the relevant market for the benefit comparison was a single market for electricity generated from all sources of energy. The Panel considered all these benchmarks to be distorted, and thus not appropriate, for a proper benefit analysis. (Para.5.167)

The Appellate Body saw two main problems with the Panel's analysis of relevant market for the purpose of benefit comparison in these disputes:

a. First, it was of the view that the Panel should have started, rather than concluding, its benefit analysis with the definition of the relevant market. According to the Appellate Body, the definition of the relevant market was central to, and a prerequisite for, a benefit analysis under Article 1.1(b) of the SCM Agreement. The existence of benefit could properly be established only by comparing the prices of goods and services in the relevant market where they compete. (Para. 5.169)

b. Second, the Appellate Body observed that on the one hand, the fact that electricity is physically identical, regardless of how it is generated, suggested that there is high demand-side substitutability between electricity generated through different technologies. On the other hand, however, there are additional factors that may be used to differentiate on the *demand-side*, which the Panel did not consider in its analysis of the relevant market. Factors such as the type of contract, the size of the customer, and the type of electricity generated (base-load versus peak-load) may differentiate the Market.

   (***Key Question:*** *How relevant are supply side factors in determination of the 'relevant market'?)*

   In addition, the Panel did not analyze *supply-side* factors in the definition of the relevant market. In the present disputes, supply-side factors suggested that windpower and solar PV producers of electricity could not compete with other electricity producers because of differences in cost structures and operating costs and characteristics. Differences in cost structures and operating costs and characteristics between windpower and solar PV technologies, on the one hand, and other technologies, on the other hand, make it very unlikely, if not impossible, that the former may exercise any form of price constraint on the latter. In contrast, conventional generators produce an identical commodity that can be used for base-load and peak-load electricity as they have larger economies of scale and exercise price constraints on windpower and solar PV generators. (Paras. 5.170-5.174)

   The Appellate Body further noted:

   > "In circumstances where the supply of electricity from different sources is blended and, for as long as the differences in costs for conventional and renewable electricity are so significant, markets for wind- and solar PV-generated electricity can only come into existence as a matter of government regulation. It is often the government's choice of supply-mix of electricity generation technologies that creates markets for wind- and solar PV-generated electricity. A government may choose the supply-mix by setting administered prices (based on the principles of cost recovery and reasonable margin) for technologies that would not otherwise be able to recover their costs on the spot market. Alternatively, a government may require that private distributors or the government itself buy part of their requirements of electricity from certain specified generation technologies. As we consider further below, in both instances, the definition of a certain supply-mix by the government cannot in and of itself be considered as conferring a benefit within the meaning of Article 1.1(b) of the SCM Agreement." (Para. 5.175)

   The Appellate Body also noted that the Panel's analysis of the relevant market focused on the preferences of the final consumers and ignored that electricity was purchased by the Government of Ontario at the wholesale level and resold to consumers at the retail level. Thus, according to the Appellate Body, not only should the Panel have defined the relevant market at the outset of its benefit analysis, but, in its analysis of the relevant market, it should have considered that in Ontario

government definition of the energy supply mix for electricity shaped the markets in which the generators of electricity through different technologies compete. Furthermore, it added that had the Panel more thoroughly scrutinized supply-side factors, it would have come to the conclusion that, even if demand-side factors weighed in favour of defining the relevant market as a single market for electricity generated from all sources of energy, supply-side factors suggested that important differences in cost structures and operating costs and characteristics among generating technologies prevented the very existence of windpower and solar PV generation, absent government definition of the energy supply-mix of electricity generation technologies. (Paras. 5.176-5.178)

This, in turn, would have led the Panel to conclude that the benefit comparison under Article 1.1(b) should not be conducted within the competitive wholesale electricity market as a whole, but within competitive markets for wind- and solar PV-generated electricity, which are created by the government definition of the energy supply-mix. (Paras. 5.178)

iii. Identification of a benefit benchmark for electricity produced from windpower and solar PV technologies

The Appellate Body noted that although the Panel defined the relevant market as a single market for electricity generated from all energy sources and engaged in an in-depth analysis of all market benchmarks for blended electricity put forwarded by the complainants, the Panel stated in its conclusion that the competitive wholesale electricity market was not an appropriate benchmark, given that the government intervention was required to achieve certain policy goals, such as ensuring a stable and reliable supply of electricity, including from renewable sources. It further observed that the Appellate Body in *US – Softwood Lumber IV*[6], had stated that Article 14(d) required a comparison with *market* conditions, and hence, resorting to a benchmark that did not reflect conditions would not be consistent with the guidelines of Article 14(d). (Paras.5.180-5.184)

The Appellate Body also noted that it did not think that a market-based approach to benefit benchmarks excluded taking into account situations where government intervened to *create* markets that would otherwise not exist. For example, governments create electricity markets with constant and reliable supply. By regulating the quantity and the type of electricity that is supplied through the network (base-load, intermediate-load, or peak-load) and the timing of such supply, governments ensure that there is a continuous supply-demand balance between generators and consumers, thus avoiding imbalances that would destabilize the network and cause interruptions of power supply. Although this type of intervention has an effect on market prices, as opposed to a situation where prices are determined by unconstrained forces of supply and demand, it does not exclude *per se* treating the resulting prices as market prices for the purposes of a benefit analysis under Article 1.1(b) of the SCM Agreement and in absence of such government intervention, there could not be a market with a constant and reliable supply of electricity. (Para. 5.185)

(***Key Question:*** *How is the determination of subsidy different when a government intervention creates a market, which would otherwise not exist, as opposed to an intervention in an already existing market?*)

According to the Appellate Body, considerations relating to the choice of energy supply-mix by a government, including wind and solar PV generated electricity may be crucial to the viability and sustainability of the electricity market in the long term. The Appellate Body also stated:

[6] Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, 571

> "Nevertheless, a distinction should be drawn between, on the one hand, government interventions that create markets that would otherwise not exist and, on the other hand, other types of government interventions in support of certain players in markets that already exist, or to correct market distortions therein. Where a government creates a market, it cannot be said that the government intervention distorts the market, as there would not be a market if the government had not created it. While the creation of markets by a government does not *in and of itself* give rise to subsidies within the meaning of the SCM Agreement, government interventions in existing markets may amount to subsidies when they take the form of a financial contribution, or income or price support, and confer a benefit to specific enterprises or industries." (Para 5.188)

Furthermore, it observed that a comparison between renewable energy electricity generators and conventional energy electricity generators required consideration of the full costs associated with generation of electricity. Thus, if the higher costs for renewable energy have certain positive externalities, such as guaranteeing long term supply and addressing environmental concerns, lower price for non-renewable electricity have certain negative externalities, such as adverse impact on human health and environment. Consideration relating to these will often underlie a government definition of energy supply-mix and thus be the reason why governments intervene and create markets for renewable electricity generation. (Para. 5.189)

Thus in light of the above, and, in particular, in view of the fact that the government's definition of the energy supply-mix for electricity generation does not *in and of itself* constitute a subsidy, the Appellate Body concluded that benefit benchmarks for wind- and solar PV-generated electricity should be found in the markets for wind- and solar PV-generated electricity that result from the supply-mix definition. Thus, where the government has defined an energy supply-mix that includes windpower and solar PV electricity generation technologies, as in the present disputes, a benchmark comparison for purposes of a benefit analysis for windpower and solar PV electricity generation should be with the terms and conditions that would be available under market-based conditions for each of these technologies, taking the supply-mix as a given. (Para. 5.190)

iv. The Panel's benefit benchmark analysis

After setting out the interpretative framework of Articles 1.1(b) and 14(d) of the SCM Agreement and before defining the relevant market, the Panel had proceeded to examine various Ontario blended electricity market benchmarks put forward by the complainants. The Panel had examined: (i) the HOEP – that is, the price for electricity sold at the wholesale level in the IESO-administered market; (ii) the retail prices offered under the RPP; and (iii) the export and import prices to and from neighbouring provinces and the United States. However, the Panel had rejected all these benchmarks, as it had found that they were distorted by the government intervention in the market, and thus not suitable. Japan and the EU had challenged the Panel's finding and the Appellate Body noted that their arguments on appeal were very similar to those put forward in the dissenting opinion in the Panel Reports. The Appellate Body thus stated that Japan and EU's argument was that the Panel had erred under Article 1.1(b) of the SCM Agreement because it embarked in a full benefit benchmark analysis instead of establishing the existence of benefit based on a simple "but for" test. Under such a test, the history, structure, and objectives of the FIT Programme, as well as the uncontested fact that, absent the FIT Programme, solar PV and windpower generators would not operate in the Ontario electricity market, would reveal the existence of a benefit. (Paras. 5.192-5.196)

(***Key Question:*** *How relevant is the 'but for' test in a benefit benchmark analysis under the SCM Agreement?)*

The Appellate Body observed that if, as the Panel acknowledged, windpower and solar PV energy generation would not occur in Ontario absent the government's definition of the energy supply-mix, a "but for" approach would be inapposite for establishing benefit, because such an approach would, by definition, not measure what the recipient could obtain in the marketplace for windpower and solar PV energy generation. Assuming that benefit could be established by determining whether or not windpower and solar PV generators would have entered the market "but for" the FIT Programme, the fundamental question that needed to be answered was "what" market provided the appropriate benchmark. Before answering the question of whether windpower and solar PV generators would have entered the market, the relevant market in which they would operate needed to be defined. It was in this market that the appropriate benchmark would need to be identified. (Para. 5.197)

Thus, according to the Appellate Body having disagreed with the relevant market definition underpinning the Panel's benefit analysis, the relevant question was whether windpower and solar PV electricity suppliers would have entered the wind and solar PV generated electricity market absent the FIT Programme, not whether they would have entered the blended wholesale market. The Appellate Body stated that,

> "We recall that we have considered above that the proper benchmark for wind- and solar PV-generated electricity should take into account the Government of Ontario's definition of the energy supply-mix as including wind- and solar PV-generated electricity, which implies the existence of separate markets for wind- and solar PV-generated electricity. The weighted-average wholesale rate and the RPP retail prices are prices for blended electricity, that is, electricity generated from all sources of energy. As such, we consider that the weighted-average wholesale rate and the RPP retail prices are not appropriate benchmarks to determine whether the FIT Programme confers a benefit on windpower and solar PV generators. For the same reason, we consider that all the other in-province and out-of-province blended electricity benchmarks that were submitted to the Panel are not appropriate benefit benchmarks." (Para.5.204)

Furthermore, the Appellate Body did not consider that the Panel finding that mere participation in the FIT Programme constituted an *advantage* within the meaning of paragraph 1 of the Illustrative List of TRIMs while, at the same time not finding that *benefit* existed under Article 1.1(b) of the SCM Agreement demonstrated that the Panel committed an error under Article 1.1(b). In this context, the Appellate Body had also noted that in *Canada – Aircraft*[7] and in its later jurisprudence, the Appellate Body had not equated the notion of "benefit" and "advantage". It noted that the Appellate Body's interpretation of "benefit" in Article 1.1(b) of the SCM Agreement clearly suggested that, while benefit involved some form of advantage, the former has a more specific meaning under the SCM Agreement. "Benefit" was linked to the concepts of "financial contribution" and "income or price support", and its existence required a comparison in the marketplace. The same could not be said about an "advantage" within the meaning of the TRIMs Agreement. (Paras. 5.206-5.210)

v. Conclusions under Article 1.1(b) of the SCM Agreement

In light of the above, the Appellate Body considered that the Panel had committed an error in not conducting the benfit analysis on the basis of a market that was shaped by the government's definition of the energy-supply mix, and of a benchmark located in that market reflecting competitive prices of windpower and solar PV generation, and therefore reversed the Panel's findings on these.

[7] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377

(b) Whether the Panel acted inconsistently with Article 11 of the DSU in finding that the EU and Japan failed to establish that the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement?

Both the EU and Japan claimed, in the alternative, that should the Appellate Body agree with the Panel's findings under Article 1.1(b) of the SCM Agreement, it should find that the Panel failed to make and objective assessment of the matter, under Article 11 of the DSU, in concluding that there was not enough evidence on the record that would allow it to reach conclusions on benefit under Article 1.1(b) of the SCM Agreement, based on its own approach to the question of benefit**. The Appellate Body declined to address the alternative claim, noting that having reversed the Panel's finding under Article 1.1(b) of the SCM Agreement, there was no need for it to address the alternative claims under Article 11 of the DSU to provide a positive solution to these disputes.**

(c) Completion of the analysis

Both Japan and the EU had requested that should the Appellate Body reverse the Panel's "benefit" finding, it complete the legal analysis on the basis of the factual findings made by the Panel and uncontested evidence on the Panel's record and find that the challenged measures conferred a benefit within the meaning of Article 1.1(b) of the SCM Agreement and constituted prohibited subsidies inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement**.** However, the Appellate Body noted that it did not consider that there were sufficient factual findings by the Panel and uncontested evidence on the Panel record that would allow it to complete the legal analysis and conduct a benefit benchmark comparison between the prices of wind-generated electricity under the FIT Programme and the prices for wind-generated electricity under the Renewable Energy Supply Initiative (RES initiative). In particular, it stated that it had found evidence on the Panel record, that suggested that RES prices for windpower generation contracts awarded through competitive bidding may qualify as benchmarks for a benefit comparison, and seemed to suggest a benefit may exist in the case of FIT windpower generation contracts, however such evidence had neither been sufficiently debated before the Panel, nor before it. **Consequently, it could not determine whether the challenged measures conferred a benefit within the meaning of Article 1.1(b) of the SCM Agreement and whether they constitute prohibited subsidies inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement.** (Paras.5.223-5.246)

III. DISPUTE NOTES ON SELECT ISSUES

- Sources of International Law:

  The Appellate Body in its analyses has mainly relied on treaty text (viz. the *SCM Agreement*) and the previous relevant Panel/ Appellate Body Reports.

- Article III:8(a) of the GATT 1994:

  As remarked by the Appellate Body, this was the first time that it had been called upon to interpret Article III:8(a) of the GATT 1994. The Appellate Body analysed several key elements of the Article in the Reports. In particular, it found that the terms 'procurement' and 'purchased' in Article III:8(a) could not be equated, as not every procurement needed to be effectuated by way of a purchase, and not every purchase was a part of a process of government procurement.

  The Appellate Body also noted that word 'product' in 'product purchased was informed by the scope of 'products' referred to other paragraphs of Article III. Thus the coverage of the Article III:8 extended not only to products that are identical to the products that are purchased, but also to "like

products" and products that were directly competitive to or substitutable with the product purchased under the challenged measure.

The Appellate Body also found relevant context to conclude that the term "products purchased for governmental purposes" did not require that where products are purchased in governmental use, this be "immediate or ultimate". The phrase referred to what was consumed by government or what was provided by government to recipients in the discharge of its public functions.

On the interpretation of the term "commercial resale", the Appellate Body stated that while profit orientation is generally an indication that a resale is at arm's length, a commercial resale is an assessment of the relationship between the seller and the buyer in transaction in question that allows a judgment to be made whether a transaction is made at an arm's length.

- Creation of market v government intervention in an existing market

In its determination of the benefit benchmark, the Appellate Body stated that a distinction should be drawn between, on the one hand, government interventions that create markets that would otherwise not exist and, on the other hand, other types of government interventions in support of certain players in markets that already exist, or to correct market distortions therein. Where a government creates a market, it cannot be said that the government intervention distorts the market, as there would not be a market if the government had not created it. According to the Appellate Body, while the creation of markets by a government does not *in and of itself* give rise to subsidies within the meaning of the SCM Agreement, government interventions in existing markets may amount to subsidies when they take the form of a financial contribution, or income or price support, and confer a benefit to specific enterprises or industries.

Thus, according to the Appellate Body, the present instance related to creation of a market, and hence the government's definition of the energy supply-mix for electricity generation did not *in and of itself* constitute a subsidy. Thus, flowing from this, the Appellate Body concluded that proper benchmark for wind and solar PV generated electricity would be the separate markets for wind and solar PV generated electricity and not prices for blended electricity, generated from all sources of energy.

The Appellate Body's distinction of government intervention that creates a market and government intervention in an existing market for determination of a subsidy may have wide implications in the future, which may extend well beyond the electricity sector. One would have to wait for future actions of the Members and any future dispute on the issue, to assess the impact that the Appellate Body's finding has on the existing subsidy regimes, in particular, on those relating to the green energies.