

WORLD TRADE ORGANIZATION

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CANADA – CERTAIN MEASURES AFFECTING THE RENEWABLE ENERGY GENERATION SECTOR

CANADA – MEASURES RELATING TO THE FEED-IN TARIFF PROGRAM

Reports of the Panels

Note by the Secretariat:

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

and application to any analysis that would need to be undertaken for the purpose of evaluating whether the challenged measures, when characterized as *government purchases of goods*, confer a benefit⁵⁰⁶. In this regard, we recall that both complainants have emphasized that were the challenged measures to be characterized as government purchases of goods, this would be consistent with their views that they amount to financial contributions⁵⁰⁷. Thus, although primarily submitted for the purpose of substantiating a different line of subsidization arguments, we see no legal impediment to evaluating the merits of the same contentions for the purpose of establishing whether the complainants have established that the challenged measures amount to subsidies when characterized as "government purchases [of] goods". To this end, we now turn to examine the parties' arguments by first recalling the relevant legal standard for the determination of the existence of "benefit" under the terms of Article 1.1(b) of the SCM Agreement. We then review the parties' specific assertions about how the FIT Programme, and the FIT and microFIT Contracts, confer (or do not confer) a "benefit" in the light of the relevant legal standard, directing particular attention to the extent to which the wholesale market for electricity in Ontario should be the appropriate focus of the benefit analysis. Finally, in last part of our evaluation, we set out our conclusions on the merits of the complainants' submissions in the light of our findings about the relevant focus of benefit analysis.

(ii) *The legal standard for determining the existence of "benefit"*

7.271 A financial contribution will confer a benefit upon a recipient within the meaning of Article 1.1(b) of the SCM Agreement when it provides an advantage to its recipient⁵⁰⁸. It is well established that the existence of any such advantage is to be determined by comparing the position of the recipient with and without the financial contribution, and that "the marketplace provides an appropriate basis for [making this] comparison"⁵⁰⁹. Article 14(d) of the SCM Agreement establishes guidelines for calculating the amount of subsidy in terms of benefit when there has been a government purchase of goods for the purpose of countervailing duty investigations. Although not intended to define the circumstances when a government purchase of goods will confer a benefit in disputes involving Part III of the SCM Agreement, Article 14(d) provides useful context for the analysis that is required in the present disputes. Article 14(d) reads as follows:

[T]he provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

7.272 On its face, Article 14(d) stipulates that a government purchase of goods will not confer a benefit upon a recipient unless it is made for "more than adequate remuneration", and that the

⁵⁰⁶ European Union's opening statement at the second meeting of the Panel, para. 23; second written submission, para. 53; response to Panel question No. 21 (second set); and Japan's response to Panel question No. 22 (second set).

⁵⁰⁷ European Union's first written submission, para. 54; response to Panel question No. 12 (first set); and Japan's response to Panel question No. 22 (second set).

⁵⁰⁸ Appellate Body Report, *US – Softwood Lumber IV*, para. 51.

⁵⁰⁹ Appellate Body Report, *Canada – Aircraft*, para. 157. We note that to date, the "marketplace" has not been explicitly used as a benchmark to determine whether financial contributions taking the form of the measures described in Article 1.1(a)(ii) of the SCM Agreement (i.e. where "government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)") confer a benefit. Panel Reports, *US – FSC*, para. 7.103; and *US – FSC (Article 21.5 – EC)*, paras. 8.44-8.48; and Appellate Body Reports, *US – FSC*, para. 140; and *US – FSC (Article 21.5 – EC)*, para. 198.