

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

(WT/DS412)

THIRD PARTY WRITTEN SUBMISSION

OF THE UNITED STATES

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Short Form	Full Citation
<i>Australia – Leather</i>	Panel Report, <i>Australia – Subsidies Provided to Producers and Exporters of Automotive Leather</i> , WT/DS126/R, adopted 16 June 1999
<i>Canada – Autos (Panel)</i>	Panel Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by the Appellate Body Report, WT/DS139/AB/R, WT/DS142/AB/R
<i>Canada – Wheat (Panel)</i>	Panel Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/R, adopted 27 September 2004, as modified by the Appellate Body Report, WT/DS276/AB/R
<i>China – EPS</i>	Preliminary Ruling of the Panel, <i>China – Certain Measures Affecting Electronic Payment Services</i> , WT/DS413/4, circulated 30 September 2011
<i>India – Autos</i>	Panel Report, <i>India – Measures Affecting the Automotive Sector</i> , WT/DS/146/R, WT/DS175/R, and Corr. 1, adopted 5 April 2002
<i>Korea – Dairy (AB)</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000
<i>US – FSC (Article 21.5) (Panel)</i>	Panel Report, <i>United States – Tax Treatment for “Foreign Sales Corporations” – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/RW, adopted 29 January 2002, as modified by the Appellate Body Report, WT/DS108/AB/RW
<i>US – OCTG from Argentina (AB)</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004
<i>US – Steel Safeguards (AB)</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R,

	WT/DS258/AB/R, WT/DS259/AB/R, and Corr.1, adopted 10 December 2003
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I. INTRODUCTION

1. The United States makes this third party submission because of its systemic interest in the correct interpretation of Articles III:4 and III:8(a) of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”), and Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”).

2. Japan asserts that the measures at issue in this case impact the purchase and use of parts and equipment utilized to generate electricity from wind and solar PV sources (“renewable energy generation equipment”) in connection with several regulatory regimes in the province of Ontario.¹

II. INTERPRETATIVE QUESTIONS RELATING TO ARTICLE III:4

3. Japan asserts that the Ontario FIT program violates Article III:4 of the GATT 1994 to the extent that it accords less favorable treatment to imported renewable energy generation equipment relative to like products of Ontario origin.² Canada does not dispute Japan’s assertion that the Ontario FIT program accords less favorable treatment to imported renewable energy generation equipment than it accords to like products that meet the domestic content requirements specified under the Ontario FIT program. Instead, Canada posits that the Ontario FIT program, including its associated local content requirements, “falls within the scope of Article III:8(a),” giving Canada “the ability to impose requirements that may be discriminatory, including domestic content requirements.”³ In short, Canada would not appear to contest Japan’s assertion of a *prima facie* violation of Canada’s obligations under Article III:4 of the GATT 1994, should Canada’s defense under Article III:8(a) of the GATT 1994 fail.

4. Japan discusses past reports concerning Article III:4 of the GATT 1994.⁴ The United States supplements the discussion of “likeness” in one respect: several panels have found

¹ See First Written Submission of Japan, para. 1.

² See First Written Submission of Japan, paras. 262-283.

³ See First Written Submission of Canada, para. 7.

⁴ See First Written Submission of Japan, paras. 263-281.

significant the fact that a measure distinguishes between a domestic and an imported product solely on the basis of origin.⁵ For instance, the *Canada Wheat* panel stated that:

Where a difference in treatment between domestic and imported products is based exclusively on the products' origin, the complaining party need not necessarily identify specific domestic and imported products and establish their likeness in terms of the traditional criteria – that is, the physical properties, end-uses and consumers' taste and habits. Instead, it is sufficient for the purposes of satisfying the “like product” requirement, to demonstrate that there can or will be domestic and imported products that are like.⁶

5. Moreover, another panel, noting that the statute at issue made a distinction between foreign and imported articles solely on the basis of origin, found that “there is no need to demonstrate the existence of actually traded like products in order to establish a violation of Article III:4.”⁷

III. INTERPRETATIVE QUESTIONS RELATING TO ARTICLE III:8(a)

6. Canada asserts that “under GATT Article III:8(a), the FIT program is not subject to the obligations of GATT Article III,” because it “is a program for the procurement of renewable energy by the Government of Ontario.”⁸

7. Canada has improperly assigned an “object and purpose” to Article III:8(a), employed an overly broad interpretation of “governmental purposes,” and incorrectly identified the relevant product for purposes of Article III:8(a).

A. Object and Purpose of the GATT 1994

8. Canada states that the object and purpose of Article III:8(a) is to allow governments to pursue public policy through procurements.⁹

⁵ See *Canada – Autos (Panel)*, para. 10.74; *India – Autos*, paras. 7.173 - 7.176; *US – FSC (Article 21.5) (Panel)*, paras. 8.130-8.135.

⁶ *Canada – Wheat (Panel)*, para. 6.164. The panel also recalled that in *Argentina – Leather*, which dealt with a claim arising under Article III:2 of the GATT 1994, the panel found that it was unnecessary to examine the likeness criteria where the respondent drew a distinction based on origin with respect to an internal tax (paras. 11.168-11.170).

⁷ *US – FSC (Article 21.5) (Panel)*, para. 8.133.

⁸ See First Written Submission of Canada, para. 62.

⁹ See First Written Submission of Canada, paras. 64, 86.

9. The *Vienna Convention on the Law of Treaties* (“Vienna Convention”) instructs that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁰ The reference to “its object and purpose” is in the singular. In contrast, the other two interpretive tools set out in Article 31 of the Vienna Convention – ordinary meaning and context – are with reference to “the terms of the treaty” (plural). The reference in the singular – “its object and purpose” – therefore relates back to “[a] treaty.” Thus, the object and purpose that must inform the interpretation of treaty provisions is the object and purpose of the entire agreement.¹¹

10. Accordingly, proper identification of the object and purpose of an agreement is not derived by reviewing an isolated subsection of an agreement. The object and purpose that must inform the Panel’s interpretation of Article III:8(a) is the object and purpose of the GATT 1994. Canada assigns an object and purpose to Article III:8(a) and then attempts to use this self-proclaimed object and purpose to inform the interpretation of Article III:8(a). That approach is incorrect.

11. Moreover, aside from the fact that Canada’s approach to object and purpose is incorrect, Canada has provided no support for its chosen object and purpose. The passage Canada relies on for its alleged object and purpose of Article III:8(a) is not the text of the agreement, an interpretation of the Ministerial Conference or General Council, or guidance from a panel or the Appellate Body. Rather, Canada bases its entire theory for the object and purpose of Article III:8(a) on one statement found in a Japanese government document. A single Member’s views are not authority or guidance upon which Canada can rely to make its case about the object and purpose of Article III:8(a).

12. The United States believes the Panel should reject Canada’s alleged object and purpose of Article III:8(a).

¹⁰ Vienna Convention, Art. 31.

¹¹ See Vienna Convention, Art. 2.1(a) (defining “treaty” as “an international agreement concluded between States in written form and governed by international law”); see also *US – Steel Safeguards (AB)*, para. 286 (“The meaning of Article 3.1 must be established through an examination of the ordinary meaning of the terms of Article 3.1, read in their context and in the light of the object and purpose of the *Agreement on Safeguards*.”).

B. Governmental Purposes in Article III:8(a)

13. Building from this concept of object and purpose, Canada puts forth an overly broad definition of “purchased for governmental purposes” in Article III:8(a). Canada states that a purchase for a governmental purpose is a purchase made with any aim of the government in mind. Moreover, Canada argues that aims of governments are expressed through documents promulgated by a government, and any procurement that occurs pursuant to a government document is procurement pursuant to a governmental purpose.¹²

14. This definition of governmental purpose is clearly too broad. First, Article III:8(a) already specifies that it only applies to “laws, regulations, or requirements governing the procurement by governmental agencies.” It is difficult to conceive of a situation in which a government would say it is not acting with a governmental aim in mind. An interpretation of “governmental purposes” that amounts to saying that if a procurement is by a government agency then it is for government purposes is circular and would render the phrase “for governmental purposes” inutile.

15. Second, nearly every government procurement is “directed by” a government document of some sort. As a practical matter, Canada’s definition would collapse “for governmental purposes” into the very act being considered in the first place – the purchase of a product by a government. Such a definition would render meaningless the phrase “purchased for a governmental purpose” in Article III:8(a) and is therefore incorrect.

C. Product at Issue

16. Canada takes the position that in this dispute the relevant “products” for purposes of Article III:8(a) of the GATT 1994 are “electricity,” and Japan has contested this position.¹³ The United States does not comment upon whether Ontario is engaged in government procurement of electricity or not.

17. Assuming for the sake of argument that Ontario is procuring electricity, it would then be important to determine what are the relevant “products” in this dispute for purposes of invoking Article III:8(a) in order to assess whether the local content requirements at issue are justified.

¹² First Written Submission of Canada, para. 86.

¹³ Compare First Written Submission of Canada, at paras. 66-99 with First Written Submission of Japan, paras. 284-290.

18. Canada’s reliance on the purported procurement of electricity appears misplaced. The particular purchases to which the Ontario FIT local content requirements apply – sales of equipment by equipment manufacturers to private power generators – appear to differ in nature and by contract from the purported governmental procurement of electricity that is at the core of Canada’s Article III:8(a) defense. Although Canada consistently identifies “electricity” as the “product” covered by Article III:8(a), it seeks to justify local content requirements that apply to “equipment.” Yet the two products are not the same. It does not follow that a purported governmental procurement of one class of goods under Article III:8(a) justifies a local content requirement covering private purchases of a different class of goods. Indeed, Canada’s approach would appear to read into Article III:8(a) language that is not there, in effect adding a sentence at the end of Article III:8(a) along the lines: “Additionally, the provisions of this Article shall not apply to laws, regulations or requirements governing the purchase by private parties of other products.”

19. Furthermore, the interpretation advanced by Canada would extend the scope of Article III:8(a) well beyond its ordinary meaning, effectively broadening it to permit a government procurement of a good to be used to leverage all manner of domestic content requirements. For example, it would appear to permit a government to condition the procurement of a good on the supplier discriminating against imported products throughout a supplier’s operations. A government could require that a supplier use only domestically manufactured equipment for all of its manufacturing, its facilities to be built only with domestic materials, and that it purchase its inputs only from those who met similar discriminatory requirements.

20. Because the local content requirement at issue here applies to private purchases of renewable energy equipment, Article III:8(a) cannot be cited to justify those local content requirements on the bases cited by Canada. In the absence of a viable defense under Article III:8(a), both parties would appear to agree that a violation of GATT Article III:4 exists.

IV. INTERPRETATIVE QUESTIONS RELATING TO ARTICLE 6.2

21. In its submission, Canada reiterates its claim that Japan violated Article 6.2 of the DSU by failing to provide a brief summary of the legal basis of its complaint sufficient to present the problem clearly.¹⁴ The United States disagrees.

22. The United States notes that Canada’s argument that Japan’s panel request did not include a brief summary of the legal basis of its complaint is similar to that recently addressed in the preliminary ruling of the panel in *China – EPS*. As that panel stated, “the term ‘legal basis’ in Article 6.2 of the DSU refers to the claim made by the complaining party.”¹⁵ It further explained that “[a] claim ‘sets forth the complainant’s view that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement’.”¹⁶

23. It appears to the United States that Japan has satisfied that requirement. Japan identified the measures at issue.¹⁷ Japan then provided a brief summary of the legal basis of its complaint by setting forth its view that the measures violated provisions of the WTO Agreement “because they constitute a prohibited subsidy, and also discriminate against equipment for renewable energy generation facilities produced outside Ontario” and identifying the specific provisions of the WTO Agreement it believes violated.¹⁸ As such, Japan’s panel request satisfied Article 6.2 of the DSU.

24. Canada’s argument that a Member cannot claim a measure violates Article 3 of the SCM Agreement without identifying specifically “the form of the subsidy, as well as who provided the subsidy, who benefited from the subsidy and the form of the benefit” is also without merit.¹⁹ As Canada acknowledges, Article 1.1(a) defines a type of measure – a subsidy.²⁰ Japan properly stated in its panel request that it believed the measures it identified were subsidies. It then stated which provisions of the SCM Agreement it believes these measures violated. Article 6.2 does not require that Japan provide arguments as to why it believes the measures meet the definition

¹⁴ First Written Submission of Canada, para. 104

¹⁵ *China – EPS* (Preliminary Ruling), para. 8 (citing *US – OCTG from Argentina (AB)*, para. 162).

¹⁶ *China – EPS* (Preliminary Ruling), para. 8 (quoting *Korea – Dairy (AB)*, para. 139).

¹⁷ Request for the Establishment of a Panel by Japan, WT/DS412/5, pp. 1-3.

¹⁸ Request for the Establishment of a Panel by Japan, WT/DS412/5, p. 4.

¹⁹ First Written Submission of Canada, para. 112.

²⁰ First Written Submission of Canada, para. 111.

of subsidy. Rather, Japan was required to state the legal basis of its complaint, and it is apparent that it did.