

***CANADA – MEASURES AFFECTING THE RENEWABLE
ENERGY GENERATION SECTION (WT/DS412)***

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

**EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION
OF THE UNITED STATES OF AMERICA**

April 4, 2012

I. INTERPRETATIVE QUESTIONS RELATING TO ARTICLE III:4

1. Japan discusses past reports concerning Article III:4 of the GATT 1994. The United States supplements the discussion of “likeness” in one respect: several panels, including the panel in *Canada – Wheat*, have found significant the fact that a measure distinguishes between a domestic and an imported product solely on the basis of origin. The panel in *US – FSC (Article 21.5)* upon finding that the statute at issue in that dispute made a distinction between foreign and imported articles solely on the basis of origin, stated that “there is no need to demonstrate the existence of actually traded like products in order to establish a violation of Article III:4.”

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

2. 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

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

4. 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.” 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.

5. 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.

6. 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).

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

7. 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.

8. 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.

9. 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

10. Canada takes the position that in this dispute the relevant “products” for purposes of Article III:8(a) of the GATT 1994 are “electricity.” 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.

11. 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.”

12. 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. 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.

III. INTERPRETATIVE QUESTIONS RELATING TO ARTICLE 6.2

13. 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. 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.” 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’.”

14. It appears to the United States that Japan has satisfied that requirement. Japan identified the measures at issue and then provided a brief summary of the legal basis of its complaint by setting forth its view that the measures violated specific provisions of the WTO Agreement. As such, Japan’s panel request satisfied Article 6.2 of the DSU.

15. 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 benefitted from the subsidy and the form of the benefit” is also without merit. As Canada acknowledges, Article 1.1(a) defines a type of measure – a subsidy. 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 of subsidy. Rather, Japan was required to state the legal basis of its complaint, and it is apparent that it did.