Exhibit	Description
JPN-167	Ontario Power Authority, microFIT Contract (version 1.3), 10 December 2009
JPN-168	Ontario Power Authority, microFIT Contract (version 1.4), 2 July 2010
JPN-169	Ontario Power Authority, microFIT Contract (version 1.5), 25 August 2010
JPN-170	Ontario Power Authority, microFIT Contract (version 1.6), 8 December 2010
JPN-171	Ontario Power Authority, Conditional Offer of microFIT Contract (version 1.6.1)
JPN-229	Canada Energy webpage, "Mid and Peak Tier Time-of-Use Rate Rises 8% on May 1", news article posting, *The Toronto Star*, 19 April 2012, available at: <http://www.canadaenergy.ca/>
JPN-230	My Rate Energy Ontario, Canada webpage, "Price Protection for Electricity", available at: <http://myrateenergy.ca/electricity-info.php>

1. INTRODUCTION

1.1 Canada, Japan, and the European Union each appeals certain issues of law and legal interpretations developed in the Panel Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*[3] and *Canada – Measures Relating to the Feed-in Tariff Program*[4] (Panel Reports).[5] The Panel was established[6] to consider complaints by Japan[7] and the European Union[8] (the

[3] WT/DS412/R, 19 December 2012 (Japan Panel Report (DS412)).
[4] WT/DS426/R, 19 December 2012 (EU Panel Report (DS426)).
[5] The Panel issued its findings in the form of a single document containing two separate reports, with a common cover page, table of contents, and sections I through VII (including the Panel's findings), and with separate conclusions and recommendations in respect of the dispute initiated by Japan and in respect of the dispute initiated by the European Union.
[6] At its meetings held on 20 July 2011 and 20 January 2012, the Dispute Settlement Body (DSB) established two panels pursuant to, respectively, Japan's request in document WT/DS412/5 and the European Union's request in document WT/DS426/5, in accordance with Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). (Panel Reports, para. 1.4)

On 6 October 2011, the Director-General composed the Panel in DS412. With respect to DS426, following the agreement of the parties, the Panel was composed, on 23 January 2012, with the same persons as in DS412. Following consultations with the parties, the Panels in the two disputes decided to harmonize their timetables to the greatest extent possible, in accordance with Article 9.3 of the

complainants) with respect to certain domestic content requirements in the feed-in tariff programme (FIT Programme) established by the Canadian Province of Ontario.

1.2 The measures at issue in these disputes, as identified by the Panel[9], are the following:

a. the FIT Programme, as evidenced by the following measures:

i. the Electricity Act of 1998[10], as amended, including in particular Part II – Independent Electricity System Operator, Part II.1 – Ontario Power Authority, and Part II.2 – Management of Electricity Supply, Capacity and Demand, including in particular Section 25.35 – Feed-in tariff program;

ii. an Act to enact the Green Energy Act of 2009 and to build a green economy, to repeal the Energy Conservation Leadership Act of 2006 and the Energy Efficiency Act and to amend other statutes[11] (Green Energy and Green Economy Act of 2009), including in particular Schedule B, amending the Electricity Act of 1998;

iii. an Act to amend the Electricity Act of 1998 and the Ontario Energy Board Act of 1998 and to make consequential amendments to other Acts[12] (Electricity Restructuring Act of 2004), including in particular Schedule A, Sections 29-32, enacting Part II.1 of the Electricity Act of 1998, and Sections 33-38, enacting Part II.2 of the Electricity Act of 1998, and Schedule B, Sections 17-18, enacting Sections 78.3-78.4 of the Ontario Energy Board Act of 1998;

iv. Ontario Regulation 578/05, made under the Ontario Energy Board Act of 1998, entitled "Prescribed Contracts Re Sections 78.3 and 78.4 of the Act"[13];

v. the Independent Electricity System Operator (IESO) Market Manual, including in particular Part 5.5 – Physical Markets Settlement Statements[14];

DSU. As in the Panel Reports, the Panels in DS412 and DS426 are herein collectively referred to as the "Panel". (See *Ibid.*, paras. 1.6 and 1.7 and fn 5 thereto)

7 Request for the Establishment of a Panel by Japan, WT/DS412/5.

8 Request for the Establishment of a Panel by the European Union, WT/DS426/5.

9 Panel Reports, para. 2.1.

10 *Service Ontario 1998*, Chapter 15, Schedule A (Panel Exhibit JPN-5).

11 *Service Ontario 2009*, Chapter 12 (Panel Exhibit JPN-101).

12 *Service Ontario 2004*, Chapter 23 (Panel Exhibits CDA-18 and JPN-8).

13 As amended (Panel Exhibit JPN-154).

14 IESO, Market Manual, Part 5.5 (Panel Exhibit JPN-82).

vi. the IESO Market Rules, including in particular Chapter 7 – System Operations and Physical Markets, Chapter 9 – Settlements and Billing, and Chapter 11 – Definitions[15];

vii. Direction dated 24 September 2009 from George Smitherman, Deputy Premier and Minister of Energy and Infrastructure, to Colin Andersen, Chief Executive Officer, Ontario Power Authority (OPA), directing the OPA to 0develop a feed-in tariff (FIT) programme and include a requirement that the applicant submit a plan for meeting the domestic (i.e. Ontario) content goals in the FIT Rules[16] (Minister's 2009 FIT Direction);

viii. all versions of the FIT Rules[17] and microFIT Rules[18] issued by the OPA since the inception of the FIT Programme;

ix. all versions of the FIT Contract, including General Terms and Conditions, Exhibits, and Standard Definitions[19], and microFIT Contract, including Appendices and the Conditional Offer of microFIT Contract[20], issued by the OPA since the inception of the FIT Programme;

x. all versions of the FIT Application Form[21] and online microFIT Application issued by the OPA since the inception of the FIT Programme;

xi. all versions of the FIT Price Schedule[22] and microFIT Price Schedule[23] issued by the OPA since the inception of the FIT Programme; and

xii. all versions of the FIT Program Interpretations of the Domestic Content Requirements[24] (FIT Programme Interpretations) issued by the OPA since the inception of the FIT Programme;

b. the individual FIT Contracts for wind or solar photovoltaic (PV) sources executed by the OPA since the inception of the FIT Programme; and

[15] IESO, Market Rules for the Ontario Market, Chapters 7 and 9 of the 12 October 2011 issue (Panel Exhibit JPN-79), and Chapter 11 of the 7 March 2012 issue (Panel Exhibit CDA-106).
[16] Panel Exhibit JPN-102.
[17] Panel Exhibits JPN-119 through JPN-126 and EU-4.
[18] Panel Exhibits JPN-157 through JPN-163.
[19] Panel Exhibits JPN-127 through JPN-134 and EU-5.
[20] Panel Exhibits JPN-164 through JPN-171 and EU-6.
[21] See Panel Exhibit JPN-145.
[22] Panel Exhibits JPN-30, JPN-32, JPN-33, and JPN-34.
[23] See Panel Exhibit JPN-31.
[24] See Panel Exhibit EU-7.

c. the individual microFIT Contracts for solar PV source executed by the OPA since the inception of the FIT Programme.

1.3 The FIT Programme is a scheme implemented by the Government of the Province of Ontario and its 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.[25] Participation in the FIT Programme is open to facilities located in Ontario that generate electricity exclusively from one or more of the following sources of renewable energy: wind, solar PV, renewable biomass, biogas, landfill gas, and waterpower.[26] It is administered by the OPA and implemented through the application of a standard set of rules, standard contracts, and, for each class of generation technology, standard pricing.[27] The FIT Programme is divided into two streams: (i) the FIT stream – for projects with a capacity to produce electricity that exceeds 10 kilowatts (kW), but is no more than 10 megawatts (MW) for solar PV projects or 50 MW in the case of waterpower projects; and (ii) the microFIT stream – for projects having a capacity to produce up to 10 kW of electricity.[28] The microFIT stream is intended to provide "'a simplified approach for enabling the development of renewable micro-generation projects in Ontario', with a view to attracting participants such as homeowners, farmers and small businesses".[29] Only projects that satisfy all of the specific eligibility requirements, and that can be connected to the Ontario electricity system, will be offered a FIT or microFIT Contract by the OPA, and thereby permitted to participate in the FIT Programme.[30]

1.4 Under the FIT stream, electricity generation facilities utilizing windpower and solar PV technologies must comply with "Minimum Required Domestic Content Levels", which must be satisfied in the development and construction of these facilities.[31] The microFIT stream also imposes Minimum Required Domestic Content Levels, but only on generation facilities utilizing solar PV technology.[32] The "Domestic Content Level" of a facility participating in either stream of the FIT Programme is calculated pursuant to a methodology that

[25] Panel Reports, para. 7.64.
[26] Panel Reports, para. 7.66 (referring to FIT Rules (version 1.5.1), Section 2.1(a); and OPA, Feed-in Tariff Appendix 1 – Standard Definitions (version 1.5.1), 15 July 2011 (FIT Standard Definitions) (Panel Exhibit JPN-135), Definition Nos. 215 and 216).
[27] Panel Reports, para. 7.67.
[28] Panel Reports, para. 7.66 (referring to FIT Rules (version 1.5.1), Section 2.1(a)(iii); and microFIT Rules (version 1.6.1), Section 2.1(a)(iv)).
[29] Panel Reports, para. 7.209 (quoting OPA, Micro Feed-in Tariff Program: Program Overview (2010) (Panel Exhibit JPN-38), p. 1 and Section 1.2(a); and microFIT Rules (version 1.6.1), Section 1.1).
[30] Panel Reports, paras. 7.68 (referring to FIT Rules (version 1.5.1), Sections 2, 3, and 5.2; and microFIT Rules (version 1.6.1), Sections 2, 3, and 4.1).
[31] Panel Reports, para. 7.9.
[32] Panel Reports, para. 7.64.

identifies a range of different "Designated Activities" and an associated "Qualifying Percentage".[33] For each Designated Activity that is performed in relation to a facility, an associated Qualifying Percentage will be achieved. A project's Domestic Content Level "will be determined by adding up the Qualifying Percentages associated with all of the Designated Activities performed in relation to that particular project".[34] The Minimum Required Domestic Content Levels prescribed under both streams of the FIT Programme are set out in Table 1.

Table 1: Minimum Required Domestic Content Levels Prescribed under the FIT Programme

	Wind (FIT)		Solar PV (FIT)		Solar PV (microFIT)	
Milestone Date for Commercial Operation	2009-2011	2012-	2009-2010	2011-	2009-2010*	2011-
Minimum Required Domestic Content Level	25%	50%	50%	60%	40%	60%

* Solar PV microFIT applications received by the OPA on or before 8 October 2010 may satisfy the 40% domestic content requirement.

Source: Panel Reports, para. 7.158, Table 1, and fn 310 thereto.

1.5 Further information about the factual aspects of these disputes is set forth in greater detail in paragraphs 2.1 and 7.9-7.68 of the Panel Reports, and in section 4 of these Reports.

1.6 Both complainants claimed that the challenged measures are inconsistent with Articles 3.1(b) and 3.2 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), 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). More specifically, Japan put forward the following claims:

a. through the FIT Programme, as well as individually executed FIT and microFIT Contracts for wind and solar PV projects, Canada grants and maintains prohibited subsidies that are contingent upon the use of domestic over imported goods, in violation of Articles 3.1(b) and 3.2 of the SCM Agreement;

[33] Panel Reports, para. 7.159.
[34] Panel Reports, para. 7.160.

b. the domestic content requirements of the FIT Programme, as well as individually executed FIT and microFIT Contracts for wind and solar PV projects, accord less favourable treatment to Japanese renewable energy generation equipment than accorded to like products of Ontario origin, in violation of Article III:4 of the GATT 1994; and

c. the FIT Programme and individually executed FIT and microFIT Contracts for wind and solar PV projects constitute trade-related investment measures (TRIMs) inconsistent with the provisions of Article III of the GATT 1994, and therefore in violation of Article 2.1 of the TRIMs Agreement.[35]

1.7 For its part, the European Union claimed:

a. Canada violates Articles 3.1(b) and 3.2 of the SCM Agreement since the FIT Programme and its related contracts established by the Government of Ontario are subsidies within the meaning of Article 1.1 of the SCM Agreement that are provided contingent upon the use of domestic over imported goods, namely, contingent upon the use of equipment and components for renewable energy generation facilities produced in Ontario over such equipment and components imported from other Members of the World Trade Organization (WTO), including the European Union;

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

c. Canada violates Article III:4 of the GATT 1994 because the FIT Programme and its related contracts established by the Government of Ontario are TRIMs falling under paragraph 1(a) of the Annex to the TRIMs Agreement and, in any event, because they impose domestic content requirements on wind and solar PV electricity generators that affect the internal sale, purchase, or use of renewable energy generation equipment and components, according less favourable treatment to like products of European Union origin.[36]

1.8 The Panel Reports were circulated to WTO Members on 19 December 2012.

[35] Panel Reports, para. 3.1.
[36] Panel Reports, para. 3.4.

1.9 In its Reports, the Panel explained that it decided first to assess the complainants' claims under the TRIMs Agreement and the GATT 1994 before entertaining the claims under the SCM Agreement. The Panel explained, in this regard, that "the complainants assert, and Canada does not contest, that the measures at issue are trade-related investment measures affecting imports of renewable energy generation equipment and components."[37] This suggested to the Panel that, "compared with the SCM Agreement and Article III:4 of the GATT 1994, it is the TRIMs Agreement that deals most directly, specifically and in detail, with the aspects of the FIT Programme, and the FIT and microFIT Contracts, that are at the centre of the complainants' concerns."[38] The Panel stated that it would therefore proceed as follows:

> In this light, we will commence our evaluation of the complainants' claims by focusing on those made under the TRIMs Agreement. However, it is apparent from the terms of Article 2.1 of the TRIMs Agreement that, in undertaking this evaluation, we will also necessarily have to come to a view about the merits of the complainants' allegations concerning the consistency of the challenged measures with Article III:4 of the GATT 1994. Thus, in the section that follows we will simultaneously evaluate the merits of both of the complainants' claims under Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994.[39]

1.10 In response to the complainants' claims under the TRIMs Agreement and the GATT 1994, Canada invoked Article III:8(a) of the GATT 1994, arguing that the FIT Programme is not subject to the obligations of Article III. Canada argued that this is because the laws and requirements that create and implement the FIT Programme are laws and requirements that govern the procurement of renewable electricity for the governmental purpose of securing an electricity supply for Ontario consumers from clean sources, and "not with a view to commercial resale or with a view to use in the production of goods for commercial sale".[40] Both Japan and the European Union disagreed with Canada that the measures at issue fall within Article III:8(a) of the GATT 1994.[41] The European Union additionally countered that Article III:8(a) does not apply to measures that fall within the scope of Article 2.2 of the TRIMs Agreement and paragraph 1(a) of the Illustrative List annexed thereto.[42]

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37 Panel Reports, para. 7.70.
38 Panel Reports, para. 7.70 (referring to Appellate Body Report, *EC – Bananas III*, para. 204).
39 Panel Reports, para. 7.70. (fn omitted)
40 Panel Reports, para. 7.86 (referring to Canada's first written submission to the Panel (DS412), para. 67).
41 See Panel Reports, paras. 7.74-7.77 and 7.81-7.85.
42 See Panel Reports, para. 7.80.

1.11 The Panel thus considered that it had to resolve the following three issues:

a. whether the measures at issue are TRIMs within the meaning of Article 1 of the TRIMs Agreement[43];

b. if so, whether paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement precludes the application of Article III:8(a) of the GATT 1994 to the challenged measures[44]; and

c. to the extent that paragraph 1(a) of the Illustrative List does not remove the possibility of applying Article III:8(a) to the challenged measures, whether those measures are of the kind described in Article III:8(a) of the GATT 1994.[45]

1.12 First, the Panel found that "the FIT Programme, and the FIT and microFIT Contracts, to the extent they envisage and impose a 'Minimum Required Domestic Content Level', constitute TRIMs within the meaning of Article 1 of the TRIMs Agreement."[46] Second, the Panel rejected the European Union's argument about the applicability of Article III:8(a) of the GATT 1994 to measures falling within the scope of paragraph 1(a) of the Illustrative List annexed to the TRIMs Agreement. The Panel considered that, "[g]iven the language of Article 2.1, it would … be inappropriate to infer from Paragraph 1(a) of the Illustrative List that TRIMs having the characteristics described in that paragraph will *always* be inconsistent with Article III:4 of the GATT 1994, irrespective of whether they may be covered by the terms of Article III:8(a) of the GATT 1994."[47]

1.13 Next, the Panel assessed the measures in the light of the various elements of Article III:8(a) of the GATT 1994. The Panel found that: (i) "the Government of Ontario's purchases of electricity under the FIT Programme constitute 'procurement', within the meaning of that term in Article III:8(a)"; and (ii) "the 'Minimum Required Domestic Content Level' prescribed under the FIT Programme, and effected through the FIT and microFIT Contracts, is one of the 'requirements governing' the Government of Ontario's 'procurement' of electricity".[48] However, the Panel found that "the Government of Ontario's 'procurement' of electricity under the FIT Programme is undertaken 'with a view to commercial resale'."[49] In the light of the last intermediate finding, the Panel concluded:

43 Panel Reports, para. 7.108.
44 Panel Reports, para. 7.113.
45 *Ibid.*
46 Panel Reports, para. 7.112.
47 Panel Reports, para. 7.120. (original emphasis)
48 Panel Reports, para. 7.152.
49 Panel Reports, para. 7.151.

> [W]e find that the measures at issue are not covered by the terms of Article III:8(a), and that consequently, Canada cannot rely on Article III:8(a) of the GATT 1994 to exclude the application of Article III:4 of the GATT 1994 to the "Minimum Required Domestic Content Level" that the complainants challenge.[50]

1.14 Having found that the measures at issue are not covered by the terms of Article III:8(a), the Panel turned to the assessment of these measures under paragraph 1(a) of the Illustrative List of the TRIMs Agreement. The Panel found that:

> … compliance with the "Minimum Required Domestic Content Level" not only involves the "purchase or use" of products from a domestic source, within the meaning of Paragraph 1(a) of the Illustrative List, but also that such compliance "is necessary" for electricity generators using solar PV and windpower technologies to participate in the FIT Programme, and thereby "obtain an advantage", within the meaning of Paragraph 1 of the Illustrative List. We are therefore satisfied that the challenged measures are TRIMs falling within the scope of Paragraph 1(a) of the Illustrative List, and that in the light of Article 2.2 and the chapeau to Paragraph 1(a) of the Illustrative List, they are inconsistent with Article III:4 of the GATT 1994, and thereby also inconsistent with Article 2.1 of the TRIMs Agreement.[51]

1.15 Hence, as regards Japan's and the European Union's claims under the TRIMs Agreement and the GATT 1994, the Panel concluded:

> In the light of the findings we have made in this Section of these Reports, we conclude that the FIT Programme, and the FIT and microFIT Contracts, are inconsistent with Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994.[52]

1.16 As regards the complainants' claims under the SCM Agreement, the Panel noted Japan's position that the measures at issue are "direct transfer[s] of funds" and "potential direct transfers of funds" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement. Alternatively, Japan submitted that the measures are "income or price support" within the meaning of Article 1.1(a)(2).[53] The European Union's "primary" argument was that the challenged measures constitute "income or price support". The European Union also argued that the measures at issue could be characterized as "direct transfer[s] of funds". In the alternative, the European Union contended that the measures at issue are "potential direct transfers of funds" under subparagraph (i)

[50] Panel Reports, para. 7.152.
[51] Panel Reports, para. 7.166.
[52] Panel Reports, para. 7.167.
[53] Panel Reports, para. 7.169.

or "entrust[ment] or direct[ion"] within the meaning of subparagraph (iv) of Article 1.1(a)(1).[54] Conversely, Canada asserted that the FIT Programme and related contracts can only be legally characterized as financial contributions in the form of government "purchases [of] goods".[55]

1.17 The Panel determined that the appropriate legal characterization of the FIT Programme and the FIT and microFIT Contracts is as a "financial contribution" in the form of government "purchases [of] goods" within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.[56] Furthermore, the Panel disagreed with the complainants' argument that they could also be legally characterized as "direct transfer[s] of funds" for the purposes of the SCM Agreement.[57] The Panel also concluded that the measures at issue cannot be "potential direct transfers of funds" under subparagraph (i) or a form of financial contribution involving government entrustment or direction within the meaning of subparagraph (iv) of Article 1.1(a)(1).[58] Moreover, on the grounds of judicial economy, the Panel decided to make no findings on whether the measures at issue may be legally characterized as "income or price support" under Article 1.1(a)(2) of the SCM Agreement.[59]

1.18 Having determined that the measures constitute a financial contribution, the Panel proceeded to examine whether they confer a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement. The Panel observed, in this regard, that the complainants' main line of argumentation was that, in the absence of the FIT Programme, a competitive wholesale market for electricity in Ontario could not support commercially viable operations of the contested FIT generators. To substantiate this argument, the complainants advanced a number of proposed competitive wholesale market electricity price benchmarks, or proxies for this benchmark, that they submitted demonstrate that the FIT Programme provides "more than adequate remuneration" for the OPA's purchases of electricity under the FIT and microFIT Contracts.[60]

1.19 The Panel agreed with the complainants that "there can be only *one* relevant market for the purpose of the benefit analysis, namely, the market for electricity that is generated from all sources of energy, including solar and wind energy."[61] The Panel then examined the complainants' claim that the IESO-administered wholesale electricity market would be the appropriate "market" benchmark to conduct the analysis under Article 1.1(b). In this context, the Panel had found that "the IESO-administered wholesale market does not arrive at its equilibrium price (the HOEP) through forces of supply and demand that are

54 Panel Reports, para. 7.176.
55 Panel Reports, para. 7.181.
56 Panel Reports, para. 7.222.
57 Panel Reports, para. 7.243.
58 Panel Reports, para. 7.248.
59 Panel Reports, para. 7.249.
60 Panel Reports, para. 7.276.
61 Panel Reports, para. 7.318. (original emphasis)