WORLD TRADE ORGANIZATION

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CANADA – MEASURES RELATING TO THE FEED-IN TARIFF PROGRAM

NOTIFICATION OF AN OTHER APPEAL BY THE EUROPEAN UNION UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU), AND UNDER RULE 23(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following notification, dated 11 February 2013, from the Delegation of the European Union, is being circulated to Members.

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Pursuant to Article 16.4 and Article 17.1 of the *DSU* the European Union hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *Canada – Measures Relating to the Feed-In Tariff Program* (WT/DS426). Pursuant to Rule 23(1) of the *Working Procedures for Appellate Review*, the European Union simultaneously files this Notice of Other Appeal with the Appellate Body Secretariat.

For the reasons to be further elaborated in its submissions to the Appellate Body, the European Union appeals, and requests the Appellate Body to modify, reverse and/or declare moot and with no legal effect the findings and conclusions of the Panel and complete the analysis with respect to the following errors of law and legal interpretations contained in the Panel Report.[1]

- The European Union submits that the Panel 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 they do not preclude the application of Article III:8(a) of the GATT 1994 to the challenged measures.2

- The European Union requests the Appellate Body to reverse the Panel's finding in paragraph 7.121, complete the analysis and find that Article III:8(a) of the GATT 1994 was not applicable in the present case. As a consequence, the European Union requests the Appellate Body to uphold, although modifying the reasoning, the Panel's ultimate finding in paragraph 7.166 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.

- The Panel erred in its interpretation and application of Article III:8(a) of the GATT 1994 when finding that that the "Minimum Required Domestic Content Level" contained in the FIT Programme should be properly characterised as one of the "requirements governing" the alleged procurement of electricity for the purpose of Article III:8(a) of the GATT 1994.3

[1] Pursuant to Rule 23(2)(c)(ii)(C) of the Working Procedures for Appellate Review this Notice of Other Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to the ability of the European Union to refer to other paragraphs of the Panel Report in the context of its appeal.

[2] Panel Report, paras. 7.114-7.121, and in particular, paras. 7.119 and 7.120.

[3] Panel Report, paras. 7.126-7.128, and 7.152.

- The European Union requests the Appellate Body to reverse such finding, complete the analysis and find instead that the "Minimum Required Domestic Content Level" are not "requirements governing the procurement … of the products purchased" in the present case. As a consequence of the Appellate Body's reversal of the Panel's finding in paragraph 7.128, the European Union requests the Appellate Body to reverse the Panel's finding in paragraph 7.152 that "(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", and find instead that the "Minimum Required Domestic Content Level" does not constitute "requirements governing the procurement … of the products purchased" in the present case.

- The Panel erred in its interpretation of Article III:8(a) of the GATT 1994 when stating that the ordinary meaning of the terms "governmental purposes" is relatively broad and may encompass the meaning proposed by Canada, i.e., that a purchase for "governmental purposes" may exist whenever a government purchases a product for a stated aim of the government.4 The European Union requests the Appellate Body to reverse this statement or, at the very least, to declare it moot and with no legal effect. In addition, should the Appellate Body reverse the Panel's finding that the Government of Ontario's procurement of electricity under the FIT Programme is undertaken "with a view to commercial resale",5 the European Union requests the Appellate Body to modify and/or reverse the Panel's reasoning6 as to the meaning of "governmental purposes" in view of the arguments raised by the European Union as to the proper interpretation of those terms, complete the analysis and find that the Government of Ontario's procurement of electricity under the FIT Programme is not undertaken for "governmental purposes". As a consequence, the Panel's findings in paragraph 7.152 should also be amended accordingly to reflect another reason why Canada could not 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".

- The Panel erred in its application of Article 1.1(b) of the SCM Agreement as well as did not make an objective assessment of the matter in accordance with Article 11 of the DSU when finding that the European Union had failed to established that the FIT Programme and its related contracts confer a "benefit" under Article 1.1(b) of the SCM Agreement.7 In particular:

  (a) the Panel erred in the application of Article 1.1(b) of the SCM Agreement to the facts of this case.[8] The "prevailing market conditions" in Ontario, as evidenced by the purpose of the FIT Programme, showed that the FIT generators would not be able to obtain the necessary remuneration to be present in such marketplace;

  (b) the Panel did not make an objective assessment of the matter in accordance with Article 11 of the DSU by failing to consider the totality of the evidence, by providing incoherent reasoning and exercising false judicial economy, when finding that, even on the basis of a hypothetical "market" counterfactual as the one suggested in its observations, the European Union had failed to establish the existence of "benefit".[9]

In view of these errors, the European Union requests the Appellate Body to *reverse* the Panel's finding in paragraph 7.328(ii) that the European Union failed to establish the existence of benefit in the present case, that the challenged measures conferred a "benefit" under Article 1.1(b) of the SCM Agreement, *complete the analysis* on the basis of the Panel's findings and uncontested facts on the record, and *find* that the challenged measures conferred a "benefit" under Article 1.1(b) of the SCM Agreement. As a consequence, the Panel's ultimate conclusion that the European Union had failed to establish that the FIT Programme and its related contracts constitute subsidies or envisage the granting of subsidies inconsistent with Articles 3.1(b) and 3.2

[4] Panel Report, para. 7.139, first sentence (and the follow-up statement in para. 7.140, second sentence).
[5] Panel Report, para. 7.151.
[6] Panel Report, paras. 7.138-7.145.
[7] Panel Report, para. 7.328(ii).
[8] Panel Report, paras. 7.276-7.327.
[9] Panel Report, paras. 7.322-7.328(ii).

of the SCM Agreement is also in error.[10] The European Union requests the Appellate Body to also *reverse* such a conclusion, *complete the analysis* on the basis of the Panel's findings and uncontested facts on the record, and *find* that the challenged measures amount to subsidies prohibited under Articles 3.1(b) and 3.2. Accordingly, the European Union requests the Appellate Body to *recommend* that Canada withdraws its prohibited subsidies without delay (and, in no case, no more than within 90 days), as required by Article 4.7 of the SCM Agreement. Should the Appellate Body be unable to complete the analysis under any of the requests made by the European Union, the European Union requests the Appellate Body to declare *moot and with no legal effect* the Panel's findings and conclusions in paragraphs 7.328(ii) and 8.7.[11]

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[10] Panel Report, para. 8.7.

[11] The European Union observes that on 11 February 2013 Japan appealed the panel report in *Canada – Certain Measures Affecting the Renewable Energy Generation Sector (WT/DS412)*. That report contains identical findings and conclusions as those contained in para. 7.328(ii) and para. 8.7 in the Panel Report in DS426. The European Union incorporates hereto Japan's Notice of Other Appeal dated 11 February 2013 with respect to the errors of law and legal interpretations, including any request for completing the analysis, made in connection with para. 7.328(ii) of the panel report in DS412.