

CANADA – RENEWABLE ENERGY/ CANADA – FEED-IN TARIFF PROGRAM¹

(DS412, 426)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainants	Japan, European Union	ASCM Art. 1.1 GATT Arts. III:4, III:8(a) TRIMs Art. 2.1	Establishment of Panel	6 October 2011 (Japan) 23 January 2012 (European Union)
			Circulation of Panel Report	19 December 2012
Respondent	Canada		Circulation of AB Report	6 May 2013
			Adoption	24 May 2013

1. MEASURE AND PRODUCT AT ISSUE

- **Measures at issue:** Feed-in Tariff (FIT) Program of the Province of Ontario (the FIT Programme), and all individual FIT and microFIT Contracts implementing the FIT Programme
- **Products at issue:** Certain electricity generation equipment in the renewable energy sector, and the electricity generated by such equipment

2. SUMMARY OF KEY PANEL/AB FINDINGS

- **Relationship between the TRIMs Agreement and GATT:** In the dispute between Canada and the European Union, the Appellate Body upheld the Panel's finding that para. 1(a) of the Illustrative List in the Annex to the TRIMs Agreement did not obviate the need for the Panel to undertake an analysis of whether the challenged measures are outside of the scope of application of GATT Art. III:4 by virtue of the operation of GATT Art. III:8(a).
- **GATT Art. III:8(a) (national treatment – derogation):** Both the Panel and the Appellate Body found, albeit for different reasons, that the measures at issue did not fall within the scope of the derogation under Art. III:8(a). The Appellate Body found that, to qualify for this derogation, the product of foreign origin allegedly being discriminated against must be in a competitive relationship with the product purchased by the government. In these disputes, the product being procured by the Government of Ontario was electricity, whereas the foreign product suffering from discrimination due to the Minimum Required Domestic Content Levels under the measures at issue was electricity generation equipment. These two products were not in a competitive relationship. Thus, the Appellate Body found that the discrimination relating to foreign generation equipment was not covered by the derogation. The Appellate Body reversed the Panel's intermediate finding that the measures at issue were laws, regulations, or requirements governing the procurement by governmental agencies of electricity within the meaning of GATT Art. III:8(a), and declared moot and of no legal effect the Panel's other intermediate findings.
- **TRIMs Agreement Art. 2.1(local content requirement) and GATT Art. III:4 (national treatment – domestic laws and regulations):** The Appellate Body upheld the Panel's conclusion that the Minimum Required Domestic Content Levels prescribed under measures at issue were inconsistent with TRIMs Agreement Art. 2.1 and GATT Art. III:4.
- **ASCM Art. 1.1(a) (subsidy definition – financial contribution):** In the dispute between Canada and Japan, the Appellate Body upheld the Panel's finding that the measures at issue constituted financial contributions in the form of government purchases of goods within the meaning of Art. 1.1(a)(1)(iii).
- **ASCM Art. 1.1(b) (subsidy definition – benefit):** The Appellate Body reversed the Panel majority's finding that the European Union and Japan failed to establish that the challenged measures conferred a benefit. The Appellate Body found that the Panel was mistaken in using the market for electricity generated from all sources of energy as the relevant market for comparison in determining benefit. The Appellate Body considered that, in defining the relevant market, the Panel should have undertaken an analysis of demand-side and supply-side factors. Such an analysis would have shown that producers of wind- and solar PV-generated electricity did not compete with other electricity producers, because of differences in cost structures and operating costs. This would have led the Panel to conclude that the relevant market for the benefit comparison was the market for wind- and solar PV-generated electricity. The Appellate Body, however, was unable to determine whether the challenged measures conferred a benefit within the meaning of Art. 1.1(b), due to the lack of a sufficient factual basis to complete the analysis. As a result, there was no finding as to whether the measures at issue were prohibited subsidies under ASCM Arts. 3.1(b) and 3.2.

¹ Canada – Certain Measures Affecting the Renewable Energy Generation Sector/Canada – Measures Relating to the Feed in Tariff Program