

6 FINDINGS AND CONCLUSIONS IN THE APPELLATE BODY REPORT WT/DS412/AB/R

6.1. In the appeal of the Panel Report, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* (WT/DS412/R) (Japan Panel Report), for the reasons set out in this Report, the Appellate Body:

- a. declines Japan's request to commence its evaluation with Japan's allegations of error relating to the SCM Agreement;
- b. as regards Article III:8(a) of the GATT 1994:
 - i. reverses the Panel's findings, in paragraphs 7.127, 7.128, and 7.152 of the Japan Panel Report, that the Minimum Required Domestic Content Levels of the FIT Programme and related FIT and microFIT Contracts are laws, regulations, or requirements governing the procurement by governmental agencies of electricity within the meaning of Article III:8(a) of the GATT 1994;
 - ii. declares moot and of no legal effect the other intermediate findings made by the Panel, in particular in paragraphs 7.136, 7.145, and 7.151;
 - iii. finds that the Minimum Required Domestic Content Levels prescribed under the FIT Programme and related FIT and microFIT Contracts do not meet the conditions of the derogation in Article III:8(a) of the GATT 1994; and
 - iv. in the light of this finding, does not find it necessary to address Canada's claim that the Panel failed to fulfil its obligations under Article 11 of the DSU by exercising judicial economy; and
 - v. finds that the FIT Programme and related FIT and microFIT Contracts are not covered by Article III:8(a) of the GATT 1994 and that, consequently, the Panel's conclusion, in paragraph 8.2 of the Japan Panel Report, that the Minimum Required Domestic Content Levels prescribed under the FIT Programme and related FIT and microFIT Contracts are inconsistent with Article 2.1 of the TRIMS Agreement and Article III:4 of the GATT 1994, stands;
- c. rejects Japan's claim that the Panel failed to fulfil its obligations under Article 11 of the DSU and exercised false judicial economy by declining to make a finding on Japan's stand-alone claim under Article III:4 of the GATT 1994;
- d. as regards Article 1.1(a) of the SCM Agreement:
 - i. declares moot and of no legal effect the Panel's finding, in paragraph 7.246 of the Japan Panel Report, that "government 'purchases [of] goods' could [not] also be legally characterized as 'direct transfer[s] of funds' without infringing [the] principle [of effective treaty interpretation]", inasmuch as it negates the possibility that a transaction may fall under more than one type of financial contribution under Article 1.1(a)(1) of the SCM Agreement;
 - ii. upholds the Panel's finding, in paragraphs 7.243 and 7.328(i) of the Japan Panel Report, that the FIT Programme and related FIT and microFIT Contracts are government "purchases [of] goods" within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement;
 - iii. rejects Japan's appeal that the FIT Programme and FIT and microFIT Contracts may also be characterized as "direct transfer[s] of funds" or "potential direct transfers of funds" under Article 1.1(a)(1)(i) of the SCM Agreement;

- iv. rejects Japan's claim that the Panel failed to fulfil its obligations under Article 11 of the DSU and exercised false judicial economy by declining to make a finding on Japan's claim that the measures at issue constitute "income or price support" under Article 1.1(a)(2) of the SCM Agreement; and
 - v. declines to make a finding on whether the FIT Programme and Contracts may be characterized as "income or price support" under Article 1.1(a)(2) of the SCM Agreement; and
- e. as regards Article 1.1(b) of the SCM Agreement:
- i. reverses the Panel's finding, in paragraphs 7.328(ii) and 8.3 of the Japan Panel Report, that Japan failed to establish that the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement and thereby that Canada acted inconsistently with Articles 3.1(b) and 3.2 of the SCM Agreement;
 - ii. in the light of these findings, does not find it necessary to address Japan's alternative claim that the Panel acted inconsistently with Article 11 of the DSU; and
 - iii. is unable to complete the analysis as to whether the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement and whether Canada acted inconsistently with Articles 3.1(b) and 3.2 of the SCM Agreement.

6.2. The Appellate Body recommends that the DSB request Canada to bring its measures found in this Report, and in the Japan Panel Report as modified by this Report, to be inconsistent with the TRIMs Agreement and the GATT 1994 into conformity with its obligations under those Agreements.

Signed in the original in Geneva this 20th day of April 2013 by:

Ricardo Ramírez-Hernández
Presiding Member

Ujal Singh Bhatia
Member

David Unterhalter
Member

6 FINDINGS AND CONCLUSIONS IN THE APPELLATE BODY REPORT WT/DS426/AB/R

6.1. In the appeal of the Panel Report, *Canada – Measures Relating to the Feed-in Tariff Program* (WT/DS426/R) (EU Panel Report), for the reasons set out in this Report, the Appellate Body:

a. as regards Article III:8(a) of the GATT 1994:

- i. upholds the Panel's finding, in paragraph 7.121 of the EU Panel Report, that paragraph 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 Article III:4 of the GATT 1994 by virtue of the operation of Article III:8(a) of the GATT 1994;
- ii. reverses the Panel's findings, in paragraphs 7.127, 7.128, and 7.152 of the EU Panel Report, that the Minimum Required Domestic Content Levels of the FIT Programme and related FIT and microFIT Contracts are laws, regulations, or requirements governing the procurement by governmental agencies of electricity within the meaning of Article III:8(a) of the GATT 1994;
- iii. declares moot and of no legal effect the other intermediate findings made by the Panel, in particular in paragraphs 7.136, 7.145, and 7.151;
- iv. finds that the Minimum Required Domestic Content Levels prescribed under the FIT Programme and related FIT and microFIT Contracts do not meet the conditions of the derogation in Article III:8(a) of the GATT 1994; and
- v. in the light of this finding, does not find it necessary to address Canada's claim that the Panel failed to fulfil its obligations under Article 11 of the DSU by exercising judicial economy; and
- vi. finds that the FIT Programme and related FIT and microFIT Contracts are not covered by Article III:8(a) of the GATT 1994 and that, consequently, the Panel's conclusion, in paragraph 8.6 of the EU Panel Report, that the Minimum Required Domestic Content Levels prescribed under the FIT Programme and related FIT and microFIT Contracts are inconsistent with Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994, stands; and

b. as regards Article 1.1(b) of the SCM Agreement:

- i. reverses the Panel's finding, in paragraphs 7.328(ii) and 8.7 of the EU Panel Report, that the European Union failed to establish that the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement and thereby that Canada acted inconsistently with Articles 3.1(b) and 3.2 of the SCM Agreement;
- ii. in the light of these findings, does not find it necessary to address the European Union's alternative claim that the Panel acted inconsistently with Article 11 of the DSU; and
- iii. is unable to complete the analysis as to whether the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement and whether Canada acted inconsistently with Articles 3.1(b) and 3.2 of the SCM Agreement.

6.2. The Appellate Body recommends that the DSB request Canada to bring its measures found in this Report, and in the EU Panel Report as modified by this Report, to be inconsistent with the TRIMs Agreement and the GATT 1994 into conformity with its obligations under those Agreements.

Signed in the original in Geneva this 20th day of April 2013 by:

Ricardo Ramírez-Hernández
Presiding Member

Ujal Singh Bhatia
Member

David Unterhalter
Member