WORLD TRADE ORGANIZATION

WT/DS412/11

15 February 2013

(13-0863)

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Original: English

CANADA – CERTAIN MEASURES AFFECTING THE RENEWABLE ENERGY GENERATION SECTOR

NOTIFICATION OF AN OTHER APPEAL BY JAPAN 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 Japan, is being circulated to Members.

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Pursuant to Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 23(1) of the Working Procedures for Appellate Review ("Working Procedures"), Japan hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report in *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* (WT/DS412/R) ("Panel Report"), and certain legal interpretations developed by the Panel in this dispute.

For the reasons to be elaborated in its submissions to the Appellate Body, Japan appeals the following errors of law and legal interpretation contained in the Panel Report, and requests the Appellate Body to reverse, modify, or declare moot and of no legal effect the related findings, conclusions and recommendations of the Panel, and where indicated to complete the analysis.[1]

1. With respect to Japan's claims under the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"):

    a. The Panel erred in its interpretation and application of Article 1.1(a) of the SCM Agreement in concluding that the appropriate legal characterization of the FIT Program and Contracts[2] is "government … purchases [of] goods".[3] Japan requests the Appellate Body to reverse the Panel's finding in this regard, and complete the analysis to find instead that the FIT Program and Contracts are appropriately characterized as "a government practice [that] involves a direct transfer of funds … [or] potential direct transfers of funds" or "any form of income or price support" or alternatively modify the Panel's finding in this regard to find that these measures may also be characterized as "direct transfer[s] of funds", "potential direct transfer of funds", or "income or price support" under Article 1.1(a) of the SCM Agreement.

[1] Pursuant to Rule 23(2)(c)(ii)(C) of the Working Procedures, 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 Japan to refer to other paragraphs of the Panel Report in the context of its appeal.

[2] Throughout this Notice of Other Appeal, Japan uses the term "FIT Program and Contracts" to refer to the Government of Ontario's feed-in tariff program (including microFIT), and the FIT and microFIT contracts entered into by the Government of Ontario under that program, that are at issue in this dispute – i.e., the "challenged measures".

[3] Panel Report, paras. 7.220-7.249.

b. The Panel erred in its interpretation and application of Article 1.1(a)(1) of the SCM Agreement by concluding that government "purchases [of] goods" under Article 1.1(a)(1)(iii) could not also be legally characterized as "direct transfer[s] of funds" or "potential direct transfers of funds" under Article 1.1(a)(1)(i).[4] Japan requests that the Appellate Body declare this finding to be moot and of no legal effect, and to find that the Government of Ontario provides financial contributions in the form of "direct transfer[s] of funds" or "potential direct transfers of funds" through the FIT Program and Contracts, regardless of whether they may be characterized as government "purchases [of] goods".

c. The Panel failed to make an objective assessment of the matter as required by Article 11 of the DSU by improperly exercising judicial economy, and failing to make findings with respect to Japan's claim that the FIT Program and Contracts may be legally characterized as "income or price support" under Article 1.1(a)(2) of the SCM Agreement.[5] Japan requests the Appellate Body to find that the Government of Ontario provides "income or price support" through the FIT Program and Contracts, regardless of whether they may be characterized as government "purchases [of] goods".

d. The Panel erred in its interpretation and application of Article 1.1(b) of the SCM Agreement, and failed to make an objective assessment of the matter as required by Article 11 of the DSU, when it found that it cannot resolve whether the challenged measures confer a benefit by applying a benchmark derived from the conditions for purchasing electricity in a competitive wholesale electricity market, particularly in disregarding Japan's argument that the challenged measures confer a benefit because the objective design, structure and operation of the FIT Program demonstrates that solar PV and wind generators would not be present in Ontario's wholesale electricity market absent the FIT Program.[6] Japan requests the Appellate Body to reverse these findings by the Panel and instead to find that the challenged measures confer a "benefit".

e. The Panel failed to make an objective assessment of the matter, including an objective assessment of the facts of the case, as required by Article 11 of the DSU, in failing to resolve the question of benefit under Article 1.1(b) of the SCM Agreement based on its preferred comparison between the relevant rates of return of the challenged FIT and microFIT Contracts with the relevant average cost of capital in Canada.[7] Japan requests the Appellate Body to complete the analysis, and find that the FIT Program and Contracts confer a benefit under the Panel's preferred approach. However, this appeal is conditional on the Appellate Body rejecting Japan's argument that the challenged measures confer a benefit pursuant to item 1.d above.

f. Should the Appellate Body find the FIT Program and Contracts to be a subsidy within the meaning of Article 1.1 of the SCM Agreement, Japan requests the Appellate Body to complete the analysis, and find the FIT Program and Contracts to be inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement.

g. In addition to its error in failing to find the FIT Program and Contracts to be prohibited subsidies, the Panel erred in failing to recommend, pursuant to Article 4.7 of the SCM Agreement, that Canada withdraw the subsidies without delay, by eliminating the domestic content requirement of the FIT Program and Contracts, and erred in failing to specify the time period within which the measures must be withdrawn. Accordingly, if the Appellate Body completes the analysis and makes the findings requested by Japan in item 1.f above, Japan further requests that the Appellate Body make the recommendation, and specify the time period within which the measure must be withdrawn, pursuant to Article 4.7 of the SCM Agreement.

[4] Panel Report, paras. 6.83-6.85, 7.243-7.248, particularly paras. 7.246-7.247.
[5] Panel Report, paras. 6.88, 7.249.
[6] Panel Report, paras. 6.94-6.95, 7.271-7.313, 7.315, 7.317, and 7.319-7.320, particularly paras. 7.308-7.313.
[7] Panel Report, paras. 7.322-7.327.

2. With respect to Japan's claims under the General Agreement on Tariffs and Trade 1994 ("GATT 1994"):

   a. The Panel failed to make an objective assessment of the matter as required by Article 11 of the DSU by exercising false judicial economy and failing to separately examine Japan's claims under Article III:4 of the GATT 1994.[8] Japan requests the Appellate Body to complete the analysis, and find that the FIT Program and Contracts are inconsistent with the terms of Article III:4 independent of the Panel's findings under the Agreement on Trade-Related Investment Measures ("TRIMs Agreement").

   b. The Panel erred in its interpretation and application of Article III:8(a) of the GATT 1994 in the following respects:

      i. The Panel erred when it found the FIT Program and Contracts to involve "procurement by governmental agencies of products purchased" under Article III:8(a) of the GATT 1994, based on its conclusion that these measures are "government … purchases [of] goods" under Article 1.1(a) of the SCM Agreement.[9]

      ii. The Panel erred when it interpreted the term "governmental purposes" in isolation, rather than the entire term "purchased for governmental purposes", and failed to separately assess whether purchases under the FIT Program and Contracts were "for" governmental purposes.[10] Japan requests the Appellate Body to complete the analysis, and find that the FIT Program and Contracts are not "purchase[s] [by governmental agencies] for governmental purposes". However, this appeal is conditional on the Appellate Body rejecting Japan's argument pursuant to item 2.b.i above.

      iii. The Panel erred when it found evidence of profit earned by the Government of Ontario and Ontario's municipal governments may be a relevant consideration in determining that the FIT Program is undertaken "with a view to commercial resale".[11] In this regard, Japan seeks only modification of the Panel's findings to conclude that the Government of Ontario's procurement of electricity under the FIT Program and Contracts is undertaken "with a view to commercial resale" by virtue of the fact that the electricity "is resold to retail consumers through Hydro One and the LDCs"[12], without regard to whether those entities make profits. However, this appeal is conditional on the Appellate Body rejecting Japan's arguments pursuant to items 2.b.i and 2.b.ii above.

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[8] Panel Report, paras. 6.72, 7.155-7.167. *See also id.*, para. 7.70 ("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").

[9] Panel Report, paras. 7.129-7.136, particularly paras. 7.135-7.136.

[10] Panel Report, paras. 7.138-7.145, particularly paras. 7.140, 7.144-7.145.

[11] Panel Report, paras. 7.146-7.151, particularly paras. 7.149-7.151.

[12] Panel Report, para. 7.147.