

Chapter 10

CANADA

NATIONAL TREATMENT

Local Content Requirement Concerning the Feed-in Tariff System for Electricity

<Outline of the measure>

The Province of Ontario in Canada passed the Green Energy Act in May 2009, in order to promote renewable energy sources. The Act also established a feed-in tariff (FIT) system for electricity derived from renewable energy sources by revising relevant laws.

The Ontario provincial government obliged electricity producers, etc. to use photovoltaic or wind power generation equipment in which at least a certain percentage (including assembling and procurement of raw materials) was value added within the province, as a condition for entering the feed-in tariff system (local content requirement).

<Problems under international rules>

Obligating the use of power generation equipment produced within the province by setting the condition that such equipment have added value within the province may violate the national treatment obligation of GATT Article III and Article 2 of the Agreement on Trade-Related Investment Measures (TRIMs) as well as constituting prohibited subsidies (subsidies contingent on the use of domestic over imported goods) as set forth in Article 3 of the Agreement on Subsidies and Countervailing Measures (ASCM).

<Recent developments>

Japan has expressed concerns regarding this case to the Ontario provincial government through a local consulate, etc. In addition, Japan has sought a solution through bilateral consultations, for example by appealing to the Federal Government of Canada at a high level to make improvements. However, Japan requested bilateral consultations with Canada under the WTO in September 2010, as it could not get a positive answer from Canada. In June 2011, Japan requested that a WTO panel be established. It was established at the meeting of the WTO Dispute Settlement Body in July and panel meetings were held in March and May 2012. In December 2012, the panel issued its final report, mostly agreeing with Japan's claim that the local content requirements in purchase conditions should be eliminated because they were inconsistent with the national treatment obligation of GATT Article III and TRIMs Article 2. (Paragraph 1 of the Annex to the TRIMs Agreement states that a measure requiring the use of products of domestic origin violates the national treatment obligation). The panel rejected Canada's objection that the measure was government procurement and so, because of GATT Article III:8(a), the national treatment obligations

were not applicable. The panel did not accept Japan's claims concerning violation of Article 3 of the Agreement on Subsidies and Countervailing Measures (prohibition of subsidies) because it said the existence of benefit (whether or not the local content requirement benefits the renewable energy generators participating in the FIT Program) had not been proved. (However, the report contains a minority opinion that benefit can be proved by the evidence and discussions submitted by Japan). Based on the above findings, the panel recommended that Canada bring the GATT and TRIMs violating measures into conformity with the WTO Agreement.

Later, in February 2013, Canada appealed the panel's decisions; the Appellate Body report was issued on May 6 of the same year. Major points of the Appellate Body report were as follows.

(1) National treatment obligation (GATT Article III, Article 2 of the TRIMs Agreement)

The Appellate Body report upheld the conclusion of the Panel report, which accepted the claims of Japan and the EU, and determined that local content requirements of the FIT program violate GATT Article III and Article 2 of the TRIMs Agreement because it constitutes a measure requiring locally-produced goods to be purchased or used, which is prohibited by the Annex to the TRIMs Agreement and provides products produced within the province with unfairly favorable treatment.

(2) Prohibited subsidies (Article 3 of the ASCM)

The Appellate Body report generally upheld the Panel report, which rejected the claims of Japan and the EU, and did not determine that the FIT program constituted subsidies contingent on the use of domestic over imported goods, which are prohibited by Article 3 of the ASCM, because there was insufficient evidence of the existence of "benefit" required for the determination of subsidies.

Canada responded to the recommendations made by the Appellate Body and agreed with Japan to set the compliance period at 10 months (until March 24, 2014). In October 2013, the Ontario provincial government issued a Provincial Minister of Energy's directive to lower the local content ratios from 50% to 20% for small-scale wind power generation business and 60% to 19-28% for small-scale solar power generation business as an interim measure. At present, a bill to remove local content requirements is under deliberation at the Legislative Assembly of Ontario. Japan needs to pay attention to whether or not full compliance is achieved within the compliance period.

QUANTITATIVE RESTRICTIONS

Export Restrictions on Logs

<Outline of the measure>

The Province of British Columbia has prohibited the export of a portion of softwood logs in order to protect its domestic industry. For province-owned forests, the provincial law stipulates that lumber produced from forests in the province shall be used or processed within the province while, for privately-owned forests, the federal law

stipulates so. Logs are exported only where they are recognized as surplus materials that are not used within the province. For province-owned forests, the Lieutenant-Governor or the Provincial Minister of Forests, Lands and Natural Resource Operations determines whether or not logs are surplus materials through examinations conducted by the Timber Export Advisory Committee (TEAC). For privately-owned forests, the Minister of Foreign Affairs and Trade makes such determinations through examinations conducted by the Federal Timber Export Advisory Committee (FTEAC). With regard to lumber produced from province-owned forests, export is banned for all of Yellow cedar and Western Red cedar and high-quality logs of Douglas fir, Western hemlock, and Sitka Spruce, etc., excluding some areas, such as native settlements. In addition, the government imposes a “fee in lieu of domestic manufacture” (equivalent to an export tax) between 5 to 15% on the exportation of logs in the southern coastal part of the province (1\$/m³ for logs in the interior part or northern part of the province).

<Problems under international rules>

Since export prohibitions or restrictions are implemented as measures to protect the domestic industries, they are highly likely to be in violation of GATT Article XI:1. Although the measure is that of a local government, pursuant to Paragraph 12 of GATT Article XXIV, the Canadian government is fully responsible for the observance of all GATT provisions. Through multilateral and bilateral consultations, Japan is urging the Canadian government to correct the measure.

<Recent developments>

The Fee in lieu of domestic manufacture on logs in the southern coastal part of the province was increased in March 2013, and the amount obtained by multiplying the tariff rates (5-15%) by coefficients (1.0~1.5) calculated based on the differences between export prices and domestic prices is being levied.

TARIFFS

High Tariff Products

*** This particular case was included in light of the following concerns despite it being a trade or investment policy or measure that does not expressly violate the WTO Agreements or other international rules.**

<Outline of the measure>

Canada’s current simple average bound tariff rate for non-agricultural products is 5.3%, a somewhat higher rate than those of Japan, the United States and the EU. The bound tariff on glass fibers (maximum 15.7%), clothing (maximum 18%) and unbound tariff on ships and tankers (maximum 25%) are examples of high tariffs. The binding ratio for non-agricultural products is 99.7%.

<Concerns>

High tariff rates themselves do not, *per se*, conflict with WTO Agreements unless they exceed the bound rates. However, from the viewpoint of promoting free trade and

enhancing economic efficiency, it is desirable to reduce tariffs to their lowest possible rate.

<Recent developments>

Market access negotiations in the DDA for non-agricultural products are ongoing and include negotiations on reducing and eliminating tariff rates. In addition, with the aim of increasing the number of items subject to elimination of tariffs on IT products, ITA expansion negotiations have been taking place since May 2012 outside the Doha Round negotiations (see (2) “Information Technology Agreement (ITA) Expansion Negotiation” in 5. of Chapter 5, Part II for details).