

**CANADA - CERTAIN MEASURES AFFECTING THE RENEWABLE
ENERGY GENERATION SECTOR**

Request for the Establishment of a Panel by Japan

The following communication, dated 1 June 2011, from the delegation of Japan to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

My authorities have instructed me to request the establishment of a Panel on behalf of the Government of Japan ("Japan").

On 13 September 2010, Japan requested consultations with the Government of Canada ("Canada") pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), Article 8 of the *Agreement on Trade-Related Investment Measures* ("TRIMs Agreement"), and Articles 4.1 and 30 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), with respect to Canada's measures relating to domestic content requirements in the feed-in tariff program ("the FIT Program").¹ The request was circulated on 16 September 2010 as document WT/DS412/1, G/L/926, G/TRIMS/D/27, G/SCM/D84/1.

Consultations were held on 25 October 2010 with a view to reaching a mutually satisfactory solution. Unfortunately, the consultations failed to resolve the dispute.

As a result, Japan respectfully requests that a Panel be established to examine this matter pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of the GATT 1994, Article 8 of the *TRIMs Agreement*, and Articles 4.4 and 30 of the *SCM Agreement*.

The measures that are the subject of this request are those taken by the Government of Canada or its provinces relating to the FIT Program established by the Canadian province of Ontario in 2009 providing for guaranteed, long-term pricing for the output of renewable energy generation facilities that contain a defined percentage of domestic content. These measures include, but are not limited to, the following:

- the *Electricity Act, 1998*,² as amended,³ including in particular Part II (Independent Electricity System Operator), Part II.1 (Ontario Power Authority) and Part II.2

¹ The reference to "FIT Program" in this request includes both projects over 10 kilowatts and projects of 10 kilowatts or less (*i.e.*, microFIT). See <http://fit.powerauthority.on.ca/>; <http://fit.powerauthority.on.ca/what-feed-tariff-program>; and <http://microfit.powerauthority.on.ca/>.

² S.O. 1998, c. 15, Sched. A.

³ The latest amendment was by: 2010, c. 15, s. 223.

(Management of Electricity Supply, Capacity and Demand) thereof, including in particular Section 25.35 (Feed-in tariff program);

- an Act to enact the *Green Energy Act, 2009* and to build a green economy, to repeal the *Energy Conservation Leadership Act, 2006* and the *Energy Efficiency Act* and to amend other statutes (the "*Green Energy and Green Economy Act, 2009*"),⁴ including in particular Schedule B amending the *Electricity Act, 1998*;
- an Act to amend the *Electricity Act, 1998* and the *Ontario Energy Board Act, 1998* and to make consequential amendments to other Acts (the "*Electricity Restructuring Act, 2004*"),⁵ including in particular Schedule A, Sections 29-32, enacting Part II.1 of the *Electricity Act, 1998*, and Sections 33-38, enacting Part II.2 of the *Electricity Act, 1998*, and Schedule B, Sections 17-18, enacting Sections 78.3-78.4 of the *Ontario Energy Board Act, 1998*;
- *Ontario Regulation 578/05* made under the *Ontario Energy Board Act, 1998* entitled "Prescribed Contracts Re Sections 78.3 and 78.4 of the Act";
- Independent Electricity System Operator ("IESO") Market Manual, including in particular Part 5.5 ("Physical Markets Settlement Statements");
- IESO Market Rules, including in particular Chapter 7 ("System Operations and Physical Markets"), Chapter 9 ("Settlements and Billing") and Chapter 11 ("Definitions");
- FIT direction dated 24 September 2009, from George Smitherman, Deputy Premier and Minister of Energy and Infrastructure, to Colin Andersen, Chief Executive Officer, Ontario Power Authority ("OPA"), directing OPA to develop a FIT Program and include a requirement that the applicant submit a plan for meeting the domestic (*i.e.*, Ontario) content goals in the FIT rules;
- individual FIT and microFIT contracts executed by the OPA since the inception of the FIT Program on 24 September 2009;⁶
- the FIT Rules, Version 1.4 (8 December 2010), and the microFIT Rules, Version 1.6 (8 December 2010), issued by the OPA;
- the FIT Contract, Version 1.4 (8 December 2010), including General Terms and Conditions, Exhibits, and Standard Definitions, the microFIT Contract, Version 1.6 (8 December 2010), including Appendices, and the Conditional Offer of microFIT Contract, Version 1.0, issued by the OPA;
- the FIT Application Form (1 December 2009), and online microFIT Application, issued by the OPA;

⁴ S.O. 2009, c. 12.

⁵ S.O. 2004, c. 23.

⁶ These contracts include, but are not limited to, those referenced at "http://fit.powerauthority.on.ca/Storage/10989_FIT_Contracts_Offered_April_8_10_-_Applicant_Legal_Name_Order3.pdf" and "http://fit.powerauthority.on.ca/Storage/11216_FIT_Contract_Awards_-_Final_List_-_February_24,_2011.pdf".

- the FIT Price Schedule (13 August 2010), and the microFIT Price Schedule (13 August 2010), issued by the OPA;
- the FIT Program Interpretations of the Domestic Content Requirements (14 December 2009, as updated on 4 October 2010 and 26 April 2011), issued by the OPA; and
- any amendments or extensions of the foregoing, any replacement measures, any renewal measures, any implementing measures, and any related measures.⁷

These measures are inconsistent with Canada's obligations under the *SCM Agreement*, the GATT 1994, and the *TRIMs Agreement* because they constitute a prohibited subsidy, and also discriminate against equipment for renewable energy generation facilities produced outside Ontario. In particular, Japan considers that these measures are inconsistent with the following provisions:

1. Articles 3.1(b) and 3.2 of the *SCM Agreement*, because the measures are subsidies within the meaning of Article 1.1 of the *SCM Agreement* that are provided contingent upon the use of domestic over imported goods, namely contingent upon the use of equipment for renewable energy generation facilities produced in Ontario over such equipment imported from other WTO Members such as Japan;⁸
2. Article III:4 of the GATT 1994, because the measures accord less favourable treatment to imported equipment for renewable energy generation facilities than accorded to like products originating in Ontario; and
3. Article 2.1 of the *TRIMs Agreement*, in conjunction with paragraph 1(a) of the Agreement's Illustrative List, because the measures are trade-related investment measures inconsistent with Article III:4 of the GATT 1994 which require the purchase or use by enterprises of equipment for renewable energy generation facilities of Ontario origin.

Further, Japan considers that Canada's measures nullify or impair benefits accruing to Japan directly or indirectly under the cited Agreements in a manner described in Article XXIII:1 of the GATT 1994.

Japan requests the establishment of a Panel with standard terms of reference in accordance with Article 7.1 of the DSU.

⁷ Japan notes that, as a matter of convenience, the above list identifies the most recent versions available as of the date of this request of the FIT Rules, microFIT Rules, FIT Contract, microFIT Contract, FIT Application Form, microFIT Application, FIT Price Schedule, microFIT Price Schedule, and FIT Program Interpretations of the Domestic Content Requirements. Japan's request, however, encompasses all versions of these measures adopted since the inception of the FIT Program on 24 September 2009.

⁸ As subsidies falling under the provisions of Article 3 of the *SCM Agreement*, the measures are deemed to be specific under Article 2.3 of the *SCM Agreement*.