

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

Request for Consultations by Japan

The following communication, dated 13 September 2010, from the delegation of Japan to the delegation of Canada and to the Chairman of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

Upon instructions from my authorities, I hereby wish to convey the request of the Government of Japan for consultations with the Government of 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* (the "*TRIMs Agreement*"), and Articles 4.1 and 30 of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*"), regarding Canada's measures relating to domestic content requirements in the feed-in tariff program (the "FIT Program").<sup>1</sup>

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 the renewable energy generation facility that contain a defined percentage of domestic content. These measures include, but are not limited to, the following:

- (1) the *Electricity Act, 1998*, as amended,<sup>2</sup> including in particular Part II.1 (Ontario Power Authority<sup>3</sup>) and Part II.2 (Management of Electricity Supply, Capacity and Demand) thereof, including in particular Section 25.35 (Feed-in tariff program);
- (2) 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

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<sup>1</sup>"FIT Program" referred to in this request includes both projects over 10 kilowatts and projects of 10 kilowatts or less (microFIT). See <http://fit.powerauthority.on.ca/>; <http://fit.powerauthority.on.ca/Page.asp?PageID=1115&SiteNodeID=1052>; and <http://microfit.powerauthority.on.ca/>.

<sup>2</sup>The latest amendment was by: 2010, c.8, s.37.

<sup>3</sup>The Ontario Power Authority ("OPA") is a not-for-profit corporation without share capital, and the governance and the structure by-law may be made only with the approval in writing of the Minister of Energy and Infrastructure (the "Minister"). See, e.g., *Electricity Act, 1998*, Sections 25.1(1) and 25.16(3).

amend other statutes (the "Green Energy and Green Economy Act, 2009"), including in particular Schedule B amending the Electricity Act, 1998;

- (3) 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"), including in particular Schedule A, Section 28, enacting Part II.1 of the Electricity Act, 1998;
- (4) FIT direction dated September 24, 2009, from George Smitherman, Deputy Premier and Minister of Energy and Infrastructure, to Colin Anderson, Chief Executive Officer, Ontario Power Authority, 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;
- (5) the FIT Rules, Version 1.3.1 issued on 2 July 2010 and amended on 13 August 2010 by the OPA, and the microFIT Rules, Version 1.5 issued on 25 August 2010;
- (6) the FIT Contract, Version 1.3.1 (2 July 2010), including General Terms and Conditions, Exhibits, and Standard Definitions, issued by the OPA, and the microFIT Contract, Version 1.5 (25 August 2010), including Appendices, issued by the OPA, as well as individual FIT and microFIT Contracts executed by the OPA with renewable energy suppliers in Ontario;
- (7) the FIT Application Form (1 December 2009), and online microFIT Application, issued by the OPA;
- (8) the FIT Price Schedule (13 August 2010), and the microFIT Price Schedule (13 August 2010), issued by the OPA;
- (9) the FIT Program Interpretations of the Domestic Content Requirements (December 14, 2009), issued by the OPA; and
- (10) any amendments or extensions of the foregoing, any replacement measures, any renewal measures, any implementing measures, and any related measures.

The Government of Japan believes these measures discriminate against equipment for renewable energy generation facilities produced outside Ontario, and also constitute a prohibited subsidy. Specifically, Japan is concerned that the measures in question, as authorized, established, and implemented, are inconsistent with Canada's obligations under, but not limited to, the following provisions:

- (1) Articles III:4 and III:5 of the GATT 1994;
- (2) Article 2.1 of the TRIMs Agreement; and
- (3) Articles 3.1(b) and 3.2 of the SCM Agreement.

The measures listed above appear to be inconsistent with Articles III:4 and III:5 of the GATT 1994 because: the measures appear to be laws, regulations or requirements affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of equipment for renewable energy generation facilities that accord less favorable treatment to imported equipment than that accorded to like products originating in Ontario; the measures could be internal quantitative

regulations relating to the mixture, processing or use of a specified amount or proportion of equipment for renewable energy generation facilities which require that equipment for renewable energy generation facilities must be supplied from Ontario sources; and the measures appear to require the mixture, processing or use of equipment for renewable energy generation facilities supplied from Ontario in specified amounts or proportions, being applied so as to afford protection to Ontario production of such equipment, contrary to the principles of Article III:1 of the GATT 1994.

In addition, the measures listed above appear to be inconsistent with Article 2.1 of the *TRIMS Agreement* because the measures appear to be trade-related investment measures that are inconsistent with the provisions of Article III of the GATT 1994.

Finally, it appears that a subsidy is granted under the measures listed above within the meaning of Article 1.1 of the *SCM Agreement* because there would be a financial contribution or a form of income or price support, and a benefit is thereby conferred. And the subsidy would be a prohibited subsidy under Articles 3.1(b) and 3.2 of the *SCM Agreement* because it appears to be 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 countries such as Japan. As the subsidy falls under the provisions of Article 3 of the *SCM Agreement*, it would therefore be deemed to be specific under Article 2.3 of the *SCM Agreement*.

Article 4.2 of the *SCM Agreement* requires that requests for consultations under Article 4.1 of the *SCM Agreement* include a statement of available evidence with regard to the existence and nature of the subsidy in question. The available evidence is listed in the Annex to this request.

The Government of Japan considers that the measures in questions also nullify or impair, within the meaning of Article XXIII:1 of the GATT 1994, benefits accruing to Japan directly or indirectly under the cited Agreements.

The Government of Japan reserves the right to request the Government of Canada to produce further information and documents regarding the measures in question. The Government of Japan also reserves the right to raise further facts and claims under other provisions of the covered agreements and address additional measures during the course of consultations.

The Government of Japan looks forward to receiving a reply from the Government of Canada to this request and to fix a mutually convenient date to hold consultations.

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## ANNEX

### Statement of Available Evidence with Regard to the Existence and Nature of the Subsidies in Question

Japan's request for consultations dated 13 September 2010 identifies the prohibited subsidies that are the subject of this request for consultations.

The evidence set out below is evidence available to Japan at this time regarding the existence and nature of those subsidies. Japan reserves the right to supplement or alter this list in the future, as required.

The evidence presently available to Japan includes the following:

- The *Electricity Act, 1998*, S.O. 1998, c. 15 (Can. Ont.), as amended, [http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_98e15\\_e.htm](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_98e15_e.htm)
- The *Green Energy and Green Economy Act, 2009*, S.O. 2009, c. 12 (Can. Ont.), [http://www.ontla.on.ca/bills/bills-files/39\\_Parliament/Session1/b150ra.pdf](http://www.ontla.on.ca/bills/bills-files/39_Parliament/Session1/b150ra.pdf)
- The *Electricity Restructuring Act, 2004*, S.O. 2004, c. 23 (Can. Ont.), [http://www.ospe.on.ca/pdf/gr\\_legislation\\_Bill\\_100\\_Electricity\\_Restructuring\\_Act\\_2004.pdf](http://www.ospe.on.ca/pdf/gr_legislation_Bill_100_Electricity_Restructuring_Act_2004.pdf)
- FIT direction from George Smitherman, Deputy Premier and Minister of Energy and Infrastructure, Province of Ontario, to Colin Anderson, Chief Executive Officer, Ontario Power Authority (September 24, 2009), [http://www.powerauthority.on.ca/Storage/106/15420\\_FIT\\_Directive\\_Sept\\_24\\_09.pdf](http://www.powerauthority.on.ca/Storage/106/15420_FIT_Directive_Sept_24_09.pdf)
- OPA, FIT Program Website, and contents therein, <http://fit.powerauthority.on.ca/Page.asp?PageID=1115&SiteNodeID=1052>
- OPA, microFIT Program Website, and contents therein, <http://microfit.powerauthority.on.ca/>
- OPA, Feed-In Tariff Program: Program Overview (2 July 2010), <http://fit.powerauthority.on.ca/Storage.asp?StorageID=10507>
- OPA, Micro Feed-In Tariff Program: Program Overview (25 August 2010), <http://microfit.powerauthority.on.ca/pdf/microFIT-Program-Overview.pdf>
- OPA, Feed-In Tariff Program: FIT Rules, Ver. 1.3.1 (13 August 2010), [http://fit.powerauthority.on.ca/Storage/102/11119\\_FIT\\_Rules\\_Version\\_1.3.1\\_August\\_13.pdf](http://fit.powerauthority.on.ca/Storage/102/11119_FIT_Rules_Version_1.3.1_August_13.pdf)
- OPA, Feed-In Tariff Program: microFIT Rules, Ver. 1.5 (25 August 2010), <http://microfit.powerauthority.on.ca/pdf/microFIT-Rules.pdf>
- OPA, FIT Contract, Ver. 1.3.1 (2 July 2010), <http://fit.powerauthority.on.ca/Storage.asp?StorageID=10775>
- OPA, microFIT Contract, Ver. 1.5 (25 August 2010), <http://microfit.powerauthority.on.ca/pdf/microFIT-Contract.pdf>

- OPA, FIT Contract Form of Domestic Content Plan, OPACM- FORM-DOMESTIC CONTENT PLANT (2010-04) (11 August 2010), [http://fit.powerauthority.on.ca/Storage/102/11118\\_FIT\\_Domestic\\_Content\\_Plan.pdf](http://fit.powerauthority.on.ca/Storage/102/11118_FIT_Domestic_Content_Plan.pdf)
- OPA, microFIT Domestic Content Grid, <http://microfit.powerauthority.on.ca/pdf/microFIT-Domestic-Content.pdf>
- OPA, FIT Appendix I – Standard Definitions, Ver. 1.3.1 (July 2, 2010), <http://fit.powerauthority.on.ca/Storage.asp?StorageID=10638>
- OPA, FIT Application Form (1 December 2009), <http://fit.powerauthority.on.ca/Storage.asp?StorageID=10662>
- OPA, online microFIT Application, <http://microfit.powerauthority.on.ca/microFIT-Program-Rules/Submitting-an-application/index.php>
- OPA, FIT Price Schedule (13 August 2010), <http://fit.powerauthority.on.ca/Storage.asp?StorageID=10620>
- OPA, microFIT Price Schedule (August 13, 2010), <http://microfit.powerauthority.on.ca/pdf/microFIT-Program-price-schedule.pdf>
- OPA, Interpretations of the Domestic Content Requirements (14 December 2009), [http://fit.powerauthority.on.ca/Storage/99/10869\\_Questions\\_and\\_Answers\\_on\\_Domestic\\_Content\\_Grid\\_Cells\\_Dec\\_14\\_09.pdf](http://fit.powerauthority.on.ca/Storage/99/10869_Questions_and_Answers_on_Domestic_Content_Grid_Cells_Dec_14_09.pdf)
- OPA, Draft Domestic Content Interpretations (last updated 19 July 2010), <http://fit.powerauthority.on.ca/Page.asp?PageID=924&ContentID=10618> (past requests for feedback on draft interpretations); <http://fit.powerauthority.on.ca/Page.asp?PageID=924&ContentID=10662&SiteNodeID=1054> (proposed changes to FIT Contract, Exhibit D, posted June 29, 2010); [http://fit.powerauthority.on.ca/Storage/100/10908\\_Domestic\\_Content\\_Exhibit\\_D\\_-\\_Draft\\_March\\_11\\_10.pdf](http://fit.powerauthority.on.ca/Storage/100/10908_Domestic_Content_Exhibit_D_-_Draft_March_11_10.pdf) (proposed changes to FIT Contract, Exhibit D, posted 11 March 2010)
- OPA, FIT Program Domestic Content FAQ (2010), <http://fit.powerauthority.on.ca/Page.asp?PageID=834&ContentID=10544>
- OPA, FIT Program Pricing and Payment FAQ (2010), <http://fit.powerauthority.on.ca/Page.asp?PageID=834&ContentID=10511>
- OPA, FIT Program Resources – Domestic Content (2010), <http://fit.powerauthority.on.ca/Page.asp?PageID=122&ContentID=10598>
- OPA, FIT Program Contract Management – Settlement (2010), <http://fit.powerauthority.on.ca/Page.asp?PageID=122&ContentID=10393>
- OPA, FIT Program Participation and Eligibility – Domestic Content (2010), <http://fit.powerauthority.on.ca/Page.asp?PageID=122&ContentID=10605>

- Press Release, OPA, Ontario's Feed-In Tariff Program Backgrounder (10 March 2010), [http://fit.powerauthority.on.ca/Storage/100/10899\\_FIT - CAE Event - Backgrounder - FINAL.pdf](http://fit.powerauthority.on.ca/Storage/100/10899_FIT_-_CAE_Event_-_Backgrounder_-_FINAL.pdf)
  - Press Release, OPA, Ontario's Landmark Green Energy Plan Delivers (10 March 2010), [http://fit.powerauthority.on.ca/Storage/100/10898\\_FIT - CAE Event News Release - FINAL.pdf](http://fit.powerauthority.on.ca/Storage/100/10898_FIT_-_CAE_Event_News_Release_-_FINAL.pdf)
  - Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. L112 (23 February 2009) (exchange between Hon. George Smitherman and MPP Paul Miller on "Green Power Generation"), [http://www.ontla.on.ca/web/house-proceedings/house\\_detail.do?Date=2009-02-23&Parl=39&Sess=1&locale=en#P201\\_38409](http://www.ontla.on.ca/web/house-proceedings/house_detail.do?Date=2009-02-23&Parl=39&Sess=1&locale=en#P201_38409)
  - Independent Electricity System Operator, The Power System, [http://www.ieso.ca/imoweb/siteShared/power\\_system.asp](http://www.ieso.ca/imoweb/siteShared/power_system.asp)
  - OPA, 2010-2012 Business Plan (September 2009), [http://www.powerauthority.on.ca/Storage/108/15587\\_A-2-1\\_2010-2012\\_OPA\\_Business\\_Plan\\_Final\\_Oct\\_1.pdf](http://www.powerauthority.on.ca/Storage/108/15587_A-2-1_2010-2012_OPA_Business_Plan_Final_Oct_1.pdf)
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