

CANADA – MEASURES RELATING TO THE FEED-IN TARIFF PROGRAM

Request for Consultations by the European Union

The following communication, dated 11 August 2011, from the delegation of the European Union to the delegation of Canada and to the Chairperson of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

The European Union ("EU") hereby requests 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").¹

The issues which the European Union would like to raise in the course of the consultations include, but are not limited to, the following measures:

- the *Electricity Act, 1998*², as amended, including in particular Part II (Independent Electricity System Operator), Part II.1 (Ontario Power Authority) and Part II.2 (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*, 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*")³, 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*")⁴, including in particular Schedule A, Sections 29-32, enacting Part II.1 of

¹ "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/>.

² S.O. 1998, c. 15, Sched. A.

³ S.O. 2009, c. 12.

⁴ S.O. 2004, c. 23.

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 including 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 2009⁵;
- 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;
- 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, revisions or extensions of the foregoing, any replacement measures, any renewal measures, any implementing measures, and any related measures.⁶

⁵ 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".

⁶ The request encompasses all versions of these measures adopted since the inception of the FIT Program on 24 September 2009.

The EU considers that the above-mentioned measures are inconsistent, among others, with Canada's obligations under the following provisions:

- Articles 3(1)(b) and 3(2) of the *SCM Agreement*, because the measures are deemed to be subsidies within the meaning of Article 1.1 of the *SCM Agreement* that are prohibited insofar they 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, including the EU;
- Article III:4 of the GATT 1994, because the measures accord less favourable treatment to imported equipment for renewable energy generation facilities over like products originating in Ontario; and
- 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.

The European Union reserves the right to address additional measures and claims under other provisions of the WTO Agreement regarding the above matters during the course of the consultations.

The European Union looks forward to receiving in due course a reply from Canada to this request. The European Union is ready to consider with Canada mutually convenient dates to hold consultations in Geneva.
