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ARTICLE XX: PROTECTOR OF PUBLIC HEALTH, THE ENVIRONMENT, AND THE NEW PROVISIONS OF EUROPEAN UNION’S FUEL QUALITY DIRECTIVE

By Joy Marie Virga*

After some controversy in the 1990s, the World Trade Organization (“WTO”) adopted a provision in the General Agreement on Tariffs and Trade (“GATT”) that created exceptions to the GATT’s free trade rules. These exceptions, codified at Article XX, allow nations to impose trade restrictions relating to, inter alia, the conservation of the environment, the promotion of human health, and the protection of national treasures. Since then, various countries have adopted regulations aimed at protecting the environment with challenges to those regulations moving through the WTO Dispute Settlement Body (“DSB”).

Recently, controversy has erupted following the European Union’s (“EU”) announcement of new implementing provisions in the EU Fuel Quality Directive (“FQD”). The Canadian Government and U.S. oil producers have expressed their strong objections to the provisions. Their concern specifically regards a provision that may be adopted in the near future requiring EU member states to reduce life cycle greenhouse gas (“GHG”) emissions of fuels used in “road-vehicles and non-road machinery” by 6% by 2020. The provision assigns a default value to various sources of crude oil, including crude oil derived from tar sands.

In May 2013, Karen Harbert of the U.S. Chamber of Commerce, alongside U.S. oil executives, wrote a letter to the Directorate-General for Climate Action of the European Commission expressing their discontent with the FQD. In this letter, the oil executives state that if the provisions are adopted, they will request that the U.S. government seek resolution of the matter at the WTO. They believe the new provisions are a clear violation of core WTO principles of free and open trade and equal treatment among nations. Additionally, the new provisions must not violate the “chapeau” of Article XX. When determining if a trade regulation violates the chapeau, the DS The DSB has already ruled that clean air constitutes an exhaustible natural resource. In 1996, Brazil and Venezuela filed a complaint against the United States for imposing air quality standards on gasoline imports. The purpose of these standards was to achieve cleaner air. The DSB ruled that because these standards were intended to preserve clean air, they could be “appropriately regarded as ‘primarily aimed at’ the conservation of natural resources for the purposes of Article XX.” However, under the U.S. fuel quality standards as promulgated, stricter standards were placed on foreign producers compared to domestic producers. The DSB concluded that the United States had the power to impose standards to achieve environmental objectives, but that such standards must be consistently applied to both domestic and foreign producers.

If enacted, the DSB will likely uphold the EU’s new FQD implementing provisions. The purpose of the provision is “to achieve levels of air quality that do not give rise to significant negative impacts on, or risks to, human health and the environment.” These objectives fall directly under the exceptions of Article XX and by reducing GHGs, the EU will be able to achieve these objectives. Nations have the right to protect the environment and the health of their people. This right is protected under the GATT’s Article XX exceptions. Thus, the WTO has no power, nor will it likely attempt, to overturn the potential new implementing provision of the EU FQD.

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1 David Vogel, The Environment and International Trade, 12.1 J. Pol’y Hist. 72, 76.
3 GATT 1994, Art. XX.
6 Id.
11 Drevna, supra note 7.
12 Drevna, supra note 7.
13 Drevna, supra note 7.
14 GATT 1994, Art. I:1. In WTO cases, four criteria have been used to determine if a product constitutes a “like product”—the physical properties, the extent to which it is capable of serving the same or similar end use, the extent to which consumers perceive and treat the product as a substitute for the product classification of the product. WTO Rules and Environmental Policies: Key GATT Disciplines, WORLD TRADE ORG. (Dec. 3, 2013, 9:30 PM), http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.
16 GATT 1994, Art. XX(g).
17 Increased GHG emissions increases average temperature, the frequency of heat waves and extreme weather events, the severity of coastal storms, and mortality. Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,497-98 (Dec. 15, 2009).
19 See Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 Fed. Reg. at 66,523.
21 Panel Report, supra, note 18 at 1-4.
22 These standards created baselines “to permit scrutiny and monitoring of the level of compliance of refiners, importers and blenders with the ‘non-degradation’ requirements.” Panel Report, supra, note 18 at 4.
23 Panel Report, supra, note 18 at 19.
24 Panel Report, supra, note 18 at 5-6.
26 See GATT 1994, Art. XX (stating that measures should not be “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.”).
27 More specifically, the DSB considered whether (a) the application of the measure necessarily results in discrimination, (b) the discrimination is arbitrary or unjustifiable in both the actual provisions of the measure and how it is applied in practice, and (c) discrimination occurs between countries where the measures prevail. Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, ¶ 150-60, (Nov. 6, 1988).
28 In United States—Standards for Reformulated and Conventional Gasoline, the DSB appellate body found that the United States “had not sufficiently explored the possibility of entering into cooperative arrangements with affected countries in order to mitigate the administrative problems raised by the United States in their justification of the discriminatory treatment.” WTO Rules and environmental policies: GATT exceptions, WORLD TRADE ORG. (Dec. 20, 2013, 4:00 PM), http://www.wto.org/english/tratop_e/dispu_e/envt_rules_gatt_exceptions_e.htm.
29 The provision does not impose a different standard on tar sands oil than other forms of crude oil within its boundaries. Therefore, there is no discrimination of like products. Defense Terre, supra note 10 at 8. See supra note 27 and accompanying text; Directive 2009/30, 2009 O.J. (140) art. 7a (EC); GATT 1994, Art. XX.
30 The EU and Canada participated in multi-year peer reviewed consultations, which demonstrates the EU’s good faith effort in mitigating potential disputes. Defense Terre, supra note 10 at 8.
32 See GATT 1994, Art. XX(b), (g).

Endnotes: U.S. Food Aid Reform through Alternative Dispute Resolution
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42 Id.; “U.S. international food aid programs have traditionally been authorized in farm bills. The most recent of such bills, the Food, Conservation, and Energy Act of 2008 (P.L. 110-246), authorized through FY2012 and amended international food aid programs. . . . U.S. international food aid has been distributed mainly through five program authorities: the Food for Peace Act (P.L. 480); Section 416(b) of the Agricultural Act of 1949; the Food for Progress Act of 1985; the McGovern-Dole International Food for Education and Child Nutrition Program; and the Local and Regional Procurement Pilot Project, a pilot program in the 2008 farm bill which ended in FY 2012. In addition, the 2008 farm bill also reauthorized the Bill Emerson Humanitarian Trust (BEHT), a reserve of commodities and cash for use in the Food for Peace program to meet unanticipated food aid needs.” Hanrahan, supra note 19, at ii.
43 Clapp, supra note 14.
44 “By setting out food aid policies within specific pieces of legislation that it must approve annually, Congress plays a strong role in determining the direction of these policies.” Clapp, supra note 14, at 72.
46 Id.
48 U.S. Gov’t Accountability Office, GAO-07-560, supra note 18, at 7.
49 Fiscal year 2014 request for U.S. food aid was $1.47 billion as compared to the $1.15 billion the House Agricultural Appropriations introduced.
52 U.S. Agency for Int’l Dev., supra note 39 (following World War II, U.S. agricultural policy funded an unprecedented and unmatched level of research, credit, and production advice while also supporting farmers’ incomes, the combination of which created a massive food commodity surplus by the end of the Korean War.).
54 Hanrahan, supra note 19, at 2.

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