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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")¹ adopted a provision in the General Agreement on Tariffs and Trade ("GATT") that created exceptions to the GATT's free trade rules.² 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.³ 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").⁴

Recently, controversy has erupted following the European Union's ("EU") announcement of new implementing provisions in the EU Fuel Quality Directive ("FQD").⁵ The Canadian Government⁶ and U.S. oil producers have expressed their strong objections to the provisions.⁷ Their concern specifically regards a provision that may be adopted in the near future⁸ 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 2020.⁹ The provision assigns a default value to various sources of crude oil, including crude oil derived from tar sands.¹⁰ 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.¹¹ 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.¹² They believe the new provisions are a clear violation of core WTO principles of free and open trade and equal treatment among nations.¹³

However, Article XX of the GATT likely protects the new provision. If the EU formally adopts the provision and Canada and the United States seek to challenge it at the WTO, Canada and the United States must show that tar sands oil is a "like product"¹⁴ and that it is being treated "less favorably" than other "like products."¹⁵ Moreover, if the United States and Canada can prove tar sands oil is a "like product" (to other crude oil feedstocks) being treated "less favorably" (than those feedstocks), they still have to prove that the Article XX exception does not apply. Previous DSB decisions, along with the language of Article XX, suggest that any resolution on this matter will likely uphold the EU's adoption of the FQD implementing provisions.

Article XX allows for trade restrictions "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."¹⁶ In 2009, the Environmental Protection Agency found that GHG emissions present a risk to public health.¹⁷ This

finding lends support to the view that the EU provision easily falls into this exception. The provision is essentially a regulation to prevent an increase in GHG emissions. It safeguards clean air and a climate fit for human habitation, both of which are "exhaustible natural resources."¹⁸ Further, a reduction in GHG emissions will promote human health and environmental conservation.¹⁹

The DSB has already ruled that clean air constitutes an exhaustible natural resource.²⁰ In 1996, Brazil and Venezuela filed a complaint against the United States for imposing air quality standards on gasoline imports.²¹ The purpose of these standards was to achieve cleaner air.²² 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(g)."²³ However, under the U.S. fuel quality standards as promulgated, stricter standards were placed on foreign producers compared to domestic producers.²⁴ 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.²⁵

Additionally, the new provisions must not violate the "chapeau" of Article XX.²⁶ When determining if a trade regulation violates the chapeau, the DSB considers whether the regulation would arbitrarily treat WTO member nations differently²⁷ and if there was a good-faith effort to negotiate an international agreement.²⁸ The DSB will likely find that the provisions do not violate the chapeau, as the provision does not create an "arbitrary discrimination" based on national origin.²⁹ Moreover, the EU actively engaged with WTO member nations to mitigate disputes for several years.³⁰

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."³¹ These objectives fall directly under the exceptions of Article XX³² 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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Endnotes: ARTICLE XX: PROTECTOR OF PUBLIC HEALTH, THE ENVIRONMENT, AND THE NEW PROVISIONS OF EUROPEAN UNION'S FUEL QUALITY DIRECTIVE

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- ¹ DAVID VOGEL, *The Environment and International Trade*, 12.1 J. POL'Y HIST. 72, 76.
- ² *Id.*; General Agreement on Tariffs and Trade, Art. XX Apr. 15, 1994, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994].
- ³ GATT 1994, Art. XX.
- ⁴ *Chronological List of Disputes*, WORLD TRADE ORG. (Dec. 3, 2013, 9:30 PM), http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.
- ⁵ Margo McDiarmid, *Joe Oliver Takes Oilsands Fight to Europe's Financial Heart*, CBC NEWS (Nov. 19, 2013), <http://www.cbc.ca/news/politics/joe-oliver-takes-oilsands-fight-to-europe-s-financial-heart-1.2432413>.
- ⁶ *Id.*
- ⁷ Charles T. Drevna et al., *Multi-Association Letter Regarding EU Fuel Quality Directive*, INSTITUTE FOR 21ST ENERGY (Dec. 3, 2013, 9:30 PM), <http://www.energyxxi.org/multi-association-letter-regarding-eu-fuel-quality-directive>.
- ⁸ Barbara Lewis, *Update 2-EU Vote on Tar Sands Oil Delayed Until 2013*, REUTERS (Apr. 20, 2012), <http://www.reuters.com/article/2012/04/20/energy-tar-idUSL6E8FK33620120420>.
- ⁹ Directive 2009/30, 2009 O.J. (L40) 1, 2 (EC).
- ¹⁰ DÉFENSE TERRE, WTO IMPLICATIONS OF REPORTING MEASURES FOR TAR SANDS UNDER THE FUEL QUALITY DIRECTIVE 1 (2011), available at http://www.transport-environment.org/sites/te/files/media/2011%2006%20WTO%20and%20Tar%20Sands_FINAL.PDF.
- 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 an alternative to perform specific functions to satisfy a particular demand, and the international tariff 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.
- ¹⁵ GATT 1994, Art. III:4.
- 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).

- ¹⁸ Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, 19, WT/DS2/9 (May 20, 1996), available at http://www.wto.org/english/tratop_e/dispu_e/2-9.pdf.
- 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.
- ²⁰ Panel Report, *supra*, note 18.
- 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.
- ²⁵ Panel Report, *supra*, note 18, at 29-30.
- 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/envir_e/envt_rules_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. DÉFENSE TERRE, *supra* note 10, at 8. See *supra* note 27 and accompanying text; Directive 2009/30, 2009 O.J. (L40) 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. DÉFENSE TERRE, *supra*, note 10, at 8.
- ³¹ Directive 2009/30, 2009 O.J. (L40) ¶ 2 (EC).
- ³² See GATT 1994, Art. XX(b), (g).

Endnotes: U.S. FOOD AID REFORM THROUGH ALTERNATIVE DISPUTE RESOLUTION

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- ⁴⁰ WORLD FOOD PROGRAMME, 2010 FOOD AID FLOWS 7 (2011), available at <http://home.wfp.org/stellent/groups/public/documents/research/wfp238954.pdf>.
- ⁴¹ 7 U.S.C.A. § 8701.
- 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.
- ⁴⁵ Agricultural Trade Development Assistance Act, 7 U.S.C. § 1721 (2006).

- ⁴⁶ *Id.*
- ⁴⁷ See HOUSE FOREIGN AFFAIRS COMM., FOOD AID REFORM, available at <http://foreignaffairs.house.gov/sites/republicans.foreignaffairs.house.gov/files/06-11-13%20Food%20Aid%20Reform%20Fact%20Sheet%20PDF.pdf>.
- 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. HOUSE FOREIGN AFFAIRS COMM., *supra* note 47; U.S. AGENCY FOR INT'L DEV., U.S. INTERNATIONAL FOOD ASSISTANCE REPORT 2007, at 7 (2008), available at http://kenya.usaid.gov/our_work/humanitarian_assistance/frp/fy07_usifar_final.04.24.08.pdf
- ⁵⁰ 7 U.S.C.A. § 1691.
- ⁵¹ U.S. AGENCY FOR INT'L DEV., *supra* note 39.
- 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.).
- ⁵³ U.S. AGENCY FOR INT'L DEV., *supra* note 39.
- ⁵⁴ Hanrahan, *supra* note 19, at 2.