
Joy Marie Virga
American University Washington College of Law

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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.

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” and that it is being treated “less favorably” than other “like products.” 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.” In 2009, the Environmental Protection Agency found that GHG emissions present a risk to public health. 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.” Further, a reduction in GHG emissions will promote human health and environmental conservation.

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(g).” 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.

Additionally, the new provisions must not violate the “chapeau” of Article XX. When determining if a trade regulation violates the chapeau, the DSB considers whether the regulation would arbitrarily treat WTO member nations differently and if there was a good-faith effort to negotiate an international agreement. 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. Moreover, the EU actively engaged with WTO member nations to mitigate disputes for several years.

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.

* J.D. Candidate 2016, American University Washington College of Law