WORLD TRADE ORGANIZATION

Panel established pursuant to Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes

CANADA – CERTAIN MEASURES AFFECTING THE RENEWABLE ENERGY GENERATION SECTOR

(WT/DS412)

CANADA – MEASURES RELATING TO THE FEED-IN TARIFF PROGRAM

(WT/DS426)

AMICUS SUBMISSIONS OF
Blue Green Canada
Canadian Auto Workers
Canadian Federation of Students
Canadian Union of Public Employees
Communications, Energy and Paperworkers Union of Canada
Council of Canadians
Ontario Public Service Employees Union

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OVERVIEW

These are the first international trade disputes which engender the potential for conflict between a nation's commitments under the World Trade Organization and its obligations under the *Framework Convention on Climate Change* and the *Kyoto Protocol*. It raises fundamental questions about whether the goals of trade liberalization can be reconciled with ecological imperatives to reduce greenhouse gas emissions, and if not, which are to prevail.

At issue are measures adopted by the Province of Ontario under a program to reduce greenhouse gas emissions by phasing out coal-fired electrical power generation, and supporting the development of renewable energy infrastructure and power generation to replace it. As described by Ontario, its decision to phase out coal-fired electricity by 2014 represents "the largest climate change initiative of its kind in North America." A similar claim is made about its support for renewable power under a comprehensive Feed-in Tariff (FIT) program.

It is important that Ontario's initiatives were taken under the auspices of a Climate Change Action Plan (2008-09)[1] and explicitly for the purposes of meeting Canada's international obligations to reduce greenhouse gas emissions under the Convention and the Protocol.

The importance of addressing the challenges of climate change has been acknowledged by the WTO. In a forward to a paper jointly commissioned by the WTO and the United Nations Environment Program (UNEP), the respective leaders of these institutions acknowledged the ecological imperatives before us in these terms:

> *Climate change is not a problem that can afford to wait. It is a threat to future development, peace and prosperity that must be tackled with the greatest sense of urgency by the entire community of nations.*[2]

The joint report underscores the importance of ensuring that trade and climate policies are mutually supportive, and describes WTO rules as having sufficient scope and flexibility to allow nations to effectively address climate change.

The measures at issue in these disputes represent the foremost efforts by any Canadian government to reduce greenhouse gas emissions, and in doing so, begin to meet Canada's obligations under international law. These disputes provide an important test, therefore, of whether in fact WTO rules will be interpreted to have the scope and flexibility that Pascal Lamy, Director General of the WTO, has indicated.

Japan and the EU have challenged Ontario's measures for offending WTO rules. While both profess support for the goal of reducing greenhouse gas emissions, they argue that Ontario's measures offend three of the foundational agreements of the WTO - those concerning trade in goods, subsidies and foreign investment. Both invite the Panel consider their claims as a "trade and investment" not a "trade and environment" dispute.[3]

The following submissions complement Canada's response to these contentions, primarily by addressing the larger question of how WTO Agreements should be interpreted when the measures at issue are mandated under international environmental instruments. In the past, conflicts between trade rules and environmental measures have been addressed as questions concerning the interpretation of GATT Article XX which allows certain limited exceptions for such measures.

There is no need for recourse to Article XX in these present disputes. The proper interpretation of WTO rules in light of the obligations of the Parties under international climate change instruments shows the measures in question to be consistent with those rules, as the Joint Report suggests they should be.

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[1] http://www.ene.gov.on.ca/stdprodconsume/groups/lr/@ene/@resources/documents/resource/std01_079210.pdf

[2] Trade and Climate Change - A report by the United Nations Environment Programme and the World Trade Organization, Ludivine Tamiotti, Robert Teh, Vesile Kulaçoğlu, Anne Olhoff, Benjamin Simmons 2009

[3] First Written Submission of Japan, p. 2.

The EU and Japan take particular exception to the domestic content requirement of the FIT program which they argue is unnecessary to promote renewable power. This contention fails on several grounds, the most important of which is that it depends upon creating a dichotomy between the environment and the economy that is fundamentally at odds with principle of sustainable development mandated by both the Convention and the Protocol. Thus Article 3 of the Convention directs that in accordance with the principle of sustainable development "*measures to protect the climate system… should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change."* In other words, under the Convention Ontario is required to integrate environmental and economic policies and goals, and this is precisely what it is has done.

In accordance with its obligations under the Convention and Protocol, Ontario is not only seeking to increase the consumption of renewable energy but to facilitate the development of renewable energy infrastructure in Ontario. By doing so it proposes to reduce the costs of renewable power and create the industrial, commercial and services infrastructure that will allow the province to more readily take the next steps to further reduce greenhouse gas emissions. In fact Japan acknowledges that it has successfully done just that.[4] In simple terms, Ontario's FIT program is a perfect expression of the principles of sustainable development in which environmental and economic goals are married to address the imperatives of climate change.

However, if to the contrary, the Panel finds that a conflict exists between the requirements of international trade and climate change instruments, the rules of treaty interpretation require such a conflict to be resolved in favour of the latter. Therefore, if the Panel finds that measures taken in good faith by Ontario to meet Canada's obligations under the *Framework Convention* and the *Kyoto Protocol* cannot be reconciled with the requirements of WTO Agreements, then priority must be given to the requirement to reduce greenhouse gas emissions, and the present challenges rejected. The often sterile inquiry about the boundaries of limited exceptions for conservation and environmental protection measures delineated by Article XX need not repeated here.

The obligation to reduce greenhouse gas emissions cannot, under international law, be relegated to secondary status to the goals of trade liberalization. To the contrary, by signing and ratifying the *Framework Convention* and the *Kyoto Protocol*, Canada, the EU and Japan have each declared that the pursuit of ecological security in the face of potentially catastrophic climate change is the paramount obligation.

Unfortunately, Canada's federal government has recently taken steps to repudiate its commitments under the Kyoto Protocol effective in December, 2012. It is the only Party to the Protocol to have done so. Nevertheless, the measures at issue were adopted at a time when Canada's obligations under the Protocol were outstanding, and are in any event mandated by the *Framework Convention on Climate Change*, to which Canada remains a Party.

Canada's repudiation of its obligations under the Protocol may explain its failure to invoke international climate change instruments in defence of measures clearly taken to meet the obligations in these Agreements. It is also apparent that the Canadian federal government sees

[4] First Written Submissions of Japan, para. 127.

trade rules as instruments that may be enlisted to challenge efforts by other nations to reduce dependence on carbon intensive fuels. Thus, it has signalled a willingness to invoke WTO and NAFTA dispute procedures to assail clean fuel initiatives underway in the US and the EU as part of their efforts to reduce greenhouse gas emissions.

These challenges to Ontario's measures will provide a critical test of whether the WTO will resist efforts to enlist its dispute procedures to defeat or discourage measures established to address the enormous challenges presented by climate change. They will also gauge the willingness of WTO dispute bodies to recognize and accede to the jurisdiction and competence of multi-lateral institutions and instruments that have been established to address the climate change imperative.

THE MEASURES AT ISSUE

As noted, the measures at issue were established by the Province of Ontario as part of a programmatic effort to reduce greenhouse gas emissions by phasing out coal generation and supporting renewable power to replace it. Until recently, the province's electricity service needs were heavily dependent on coal fired power generation, which provided roughly 25% of the province's power needs. As a result of the province's commitment to phase out coal power, that proportion has been declining and coal generation is slated to be entirely phased out by the end of 2014.

Ontario describes its commitment as "the largest climate change initiative of its kind in North America," which if achieved will play a lead role reducing the carbon footprint from electricity generation in Ontario by approximately 75%.[5] Ontario explicitly justified this commitment as necessary to meet Canada's obligations under the *Kyoto Protocol*, which requires that Canada reduce its production of greenhouse gases to 6% below 1990 levels by the end of 2014.

To ensure that the province's energy service needs would still be met, the government of Ontario embarked upon a number of initiatives, including the adoption of measures to encourage and support the development of renewable power generation and infrastructure in Ontario.

The legislative framework for those efforts was established in 2009 by the G*reen Energy and Green Economy Act*, 2009 (GEA) which was intended to spark growth in clean and renewable sources of energy such as wind, solar, hydro, and bioenergy. Pursuant to these reforms the Minister of Energy directed the Ontario Power Authority (a provincial Crown corporation) to develop and implement a Feed-in Tariff (FIT) program to encourage and support the generation of renewable power in the province.

Feed-in tariffs have been a primary price support mechanism, used in the EU, the United States and other countries to encourage the generation of electricity by means of renewable energy

[5] Government of Ontario, "Ontario's Long-Term Energy Plan", p. 3. http://www.mei.gov.on.ca/en/pdf/MEI_LTEP_en.pdf.

sources.[6] A "feed-in tariff " usually refers to a regulated minimum guaranteed price per kilowatt-hour that an electricity company must pay for renewable energy fed into the electricity grid by independent producers. Feed-in tariffs for renewable power have proved successful in other jurisdictions, primarily by providing the long term price certainty required by private investors. Feed-in tariffs are flexible in design and can be adjusted to account for advances in technology and changing market conditions, making them more effective and efficient.

Ontario's FIT program adopts this model, and authorizes the OPA to enter into long-term procurement contracts – 40 years for hydroelectric projects and 20 years for all other technologies – to provide the certainty necessary to justify substantial investments in energy infrastructure. While several other countries, including Germany, Spain and Denmark, have successfully used FIT programs to encourage the development of renewable energy projects, Ontario's initiative is the first comprehensive feed-in tariff program in Canada.

In keeping with the principles of sustainable development, which underscore the need to integrate environmental and development goals, the objectives of the FIT program include:

> • *"increase capacity of renewable energy supply to ensure adequate generation and reduce emissions";*
>
> • *"introduce a simpler method to procure and develop generating capacity from renewable sources of energy";*
>
> • *"enable new green industries through new investment and job creation"; and*
>
> • *"provide incentives for investment in renewable energy technologies*".

Therefore the purpose of Ontario's program was not only to make renewable energy more available to consumers in the province, but importantly also to increase the renewable energy generating capacity of the province. To encourage the substantial investments required to achieve this goal, the FIT program provided for a premium to be paid for renewable power under long term contracts.

In 2009, under that authority the Minister directed that such a program be established to procure energy from a wide range of renewable sources. To qualify under the program, wind and solar power projects must contain a defined percentage of domestic content. As described by the OPA, under the FIT program:[7]

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[6] Note 2. The joint UNEP-WTO report describes Feed-In Tariffs as a "successful" means of encouraging use of renewables. The report lists German, Spain, Italy, France, Australia, the United States, Algeria, and Thailand as examples of countries where feed-in tariffs programs have been adopted. p. 114.

[7] http://fit.powerauthority.on.ca/sites/default/files/FIT%20Rules%20Version%201%205%201_Program%20Review.pdf

Developers will be required to have a certain percentage of their project costs come from Ontario goods and labour at the time they reach commercial operation.

> *• For windpower projects over 10 kW, the requirement will start at 25 percent and increase to 50 percent on January 1, 2012. There are no domestic content requirements for windpower projects 10 kW or less in size.*
>
> *• For micro solar PV [photovoltaic] (10 kW or smaller) projects, the requirement will start at 40 percent and increase to 60 percent on January 1, 2011.*
>
> *• For larger solar PV projects, the requirement will start at 50 percent and increase to 60 percent on January 1, 2011.*

Under the FIT program, power generators would be paid a substantial premium for renewable power and are assured these prices under long term contracts. To justify the significant upward pressure this would impose on electricity rates, Ontario pointed to potential significant employment gains that would result from promoting the establishment of a clean-energy manufacturing base for the province.[8]

As renewable power development was a necessary means to phase out coal power generation, Ontario also pointed out that eliminating coal power would also have significant health benefits for Ontarians. A 2005 independent study, "Cost Benefit Analysis: Replacing Ontario's Coal-Fired Electricity Generation", found that coal-fired generation costs $4.4 billion annually when health and environmental costs are taken into consideration.

In sum, Ontario's FIT program is a perfect expression of the principles of sustainable development in which environmental and development goals are married to support economic development while addressing the imperatives of climate change.

THE CLAIMS

The EU and Japan's challenge to Ontario's FIT program is focused on its domestic content requirements. It is at pains to stress that has no issue with other elements of the program, and is supportive of the general purpose of promoting renewable energy sources. The EU for example describes that purpose as "legitimately valid" and states that "WTO Members can and should actively support it, for instance, by granting subsidies, insofar as they are consistent with the covered agreements."

Nevertheless both the EU and Japan assail the domestic content requirements of the FIT program as being unnecessary for the promotion of renewable power and argues that this requirement of the FIT program offends; i) the General Agreement on Trade in Tariffs (GATT), ii) the Subsidies and Countervailing Measures Agreement (SCM) and iii) the Agreement on Trade Related

[8] "Green Energy Act Creates 20,000 Jobs", http://news.ontario.ca/mei/en/2011/07/green-energy-act-creates-20000-jobs.html

Investment Measures.[9] Its submissions present highly complex and interwoven arguments that would dramatically limit the scope for government procurement practices that seek to also realize domestic economic benefits when goods and services are purchased by public bodies for public purposes.

Before adding our comments to the specific submissions of Canada, we address an issue that it has not raised. This concerns the approach for the Panel to adopt in considering measures that are impugned for offending WTO rules, when those measures are mandated by the *Framework Convention* and the *Kyoto Protocol*.

THE LAW

WTO Agreements Must be Interpreted in Light of Canada's Obligations Under The *Framework Convention on Climate Change* and the *Kyoto Protocol*

Trade dispute bodies have consistently held that international trade and investment agreements should be interpreted in accordance with the provisions of the *Vienna Convention on the Law of Treaties 1969*. Article 31 of the *Vienna Convention* sets out the general rule of treaty interpretation as follows:

> *1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
>
> *... ...*
>
> *3. There shall be taken into account, together with the context:*
>
> *(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
> *(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
> *(c) <u>any relevant rules of international law applicable in the relations between the parties.</u>*

[9] Such is the intricacy of the EU submissions that it "invites" the Panel to examine its claims in the particular order in which they are as presented in its submissions. This is to first find the measures to be prohibited subsidies under Article 3.1(b) of the SCM Agreement and thus in violation of Canada's obligations under Article 3.2 of the SCM Agreement. Second, to find the measures to fall within the scope of the TRIMs Agreement as well as requirements affecting the internal sale, purchase or use of products falling under Article III:4 of the GATT 1994. Third, to determine that Article III:8 of the GATT 1994 does not apply in the present dispute. Fourth, to find the measures to fall under paragraph 1(a) of the Annex to the TRIMs Agreement and, therefore, that Canada has violated Article 2.1 of the TRIMs Agreement. Finally, that as a consequence of the violation of the TRIMs Agreement, or in view of the requirements under Article III:4 of the GATT 1994, to find the measures at issue are also inconsistent with the national treatment principle included in Article III:4 of the GATT 1994.

The *Vienna Convention* also includes direction with respect potential conflicts between international treaties. Article 30 of the Convention concerning the *Application of successive treaties relating to the same subject matter,* provides:

> 1. *Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.*
>
> 2. *When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.*
>
> 3. *When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.* [emphasis added]

In the present case, Canada, the EU and Japan are all Parties to the *Framework Convention on Climate Change* and the *Kyoto Protocol*. As discussed below, these international instruments relate to the same subject matter put at issue in these disputes, namely measures intended to reduce greenhouse gas emissions. In our submission, the requirements of the GATT, the SCM and TRIMs agreements may readily be interpreted in a manner that is consistent with those of the Convention and the Protocol. However, should the Panel determine to the contrary, that a conflict exists between these trade and environmental treaties, then in accordance with Article 30:3 the latter must apply.

United Nations *Framework Convention on Climate Change* (1992) and the *Kyoto Protocol*

The *Framework Convention on Climate Change (1992)* provides in part as follows:

> *Article 2: OBJECTIVE*
>
> *The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.*
>
> *Article 3: PRINCIPLES*
>
> *In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, inter alia, by the following:*
>
> ... ...

The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change.

Article 4: COMMITMENTS

(f) All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall:

... ...

(b) Formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change;

[emphasis added]

The Parties herein are each a signatory to the *Kyoto Protocol*, which came into force in 2005. However in 2011, Canada became the only Party to the Protocol to repudiate its commitments under that Treaty. Under Article 27 of the Protocol, Canada's notice to withdraw from the Protocol becomes effective on December 14, 2012, one year after it was given. [10] Therefore, at all time material to this dispute, Canada was party to both the *Framework Convention* and the *Kyoto Protocol.*

As noted, under the *Protocol*, Canada committed to reducing greenhouse gas emissions by 2012 to a level 6% below those of 1990 levels. Instead, inaction by the Federal Government has resulted in increases in greenhouse gas emissions. In fact, between 1990 and 2008 Canada's greenhouse gas emissions increased by around 24.1%.

Under Canada's Constitution, the provinces have primary responsibility for regulating the energy sector and for protecting the environment. Provincial governments also have the authority to

[10] Article 27 provides:

1. At any time after three years from the date on which this Protocol has entered into force for a Party, that Party may withdraw from this Protocol by giving written notification to the Depositary.
2. Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depositary of the notification of withdrawal, or on such later date as may be specified in the notification of withdrawal.
3. Any Party that withdraws from the Convention shall be considered as also having withdrawn from this Protocol.

establish provincial energy utilities, and most have done so to provide electricity transmission, distribution and generation services. It would be impossible for Canada to achieve greenhouse gas emission reduction without the active participation and commitment of provincial governments.

As noted herein, the measures at issue were explicitly taken for the purpose of meeting Canada's obligations under the Kyoto Protocol. In addition to achieving specific emission reduction goals, the Kyoto Protocol also obligates the parties to promote sustainable development and:

> *(a) Implement and/or further elaborate policies and measures in accordance with its national circumstances, such as:*
>
> > *(i) Enhancement of energy efficiency in relevant sectors of the national economy;*
> > *...*
> >
> > *(iv) Research on, and promotion, development and increased use of, new and renewable forms of energy, of carbon dioxide sequestration technologies and of advanced and innovative environmentally sound technologies;*
> >
> > *(v) Progressive reduction or phasing out of market imperfections, fiscal incentives, tax and duty exemptions and subsidies in all greenhouse gas emitting sectors that run counter to the objective of the Convention and application of market instruments;*

The WTO has Recognized the Priority of Meeting Climate Change Goals

A joint report by the WTO and UNEP has underscored the need for trade liberalization and climate change goals to be mutually supporting. In the forward to that report, the heads of UNEP and WTO underscore the priority of addressing the challenge of confronting climate change in these terms:

> *Climate change is not a problem that can afford to wait. It is a threat to future development, peace and prosperity that must be tackled with the greatest sense of urgency by the entire community of nations. [p.v]*
>
> *The report ... highlights that there is considerable scope and flexibility under WTO rules for addressing climate change at the national level, and that mitigation measures should be designed and implemented in a manner that ensures that trade and climate policies are mutually supportive.*

The joint paper recognizes the need for both multilateral agreements and domestic action to address the challenges of climate change.

> *Policies and measures at the national level are also essential for creating incentives for consumers and enterprises to demand and adopt climate-friendly products and technologies.* [11]

The paper also describes the need for alternative energy technologies and acknowledges the failures of the market to create an economic environment within which the deployment of such technologies could occur without government intervention. It notes that environmental externalities and other factors have seriously hampered the deployment of climate-friendly and renewable energy technologies by placing them at a cost disadvantage with carbon-based conventional alternatives.[12]

SUBMISSIONS

According to the EU and Japan the sole issue in dispute in this case is the lawfulness of the domestic content requirement of Ontario's FIT program. However their arguments would, if acceded to, dramatically curtail the use of procurement and subsidy measures to achieve domestic public policy goals. Canada argues that the EU and Japanese position overreaches any plausible interpretation of GATT, SCM and TRIMs disciplines and should be rejected. We concur with these views as far as they go, but offer the following additional grounds for dismissing the challenges brought by Japan and the EU.

In this regard we submit that the domestic content requirements of Ontario's FIT program are entirely consistent with Canada's obligations under the GATT, and do not offend the requirements of the SCM or TRIMs Agreements either. However, and more importantly, any ambiguity that may be seen to exist in regard to the permissibility of such measures under WTO rules, must be resolved in favour of upholding greenhouse gas emission reductions measures mandated by the *Framework Convention on Climate Change* or the *Kyoto Protocol*.

The FIT Program is an Entirely Lawful Procurement Measure Under WTO Rules

The Government Procurement Agreement (GPA) to the WTO sets out various requirements that members must observe in regard to procurement measures that are subject to that Agreement. Among the constraints imposed by the GPA, is a general prohibition on the use of offsets in government procurement which "are measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology,

[11] Note 2, p. x

[12] According to the WTO - UNEP study, a number of factors may adversely affect the cost of renewable power. First, the cost of energy from renewable sources – except large hydropower installations, combustible biomass (for heat) or large geothermal projects – is generally not competitive with wholesale electricity and fossil fuel prices. One of the biggest challenges facing renewable energy technologies is therefore the development of options that can generate energy at costs that are competitive with conventional energy sources. Public funding policies may be able to make the price of energy from renewable sources competitive with that of fossil fuels. P. 111

investment requirements, counter-trade or similar requirements."[emphasis added][13] The domestic content requirement of the FIT program would arguably be an offset and therefore prohibited under the GPA.

GPA rules do not apply to the measures of Canadian provinces except in a few limited circumstances, and the FIT program is not one of these. In fact, Ontario and other Canadian provinces have resisted efforts to enlist their participation in the GPA in order to preserve this important tool of public policy.

Therefore, subject to domestic rules that require transparency and accountability, provincial governments may lawfully use public funds to purchase goods and services in a manner that enhances the value Canadians derive from such public purchasing. A principal means for doing this is to require that such goods and services engender some proportion of local content – that is local goods, services and/or labour. The practices of Canadian governments, are in this regard, very much like those of many other nations, including several members of the EU.

It is relevant that the EU and Canada are currently in negotiations to establish a bi-lateral free trade agreement and that proposals foresee both parties making commitments with respect to procurement beyond those made under the GPA. As the EU knows, Ontario has explicitly reserved its prerogatives to maintain the FIT program as it is. Thus Ontario has proposed a broad reservation that would preserve its:

> *right to adopt or maintain any measure relating to investment in or provision of services in renewable energy and renewable energy systems, including the production of wind and solar power.*[14]

It is precisely such measures that are the subject of this dispute.

The Domestic Content Requirements of the FIT Program Serve a Public Purpose, namely the Reduction of Greenhouse Gas Emissions as is Required under International Law

The EU and Japan argue that Ontario's domestic content requirement discriminates against EU and Japanese goods and services contrary to Article III:4 of the GATT which prohibits, *inter alia*, measures that provide less favourable treatment to imported goods.

However, Article III:8(a) states:

> *The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.*

[13] Agreement on Government Procurement, Article XVI, http://www.wto.org/english/docs_e/legal_e/gpr-94_02_e.htm#articleXVI

[14] Annex II

As Canada correctly argues, the FIT program falls squarely within the four corners of this exemption. Therefore WTO Members have retained the ability to impose requirements that may distinguish between imported goods and those produced locally, without running afoul of Article III:4. In other words, because the procurement of renewable electricity by the OPA falls within the scope of Article III:8(a), the condition that renewable electricity is produced with a certain level of domestic content is not inconsistent with GATT Article III:4.[15]

The EU and Japan contend that to the contrary, contracts with the OPA for the renewable power are not procurement contracts within the meaning of Article III:8(a) because they fail to meet the four-fold requirements of that provision, which are that such contracts:

i) are governed by laws, regulations and requirements;

ii) concern the purchase of goods or services by a government agency;

iii) are for goods and services being purchased for governmental purposes; and are not

iv) for purchases intended for commercial resale or with a view to the production of goods for commercial sale.

We concur with Canada's response to this contention, but it does not raise in defence of Ontario's measures the most important reason for rejecting claims being made by the EU and Japan. This is that to do otherwise would be to sanction an interpretation of Article III:8(a) that is fundamentally at odds with the requirements of the *Framework Convention* and the *Kyoto Protocol*, which not only authorize but formally mandate the measures at issue.

It is indisputable that the purchase of renewable energy for the purpose of reducing greenhouse gas emissions is procurement for a valid government purpose, and is in fact mandated by international law. Thus Article 4:2 of the *Framework Convention* provides that all developed country Parties:

> *... adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases ...*

Similarly, to achieve substantial reductions in greenhouse gas emissions, Article 3 of the *Kyoto Protocol* requires each of the Parties to implement policies and measures including those established for the:

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[15] GATT Article III: 4 provides:

> *The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.*

(i) Enhancement of energy efficiency in relevant sectors of the national economy; [and for];

(v) Progressive reduction or phasing out of market imperfections, fiscal incentives, tax and duty exemptions and subsidies in all greenhouse gas emitting sectors that run counter to the objective of the Convention and application of market instruments;

Notwithstanding the decision of the federal government to repudiate its commitments under the *Kyoto Protocol* as of December 2012, it continued to be bound by the *Framework Convention*. More importantly, Ontario's measures were taken in 2009 explicitly for the purpose of meeting the greenhouse gas emission reduction goals established under the Protocol, and were integral to its decision to phase out coal generation.

The exemption provided by GATT Article III:8(a) is clear, and there is no merit to arguments by Japan and the EU that "government purposes" should be narrowly defined. However, if the Panel considers there to be ambiguity in the meaning of this proviso, the rules of treaty interpretation require that it interpret this provision in a manner that accords with the requirements of both the Convention and Protocol. Moreover, if a conflict is found to exist between the requirements of the WTO and those of climate change treaties, the Panel must resolve the matter in favour of the latter as required by Article 30 of the *Vienna Convention*.

Finally, the Panel must reject any notion that the domestic content requirements of the FIT program are extraneous to its purposes. As noted, such requirements are not only permitted under WTO procurement rules, but are also integral to Ontario's efforts to reduce greenhouse gas emissions.

The EU and Japan contends that their only complaint is with the domestic content requirement of the FIT program which it argues is unnecessary for the purpose of helping promote electricity supply from renewable power. This contention fails on several grounds.

First the EU is attempting to incorporate a "necessity" test into Article III:8(a) where no such requirement was intended. The wording of the GATT III:8(a) procurement exemption does not require that the measures being used to further governmental purposes in procurement have to be "necessary." Establishing that a measure is necessary to achieve a particular purpose is part of the test for exemption under GATT Article XX – that same provision could have been included in the procurement exemption had that been the intent of GATT negotiators. This omission suggests that, in the wording chosen for the procurement exemption, the agreement's drafters did not intend necessity to be the test for validity of a procurement measure.

In the *India – Patents* dispute, the Appellate Body stated that "principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended." Yet in the Canada FIT dispute, the EU is asking the panel to import a necessity test into the GATT III:8(a) exemption despite any support for this in the text of the exemption.

Second, the EU's and Japan's contention that governments cannot use procurement to promote economic development deprives the exemption of meaning**.** In its first written submission, the EU argues that "the protection of local industries" cannot be a legitimate purpose for government procurement because it is contrary to the "fundamental national treatment principle" in GATT III. Japan makes a similar argument. But that interpretation deprives GATT III:8(a) of meaning, since the purpose of this provision is specifically to exempt government procurement from national treatment obligations. Adopting the interpretation urged by the EU and Japan would open up all government offsets to challenge, despite the limited commitments Members have lodged in their GPA annexes and the decision by most WTO Members not to be parties to the GPA.

As the Appellate Body in the *US – Gasoline* case has ruled, "An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility," and that would be precisely the result if the position of the EU and Japan were adopted.

Third, the contention of the EU and Japan invites the Panel to create a dichotomy between environmental and development goals which is entirely at odds with principle of sustainable development that is mandated by both the Convention and the Protocol. Thus, Article 3 of the Convention directs the Parties to be guided by certain principles, including the following:

> *The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change.* [emphasis added]

In other words, under the Convention Ontario is required to integrate environmental and economic policies and goals, and this is precisely what it is has done.

The reason for this is obvious and was in fact made explicit by Ontario when it in adopted the FIT program. Thus it was not Ontario's goal to simply increase the consumption of renewable energy within the province by facilitating the purchase of renewable energy goods and services from foreign suppliers. It was instead its purpose to facilitate the development of renewable energy infrastructure in Ontario according to the classic sustainable development paradigm. By doing so, not only would Ontario achieve a greater measure of energy security, but it would create a service and manufacturing infrastructure that would reduce the costs of renewable power and create a domestic constituency in favour of such measures. Thus skills would be gained, capital investments would be made and in the process, Ontario would acquire the capacity to pursue a more sustainable energy path that would be unattainable without these domestic resources and infrastructure.

It is entirely disingenuous of the EU and Japan to suggest that public support for renewable power, and the substantial premium consumers will pay for it, is indifferent to whether there are to be any gains for the domestic economy to offset those additional costs. Environmental law and policy are not made in a political or economic vacuum.

The invidiousness of this contention by the EU and Japan is apparent when one considers the enormous difficulties nations have had in meeting their obligations under the Convention and Protocol even without having to isolate economic and industrial policy in that pursuit. Preventing governments from using procurement measures such as the FIT program, replete with domestic content requirements, would create another disincentive to such action and be entirely inconsistent with the principles and requirements of the Convention and Protocol.

It is regrettable that Canada's has been unwilling to live up to its international obligations under the Convention and Protocol and that, alone among the parties to the Protocol, it has chosen to repudiate those commitments. It is not surprising then that Canada has chosen not to invoke these climate change instruments in defense of the impugned Ontario measures. It is also problematic that it has chosen to signal to the EU that it does not support the domestic content requirements of the FIT program. [16]

The EU and Japan have enlisted WTO dispute procedures in a manner that hinders the realization of greenhouse gas emission reduction goals. Unfortunately, Canada has signalled that it is willing to do the same thing if EU implements a clean fuel directive that would distinguish between energy products depending upon the carbon intensity associated with their production and use. The directive would address the failure of the market to capture and reflect the true costs of carbon fuels, a problem which the WTO and UNEP have acknowledged. But the products of the Canadian oil sands have a much higher carbon footprint than conventional oil, and so Canada is making efforts to discourage the EU from adopting a fuel directive that would reflect that reality.

The government of Ontario has no standing before this Panel, and must rely on the federal government to defend its measures – measures the federal government does not support. Moreover it is demonstrable in the present case that Canada's antipathy towards the *Kyoto Protocol* has hindered its defence of measures taken to meet Kyoto commitments. The complexities of Canadian federal-provincial relations cannot, however, cloud the very broad implications of the fundamental questions these cases have raised about the role WTO Agreements and dispute bodies will play when called upon to consider measures adopted to reduce greenhouse emissions. In our submission, that must be one of deference to the imperatives of addressing climate change.

The Domestic Content Requirement of the FIT Program Does Not Unfairly Subsidize Wind and Solar Technologies

The EU and Japan profess support for the objectives of the FIT program and for active government efforts to promote renewable energy sources. This, they argue, can be provided by way of government subsidies – but not if these are attached to domestic content requirements such as those of Ontario's FIT program. It argues therefore that this feature of the FIT also offends the WTO Agreement on Subsidies and Countervailing Measures (SCM).

[16] Para. 4 EU submissions

The claim by the EU and Japan depends entirely upon a mischaracterization of the OPA's purchases of electricity under the FIT program. A subsidy is defined for the purposes of the SCM Agreement as follows:

> *For the purpose of this Agreement, a subsidy shall be deemed to exist if:*
>
> *(a)(1) there is a financial contribution by a government or any public body within the territory of a Member ...*

In response, as Canada correctly points out, a transaction properly characterized as a purchase of goods [or services] by the OPA cannot be considered a contribution by government. As noted, the OPA contracts at issue are procurement arrangements, not subsidies, and this is consistent with the international practice for the purchase of electricity goods and services.[17]

Moreover, even if FIT contracts are considered subsidies and not procurement, they would be exempt from the constraints imposed by Article III:4, by reason of Article III:8(b) which provides:

> *The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.*

We have already noted the authority provided by the Convention and Protocol for the use of economic instruments to achieve climate change abatement goals. Indeed, the need for financial incentives to promote renewable power generation has also been explicitly acknowledged by the joint WTO-UNEP report this way:

> *Financial mechanisms to promote the development and deployment of climate-friendly goods and technologies A number of factors may hamper the development of new climate-friendly goods and technologies, and may inhibit innovation in the climate change technology sector. First, there is the problem of "environmental externality": because carbon emissions do not have a cost, firms and consumers have no direct incentive to find ways to reduce them.*[18]

The joint report acknowledges that in allowing the true cost of carbon use to be externalized, the market sends the wrong signals which discourage alternative forms of energy generation. As noted, the EU clean fuel directive attempts to correct this market failure by requiring the internalization of some proportion of real environmental costs.

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[17] See, for example, the US revised 2012 GPA offer that commits all goods purchased by listed US electrical utilities, with the exception of power generation projects financed by the Rural Utilities Service . WTO, Adoption of the Results of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement , Offer of the United States - Annex 7 – General Notes, paragraph 8. p. 433.

[18] Note 2, p. 110.

It would be perverse for WTO rules to be read in manner that frustrated efforts to address these market failures. Yet that is precisely the position the EU and Japan are urging the Panel to adopt, and that Canada is threatening to also advocate in regard to the EU fuel directive.

In our submission it is incumbent upon the WTO to send a very clear signal that it will not allow WTO Rules to be invoked in a manner that frustrates the realization of the climate change engendered by the *Framework Convention* and *Kyoto Protocol*.

All of Which is Respectfully Submitted by

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