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Ontario's Feed-in Tariff: Will the WTO Trump Climate Imperatives?

Ontario's feed-in tariff (FIT) program, which incentivizes investment in and production of renewable energy, has come under fire at the World Trade Organization (WTO). The program has enjoyed success and acclaim in incentivizing the production of clean energy and the creation of green jobs – both key elements of tackling the climate crisis. However, in November 2012, a WTO panel ruled¹ that the “buy local” components of the program violate WTO rules in the General Agreement on Tariffs and Trade (GATT) and the Agreement on Trade-Related Investment Measures (TRIMs) and should be “brought[.]...into conformity” (i.e. eliminated).² In a May 2013 final ruling, the Appellate Body of the WTO upheld the decision that the FIT program violates the GATT and the TRIMs.³ Canada now faces the threat of WTO-authorized trade sanctions if Ontario does not bring its acclaimed program into compliance with WTO rules, which could mean watering down or striking the program's critical buy-local provisions.

At stake in this case is the extent to which governments can provide incentives for renewable energy production and green job creation. The ability of governments to adopt domestic content rules favoring local producers and suppliers is critical to these goals, and the broader goal of tackling climate change. The transition to a clean energy economy depends on a robust local supply of green goods, services and jobs to cultivate a domestic renewable energy industry that can challenge the power of the fossil fuel industry in the setting of national climate policies. Additionally, tying together green jobs and climate policy has the benefit of making climate change solutions politically feasible in sometimes-hostile political environments. And, by helping to develop localized renewable energy industries, domestic content rules help bring more renewable energy producers to the global market, driving down the cost of renewable energy technologies and encouraging competition and innovation in the medium and long-term.

Indeed, one of the main arguments of Japan and the EU, which launched the WTO case against Canada's FIT program, is that without the buy-local provisions, Ontario's market would not be able to sustain any domestic renewable electricity generators. While they presented this fact as evidence of a violation of WTO rules, Canada explained that indeed the FIT's very purpose “was to encourage the construction of new renewable energy generation facilities that would not have otherwise existed.”⁴ The buy-local components of Ontario's feed-in tariff program are fundamental to combating the climate crisis and must remain intact.

The ruling has even broader implications for developing countries. Particularly during the early stages of countries' development, it is critical that governments have policy space to nurture and grow domestic industries – including renewable energy industries – in order to cultivate a manufacturing base. History shows that governments need a range of policy tools, including local content requirements, to cultivate and support such industries until they are internationally competitive. If allowed to stand, this WTO ruling would set a worrisome precedent, undermining

the tools available to developing country governments to develop the renewable energy industries necessary to stabilize the climate.

It is also important to note that this decision follows a trend of anti-environment and anti-consumer rulings at the WTO. In May 2012, for example, the WTO found that voluntary “dolphin-safe” tuna labels, which allow consumers to choose to buy tuna that was caught without using fishing practices that kill dolphins, discriminate against Mexico’s tuna industry. Just one month later, in June 2012, the WTO ruled against the highly popular U.S. program of country-of-origin labeling (COOL) for meat, which allows American consumers to know where their food is coming from and helps health regulators track food safety issues.

The case of Ontario’s FIT program may be part of another worrying trend: the rise of international trade disputes that target renewable energy and climate policies. As the WTO panel handed down its ruling against Ontario’s FIT local content rules, for example, China initiated a dispute against the EU and certain member states over the domestic content rules in their feed-in tariff programs.⁵ And the United States, on February 6th, initiated a WTO complaint against India’s use of domestic content rules in its solar industry.⁶ Tragically, climate policies may increasingly be judged at the WTO and other venues based on narrow interpretations of trade law rather than climate science, climate economics and urgent public interest objectives.

This brief, which explains Ontario’s FIT program and the challenges launched against it at the WTO, should be read within this context.

Ontario’s Renewable Energy Incentives Program

Ontario’s renewable energy incentives program, which utilizes a feed-in tariff, was established under the Green Energy and Green Economy Act of 2009, and is administered by the Ontario Power Authority (OPA). The primary objective of the program is “to facilitate the increased development of Renewable Generating Facilities of varying sizes, technologies and configurations...”⁷ while creating jobs and a stronger local economy.⁸

The program guarantees that OPA will procure electricity generated by wind and solar at a preferential 20-year purchase price per kilowatt-hour. For wind and solar generators, for example, the guaranteed purchase price ranges from 13.5 - 19 Canadian cents per kilowatt-hour (cents/kWh) and 44.3 - 80.2 cents/kWh respectively. By contrast, the market rate in Ontario for electricity was 3.79 cents/kWh on average in 2010.⁹

Realizing that combating the climate crisis and transitioning to a clean energy economy must include localizing production and creating green jobs, the government of Ontario stipulated that to qualify for the guaranteed renewable-energy purchase price, electricity generating firms must have a certain percentage of their project costs – 50% for wind power projects over 10kW and 60% for solar photovoltaic projects – originate from Ontario.¹⁰

A two-year review of the FIT program highlights economic benefits and green job creation, citing that the program brought in “more than \$27 billion in private sector investment, welcomed more than 30 clean energy companies to the province, created more than 20,000 jobs and is on track to create 50,000 jobs.”¹¹ By March 2012, the FIT program had contracted 4,600 megawatts of renewable energy.¹² This includes a 2,500-megawatt agreement with a Korean Consortium of

Samsung C&T and Korea Electric Power Corporation¹³ for the development of a renewable energy generation project as well as the production of solar inverters, wind turbines and blades, all made in Ontario.¹⁴ Samsung's \$7 billion investment – the single largest investment in the FIT program – in addition to investments from other foreign firms including Siemens and Automation Tooling Systems,¹⁵ demonstrates that Ontario's program does not exclude foreign investment.

Japan and the EU Challenge Ontario's Program at the WTO

Japan and the EU respectively launched claims at the WTO challenging Ontario's FIT program in June 2011 and January 2012.¹⁶ Japan and the EU claimed that the program discriminates against foreign renewable energy products through its buy-local rules and, as such, violates provisions in the GATT and related provisions in the TRIMs of the WTO. They also alleged that the program constitutes a subsidy that violates the Agreement on Subsidies and Countervailing Measures (SCM).

Japan and the EU claimed that the buy-local rules are inconsistent with Canada's obligations under Article III:4 of the GATT. This "national treatment" provision states that products from a WTO member country (e.g. Japan) must receive treatment "no less favorable" than products of national origin¹⁷ (e.g. those produced in Canada). Relatedly, the EU and Japan stated that the domestic content measures are inconsistent with Article 2.1 of the TRIMs, which states that no member shall apply investment measures that violate Article III of the GATT.

The EU and Japan also claimed that the program's provisions are a WTO-illegal subsidy under Articles 3.1(b) and 3.2 of the SCM Agreement. They argued that the FIT constitutes a prohibited subsidy because it is "contingent upon the use of equipment for renewable energy generation facilities produced in Ontario over such equipment imported from countries such as Japan."¹⁸

Canada Defends the Legality of the FIT

Canada argued that its government-initiated and administered feed-in tariff program is a government procurement policy designed to ensure the affordable generation of clean energy in Ontario, and, as such, is not subject to the non-discrimination requirements of Article III of the GATT. To defend its case, Canada pointed to GATT Article III:8(a) which states that "the procurement by governmental agencies of products purchased for governmental purposes" is not subject to the obligations of GATT Article III.¹⁹ In this case, Canada stated, the government purpose for the FIT was to "secure the supply of adequate and reliable electricity from clean sources."²⁰ Canada argued, therefore, that the FIT program should not be subject to the GATT national treatment requirements or the TRIMs provision cited by Japan and the EU.

The Position of the United States

The United States weighed in on this case by filing a third-party submission supporting the claims that Ontario's program violates WTO rules. In its submission, the United States claimed that Ontario's measures put imported renewable energy equipment at a competitive disadvantage and, as such, constitute a violation of GATT national treatment rules unless the program can be shown to meet the Article III:8(a) exception as a qualifying governmental procurement measure. However, the United States rejected this exception, arguing that Canada had used an "overly broad" interpretation of the GATT in stating that its FIT program was an exempted government procurement policy.²¹

The WTO Ruling

In its November 2012 ruling, the WTO panel found that, as alleged by Japan and the EU, the domestic content requirements in Ontario's program violate Article III.4 of the GATT by granting more favorable treatment to renewable energy equipment produced in Ontario than to renewable energy equipment produced abroad. Therefore, the panel also found that the FIT provisions violate Article 2.1 of the TRIMs as an investment measure inconsistent with GATT Article III:4.²²

The panel did not agree with Canada's argument that its feed-in tariff program was a government procurement policy not subject to the anti-discrimination clauses of the GATT. This is because the panel found that the Ontario's government purchase of electricity was "with a view to commercial resale," since the procured electricity was then sold to Canadian customers, as is standard for publicly utilities.²³ Under GATT Article III, the only way that a government can favor domestic products in procurement policies is if the procurement is "not with a view to commercial resale."²⁴

The panel's interpretation is worrisome for clean energy policies. It means that a public utility's procurement of electricity from a electricity generator – as long as it charges a fee for usage of the electricity – is not, under the WTO, considered government procurement and will not, therefore, be exempt from GATT Article III national treatment obligations. If the vast majority of the world's public energy utilities, which indeed charge fees for electricity, are seen as being obliged to comply with GATT restrictions against local sourcing for electricity generation, then WTO rules present an enormous hurdle to the transition to a clean energy economy.

Importantly, the majority of the panel found that Japan and the EU did not establish the existence of a WTO-prohibited subsidy. Japan and the EU tried to argue that the FIT program paid renewable energy generators more per kilowatt-hour than they would have received in a hypothetical electricity market that was free from government intervention (one way to measure a subsidy). But the majority of the panel found that Japan and the EU did not correctly estimate what the price would have been without government intervention and thus failed to accurately calculate a subsidy. Furthermore, the panel majority found that an electricity market devoid of government involvement was an unfair comparison, given that it would probably be impossible for Ontario to provide electricity to consumers without any government assistance. As such, they concluded that Japan and the EU had failed to meet the burden of proof of a WTO-prohibited subsidy.²⁵ However, having already found that the FIT program violated the WTO's GATT and TRIMs, the panel did not need to find a subsidy violation, or any other violation, to ask Canada to "bring its measures into conformity with its obligations under the WTO."²⁶

Canada, Japan, and the EU appealed certain parts of the panel decision. In May 2013, the WTO Appellate Body (AB) issued the WTO's final ruling on the case. While the AB upheld the basic decision that Canada's innovative clean energy and green jobs program violates GATT and TRIMs rules, the details of their reasoning differed.²⁷

Most importantly, with respect to Canada's argument that its feed-in tariff program is a government procurement policy and not subject to the anti-discrimination clauses of the GATT, the AB went even further than the panel in rejecting Canada's defense. The AB proclaimed that while the product being procured is electricity, the product targeted by the buy-local provisions is electricity-generation equipment. The AB used this argument to deem Canada's procurement defense as irrelevant, and to judge the FIT program as a violation of WTO rules.²⁸

According to the AB's rationale, governments cannot, under WTO rules, establish buy-local policies for the equipment or other goods used to produce energy or other government-purchased services. That is, while WTO rules could potentially allow governments to require that solar cells or wind turbines be locally produced when directly buying such equipment, they do not permit governments to establish the very same requirement for equipment used to generate government-procured electricity. Indeed, under the AB's logic, WTO rules may not only bar buy-local policies for the production of wind turbines, for example, but also for the steel, motors or parts used to make the turbines, so long as the government is not directly purchasing those goods but rather the energy they generate. Since many of the world's public energy utilities procure electricity rather than electricity-generating equipment, this bizarre logic implies that WTO rules widely restrict governments' ability to use buy-local incentives to facilitate the transition to a clean energy economy.

Conclusion

As climate change reaches catastrophic tipping points, it is critical that governments have the ability to put in place policies to address the crisis. Ontario's feed-in tariff program, which seeks both to reduce greenhouse gas emissions and create green jobs, should serve as a model for other countries.

This ruling signals that it is WTO-illegal for a public utility to set local production requirements that are necessary to transition to a clean energy economy. Given the dire impacts of the climate crisis that the WTO itself has acknowledged,²⁹ it is imperative that WTO rules offer sufficient flexibility to allow nations to grow their renewable energy industries so as to effectively tackle climate change.

Ontario's program strives to accomplish the inseparable goals of incentivizing the clean energy transition necessary to combat the climate crisis, and incentivizing an economic transition to a green economy. The successful program and others like it must not be hampered by the WTO.

ENDNOTES

- ¹ Though the ruling occurred in November, it was not made public until December 2012. For a summary of the case, jointly brought by the European Union and Japan, see http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds426_e.htm and http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds412_e.htm.
- ² Panel Report, Canada – Certain Measures Affecting the Renewable Energy Generation Sector, WT/DS412/R and WT/DS426/R, 19 December 2012, at para. 8.5. [Hereinafter “Panel Report, Canada – Feed-in Tariff Program”]
- ³ Appellate Body Report, Canada – Certain Measures Affecting the Renewable Energy Generation Sector, WT/DS412/R and WT/DS426/R, 6 May 2013, at paras. 6.1 and 6.2. [Hereinafter “Appellate Body Report, Canada – Feed-in Tariff Program”]
- ⁴ Panel Report, Canada – Feed-in Tariff Program, at paras. 7.276-7.277.
- ⁵ WTO, European Union and certain Member States – Certain Measures Affecting the Renewable Energy Generation Sector, accessed March 1, 2013. Available at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds452_e.htm.
- ⁶ WTO, India – Certain Measures Relating to Solar Cells and Solar Modules, accessed March 1, 2013. Available at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds456_e.htm.
- ⁷ Ontario Power Authority, “Feed-In Tariff Program: FIT Rules Version 2.0,” Aug. 10, 2012, at 1. Available at: http://carmanah.com/files/docs/Other/GRID_FIT%20Rules%20Version%202.0.pdf.
- ⁸ Ontario Ministry of Energy, “Moving Clean Energy Forward, Creating Jobs,” March 22, 2012. Available at: <http://news.ontario.ca/mei/en/2012/03/moving-clean-energy-forward-creating-jobs.html>
- ⁹ Daniel Pruzin and Peter Menyasz, “EU, Japan Score Win in WTO Complaint against Ontario Green Energy Program,” *BNA WTO Reporter*, October 1, 2012.
- ¹⁰ Ontario Power Authority, “Domestic Content,” accessed March 1, 2013. Available at: <http://fit.powerauthority.on.ca/program-resources/faqs/domestic-content>.
- ¹¹ Ontario Ministry of Energy, “Feed-In Tariff Program Two-Year Review,” accessed March 1, 2013. Available at: <http://www.energy.gov.on.ca/en/fit-and-microfit-program/2-year-fit-review/>.
- ¹² Ontario Ministry of Energy, “Ontario’s Feed-In Tariff Program Two-Year Review Report,” March 2012, at 4. Available at: <http://www.energy.gov.on.ca/docs/en/FIT-Review-Report-en.pdf>.
- ¹³ Ontario Power Authority, “Power Purchase Agreements Signed With Korean Consortium,” Aug. 03, 2011. Available at: <http://www.powerauthority.on.ca/news/power-purchase-agreements-signed-korean-consortium>.
- ¹⁴ “\$20 Billion in Renewable Energy Investments Power Ontario Clean Technology Alliance at the Solar Power International Tradeshow in Dallas, Texas,” *Marketwire*, Oct. 18, 2011. Available at: <http://www.marketwire.com/press-release/20-billion-renewable-energy-investments-power-ontario-clean-technology-alliance-solar-1574519.htm>.
- ¹⁵ Siemens Canada, “Siemens invests in Solar Inverter Manufacturing in Canada,” June 3, 2010. Available at: <http://www.siemens.ca/web/portal/en/press/pages/siemensinvestsinsolarinvertermanufacturingincanada.aspx>. Chuck Howitt, “ATS lifts curtain on green wing”, *The Record*, Nov. 26, 2010. Available at: <http://www.therecord.com/news/business/article/283679--ats-lifts-curtain-on-green-wing>.
- ¹⁶ In September 2010 and August 2011 Japan and the EU respectively requested consultations with Canada on the FIT program. In June 2011 and January 2012 Japan and the EU respectively requested the establishment of a WTO panel.
- ¹⁷ WTO, The General Agreement on Tariffs and Trade, Article III.4.
- ¹⁸ WTO, Canada – Certain Measures Affecting the Renewable Energy Generation Sector, accessed March 1, 2013. Available at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds412_e.htm. WTO, Canada – Measures Relating to the Feed-in Tariff Program, accessed March 1, 2013. Available at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds426_e.htm.
- ¹⁹ WTO, General Agreement on Tariffs and Trade, Article III.8(a).
- ²⁰ Panel Report, Canada – Feed-in Tariff Program, at 7.90.
- ²¹ Panel Report, Canada – Feed-in Tariff Program, at 7.103-7.106.
- ²² Panel Report, Canada – Feed-in Tariff Program, at 7.113.
- ²³ Panel Report, Canada – Feed-in Tariff Program, at para. 7.152.
- ²⁴ WTO, General Agreement on Tariffs and Trade, Article III.8(a).
- ²⁵ Panel Report, Canada – Feed-in Tariff Program, at para. 7.313.
- ²⁶ Panel Report, Canada – Feed-in Tariff Program, at para. 8.5.
- ²⁷ Appellate Body Report, Canada – Feed-in Tariff Program, at paras. 6.1 and 6.2.
- ²⁸ Appellate Body Report, Canada – Feed-in Tariff Program, at para. 5.79.
- ²⁹ Ludvine Tamiotti, Robert Teh, Vesile Kulaçođlu, Anne Olhoff, and Benjamin Simmons, “Trade and Climate Change – A report by the United Nations Environment Programme and the World Trade Organization,” 2009. Available at: http://www.wto.org/english/res_e/booksp_e/trade_climate_change_e.pdf.