—Oregon Fair Trade Campaign— info@oregonfairtrade.org • (503) 736-9777 • 310 SW 4th Ave #436, Portland, OR 97204

Climate Disruption Or a New, Renewable U.S. Trade Policy?

The Problem

The North American Free Trade Agreement (NAFTA) is currently being renegotiated, and is a seminal trade-and-investment framework and a concentrated site for a public-policy problem here discussed in brief. International trade and investment agreements directly undermine governments' ability to combat climate change. Trade rules and attempts to mitigate climate change have obvious importance and in certain ways both lay claim to be international law. However they are at odds. Alarmingly and definitively, political leadership on climate, and the potential for political leadership on climate, is losing ground.

Scientists and advocates widely agree that climate change presents threats in the areas of economics, security, food and agriculture, fisheries, biodiversity, healthy communities, and more. The UN Intergovernmental Panel on Climate Change (IPCC) knows, and relays to the world, that to "avoid the chaos of runaway climate change [humanity must] dramatically reduce global emissions of greenhouse gases."[2]

Rather than aiding emissions reduction or transition to renewable energy, trade agreements have acted as accelerators of fossil-fuel use and dependence.

International trade agreements including NAFTA have served as a block on climate progress under three scenarios:

- **Energy proportionality** rules that effectively require countries to export fossil fuels;
- **Investor-state dispute settlement (ISDS),** which gives businesses legal right to undermine climate policies in courts that are beyond the reach of democratic national (or subnational) control; and
- **Government procurement**, as well as other purchasing or sourcing policy such as domestic content requirements (DCR).

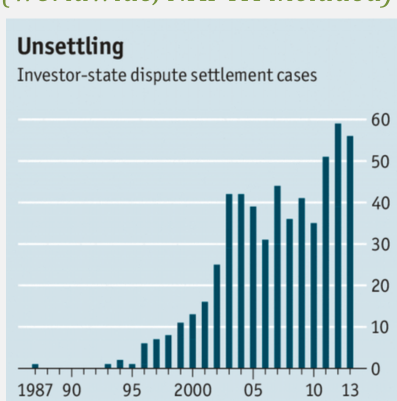
"In effect, the WTO has asserted that . . . trade rules trump climate imperatives."
—Ben Beachy and Ilana Solomon, 2016[1]

Here Beachy and Solomon analyze the WTO decision in **the case between the U.S. and India regarding solar panels**. The case departs from the NAFTA realm strictly but illustrates the conflict: In defense of a domestic content requirement (DCR) for solar panels in its major, national solar-energy initiative, the government of India claimed it needed the policy to meet international climate agreements. The U.S. went after the DCR as a violation of free trade. The WTO court which heard the case ruled in favor of the U.S.

Photo Credit: Dan Barnes

In another case of ISDS encroachment on climate mitigation, the energy infrastructure company TransCanada sued the U.S. over the Obama-era decision to deny the Keystone XL Pipeline. The Canadian company, which owns the entire Keystone pipeline network, claimed $15 billion in damages in the suit, and dropped it when President Trump reversed the earlier permitting decision, allowing the pipeline to continue.[3] The keystone pipeline system transports tar sands oil.

Number of ISDS cases by year (worldwide, NAFTA included)[4]



Source: UNCTAD via The Economist

Energy Proportionality

NAFTA contains an "energy proportionality" provision that mandates that a fixed share of Canada's energy be exported to the United States every year. Mexico fought for and won an exemption to the proportionality rule during the initial NAFTA negotiation.[6]

Under the rule, Canada currently must send the U.S. 52% of its natural gas output, 74% of its oil production, and 11% of its electricity.[7] This hamstrings Canada's ability to lower its greenhouse gas (GHG) emissions. If Canada were to ban extraction from its tar sands oil fields, for instance, the export requirement would mean that the *then-limited other oil resources it would possess* would chiefly not go to domestic use (thus could not approach Canada's domestic need). No Canadian national government could feel prepared or free to take such a step.

Canada has the world's third-greatest oil reserves, 97% of which are tar sands oil, or oil sands.[8] Tar sands oil is 82% more carbon-intensive than conventional crude.[9] Due to the nature of Canada's reserves and energy proportionality, continued use of one of the dirtiest energies on the planet is, effectively, locked in. Canadian oil sands produce more than 2 million barrels per day (bpd),[12] and projections show that number to be 3.7 million bpd by 2030.[10] It is a major reason why North America far outpaces the world in per capita CO_2 emissions, with a differential of 30% between North America and the next-highest region.[11]

Mexico reportedly wants to bind itself to energy proportionality rules in the current talks for a rewritten NAFTA.[12] (The current Mexican administration of Enrique Peña Nieto privatized oil and gas, and is soliciting foreign investment and greater role as an exporter.)

This NAFTA provision is uncontroversial to the negotiating partners, but makes obligations under the Paris Agreement virtually impossible.[13] One analysis highlights the undemocratic nature of energy proportionality in saying, "putting proportionality into an international trade agreement is like constitutionalizing it. It's hard for the next government to undo it no matter how much it and the voters wish to do so."[14] This is cast as a warning to Mexican citizens that their outgoing administration feels emboldened to make these far-reaching changes. Trade policy that is ready for the challenges of the future including the challenges of climate change must diverge from this twenty-four-year reality, and make a voter-originated energy shift possible.

Canadian oil-sands projects emit a total of 100 million tons $C0_2$ per year.[5]

Investor-State Dispute Settlement (ISDS)

ISDS — NAFTA's Chapter 11 — institutes courts where private companies bring suits against governments over alleged infringement of their investor rights. The rulings of these tribunals are non-appealable and often deliver wins to industry. The investor rights most commonly relied upon in ISDS cases are companies' rights not to be "denied justice," not to suffer "arbitrariness," or to receive "fair and equitable treatment" in decisions made a relevant government body.[15]

The original rationale for ISDS's introduction in trade agreements was to compensate for supposed corruption and lack of due process in developing countries, solidifying cross-border investors' redress against expropriation.[16] Direct expropriation, however, is a rarely filed legal claim in ISDS.[17]

Canada is the most sued country in the history of investor-state dispute settlement, and "63% of claims against Canada involve challenges to environmental protection or resource management measures."[18]

Regarding Canada and climate policy, in 2011 Quebec issued a partial ban of natural-gas hydraulic fracturing,[19] a process that is by many estimates at least as costly to the climate as coal.[20] The natural gas driller Lone Pine filed suit under NAFTA claiming damages of $240 million, saying "the Act violated [its] legitimate expectation of a stable business and legal environment."[21]

The case is still being adjudicated. There are similar cases. And in total, frequency of use of ISDS is on the rise. While it has existed broadly since the 1960s, only 50 known cases were launched in the system's first three decades.[22] Claimants have initiated more than 50 ISDS cases in each of the last seven years.[23]

At issue in the Lone Pine case is the "legitimate expectation" of continued business activity versus the implication by the government — in responding to public demand and taking a turn from fossil fuels — that there is a legitimate expectation of a livable climate and clean water.

"India increased its domestic solar module production from 246 MW in 2014-15 to 1,164 MW in 2017-18. Despite that growth, the market share of the domestic industry decreased from 13% in 2014-15 to 7% during 2017-18. During the same period, the market share of imports increased from 86% . . ."
— pv magazine, 2018[24]

Government Procurement and Other Purchasing/Sourcing Policy

Governments the world over are attempting — whether they be local governments with "Buy Local" policies or national governments with, for example, "Buy American" policies — to put their purchasing power to what they perceive to be beneficial use. These policies are framed around geographic limits or, as likely, around the manner in which a good or service is produced. Some more recent government purchasing programs are designed to reduce greenhouse gas emissions and/or mitigate potential localized climate impacts.[25]

In the United States, NAFTA requires that these policies be waived for Canada and Mexico (just as the WTO and/or other free trade agreements do likewise for a total of 60 countries), negating the impact the U.S. government (or subfederal government) had intended.[26] The Sierra Club notes, "NAFTA's procurement rules limit governments' ability to use 'green purchasing' requirements that ensure government contracts support renewable energy, energy efficiency, and sustainable goods."[27]

Public Citizen goes farther in explaining the problem, in saying, the rules

> limit the criteria governments can use to describe the goods and services they seek . . . . Effectively, only descriptions of desired goods and services related to end use are permitted. Thus, a government entity can call for a million sheets of A4 paper of a weight that works in copying machines, but cannot require that it have recycled content or be produced in a manner that does not use chlorine. A government can request X amount of electricity but cannot require that electricity come from renewable sources. A government can order 5,000 extra-long uniforms, but cannot require that they meet sweat-free standards.[28]

Trade agreements should not dictate how democratic governments can and cannot spend taxpayer funds, especially in considering the gravity of the task of combating climate change.

In the example of the solar panel dispute within the WTO between the U.S. and India, the issue is not government purchasing, but provisions in a government's law that require that utility projects source their material in-country. It is another case of a conventional approach to trade undercutting climate policy. Most pointedly, in the following history here recounted, the government of India argued that its law was a core mechanism for how it was going to meet obligations under the Paris Agreement and the UN Framework Convention on Climate Change more generally:[29]

In 2010, India designed its Jawaharlal Nehru National Solar Mission (JNNSM) — an ambitious national initiative to solarize its power grid — to phase in a domestic content requirement (DCR) for the solar panels used.[30] The reason for the DCR was to be even more ecologically sustainable, considering India's long-term need and the planetary and environmental costs of shipping.[31] In a suit against India over this DCR, the United States cited the General Agreement on Tariffs and Trade (GATT, 1994) to say that it was being denied "treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements."[32] In 2016 the WTO ruled in favor of the United States.[33] India has adjusted the JNNSM rules, and the share of Indian solar paneling composed of imports is back up to 90%, after a period, before the ruling, of more substantial domestic sourcing.[34]

Recommendations

1. Eliminate energy proportionality in trade agreements. Forcing countries to export significant amounts of fossil fuels ties their hands in the transition to clean energy and takes us in the exact wrong direction.

2. Eliminate ISDS from trade agreements. Nations have the right to democratically determine their own public-interest policies. ISDS is in common use by corporations to seek large sums of taxpayer money (either by tribunal victory or legal settlement) when they believe a public-interest law threatens their expectation of profit.

3. Eliminate trade rules that restrict "Buy Local" and "Buy Green" government purchasing preferences. Democratic governments should not be hamstrung from aiding transitions to renewable-energy economies. Nor should they be denied the ability to mandate the paying of prevailing wage, and other pro-worker measures. Steps taken in the 21st century towards a new economy — from climate and environment to jobs and empowerment — should be of same mind, and can be, at times, in the same policy.

4. Any future trade agreement or trade renegotiation must include a broad carve-out stating that government policies with the objective of reducing greenhouse gases or adapting to climate change are not in violation of the agreement and are not subject to dispute resolution.

5. Any future trade agreement or trade renegotiation should require commitment to the Paris Agreement. This will mean securing international coordination for the emission of less greenhouse gas tonnage, not more. As rulebooks for the global economy, trade agreements should become sites where climate solutions are recognized, prioritized, and advanced.

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