East vs. West: Evaluating Manitoba Hydro's Options for a Power Transmission Line from an International Law Perspective

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INTRODUCTION

MANITOBA HYDRO IS A CROWN CORPORATION that provides power to sectors of Canada and the mid-western United States.[1] One of their plans for future development projects involves the Conawapa Generating Station, a hydro-electric project based in Northern Manitoba.[2] The Conawapa Generating Station is expected to have great potential in terms of electricity generation, but its remote location on the Lower Nelson River in Northern Manitoba presents difficulties regarding the transportation of the power generated. As a result, the project has created controversy regarding a number of issues.

Generated power will need to be transported by way of hydro-electric transmission lines. The debate revolves around deciding which route these lines should take. Currently, an existing hydro-electric transmission line runs through Western Manitoba, going West of Lake Winnipeg. The question faced by Manitoba Hydro is whether the new power line should take the same route, going West of Lake Winnipeg, or whether it should go through Eastern Manitoba, to the East of Lake Winnipeg.

Financially speaking, the East option presents a clear winner. This option offers a significantly shorter route than the Western Manitoba alternative,[3] which would result in substantial cost savings.

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1 Manitoba Hydro, "About Us", online: Manitoba Hydro <http://www.hydro.mb.ca/corporate/about_us.shtml>.

2 Manitoba Hydro, "Projects: Conawapa Generating Station", online: Manitoba Hydro <http://www.hydro.mb.ca/projects/conawapa.shtml>. Since this paper was initially written, Manitoba Hydro has stated that it will take the Western route; however, many parties are still discussing the pros and cons of this decision. See Hugh McFadyen, "Doer's west-side sellout: NDP bows to pressure on power-line route" *Winnipeg Free Press* (2 October 2007) A11.

3 According to Manitoba Hydro President Bob Brennan, the West option is approximately 50 percent longer, spanning a distance of 1,200 km versus the 800 km route to the East. See Helen Fallding, "Readers would pay to save wilderness" *Winnipeg Free Press Online Edition* (11 October 2005), online: Winnipeg Free Press Online Edition <www.poplarriverfirstnation.ca/docs/ReadersSave11Oct05.doc>.

The West option is expected to cost an additional $250 million for the routing of transmission lines, and an extra $300 million in power that will be lost during transportation.[4] In addition, from a risk management perspective, the West route presents difficulties, as the new route to the West would be in close proximity with existing transmission lines, meaning that damage from natural disasters could potentially result in massive power shortages.[5] Pro-development aboriginal communities in the East region also support this initiative, as it has the potential to bring development to an area of the country that is highly undeveloped and considered the poorest region in Canada.[6]

On the other hand, the proposed East option raises environmental concerns, as it would need to run through an area of Boreal Forest that, to this day, has remained largely undisturbed. This option also raises issues of aboriginal land rights, as—depending on the route chosen—it could require the use of territories in which First Nations in the area have constitutionally-protected interests under historic treaties, including rights to generally occupy and use reserve land, or to continue harvesting in traditional territories outside of reserves.

The first issue that invites examination from the perspective of international law is the extent to which the State of Minnesota—which is expected to be a major purchaser—has the right to base its import decisions on how Manitoba resolves the environmental debate. This issue is of great importance to Manitoba Hydro, as most of the power generated from the Conawapa Generating Station is expected to be exported.[7] The State of Minnesota, currently one of Manitoba Hydro's biggest energy purchasers,[8] recently passed a new Bill that aims to hold Manitoba Hydro accountable for the impact of their projects on local communities and environments. The *Minnesota 2007 Environment & Energy Omnibus Bill (SF 2096)*[9] was passed in May 2007[10] and requires that, starting in

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[4] *Ibid.*

[5] Elijah Harper & Bryan Schwartz, "East side the right side: It is immoral to block Hydro line and perpetuate poverty" *Winnipeg Free Press* (14 May 2007) A15. See also Minnesota Power, "Energy Supply Diversity", online: Minnesota Power <http://www.mnpower.com/about_mp/supply_diversity.html> (recognizing the importance of diverse energy supplies for risk management purposes).

[6] See Harper & Schwartz, *ibid.* See also Chief George Kemp, "East side is the right side" *Winnipeg Free Press* (28 July 2007) Editorial Leaders.

[7] Manitoba Hydro, *supra* note 2.

[8] See Manitoba Hydro, News Release, "Manitoba Hydro Signs Agreement for Sale of 500 MW to Xcel Energy" (8 September 2002), online: Manitoba Hydro <http://www.hydro.mb.ca/news/releases/news_02_08_09.shtml>.

[9] U.S., S.F. 2096, *Minnesota 2007 Environment & Energy Omnibus Bill*, 2007-2008, Reg. Sess., Min., 2007 (enacted).

January 2008, the Legislative Electric Energy Task Force ("LEETF") in Minnesota request certain information from Manitoba Hydro on an annual basis. Generally speaking, the LEETF is mandated "to study future electric energy sources and costs and to make recommendations for legislation for an environmentally and economically sustainable and advantageous electric energy supply."[11] The information that will be requested in the future from Manitoba Hydro pursuant to *Bill SF2096* includes:

> (1) median household income and number of residents employed full time and part time;
> (2) the number of outstanding claims filed against Manitoba Hydro by individuals and communities and the number of claims settled by Manitoba Hydro; and
> (3) the amount of shoreline damaged by flooding and erosion and the amount of shoreline restored and cleaned.[12]

This new legislation could force Manitoba Hydro to take a more active role in cleaning up its messes, both environmental and legal, for fear of losing its American customer base.[13] In the wake of present day environmental activism, energy companies want to ensure that they have environmentally friendly policies.[14] Association with an 'environmentally unfriendly' labeled Manitoba Hydro would go against these policies. Accordingly, if Manitoba Hydro is unable to provide the LEETF with positive reports, its competitiveness as an energy supplier may be compromised.

From a legal perspective, *Bill SF2096* raises some issues regarding international law. This paper analyzes the free trade commitments of the United States and considers the question of what the State of Minnesota is able to do with the information that they seek

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[10] Minnesota spends nearly $800 million on Hydro-electric power from Manitoba annually. See Staff, "Bill Requiring Manitoba Hydro to Report on Impacts to First Nations Passes in Minnesota" *Winnipeg Free Press* (10 May 2007), online: Honor the Earth <http://www.honorearth.org/whatsnew/manitobahydro.htm>.

[11] M.S.A. § 216C.051 (2006). Amended by 2007 Minn. Sess. Law Serv. Ch. 57 (S.F. 2096) (WEST).

[12] *Minnesota 2007 Environment & Energy Omnibus Bill*, *supra* note 9, § 166.6.

[13] Staff, *supra* note 10.

[14] See Xcel Energy, "Xcel Energy Environmental Policy" (29 March 2005), online: Xcel Energy <http://www.xcelenergy.com/XLWEB/CDA/0,3080,1-1-1_11824_11843-4801-5_538_969-0,00.html>. See also Alliant Energy, "Environmental Policy & Compliance", online: Alliant Energy <http://www.alliantenergy.com/docs/groups/public/documents/pub/p014402.hcsp>.

from Manitoba Hydro. In other words, this paper asks: while *Bill SF2096* may require that the LEETF simply request information, can unflattering reports regarding impacts on the Canadian environment and Canadian aboriginal communities in Northern Manitoba or the failure of Manitoba Hydro to provide such reports be used to justify new Minnesota import regulations or selection procedures for the purchasing of energy? Is the fact that the LEETF is required to ask for such information itself in violation of international free trade principles? This paper will discuss the legality of *Bill SF2096* with regards to *GATT*/WTO jurisprudence and the international free trade obligations of national treatment, most-favoured nation treatment, and government procurement obligations.

The second issue that invites examination from an international law perspective is the pursuit of a World Heritage Site designation by Parks Canada for the Canadian Boreal Forest Network. Referred to by some as the "northern lung of the planet" based on its ability to consume carbon and produce oxygen, this forest alone stores 186 million tonnes of carbon, equivalent to 27 years of the world's carbon dioxide emissions from burning oil and gas for cars and heat.[15] An area of this Boreal forest that occupies land in Eastern Manitoba and Northwestern Ontario was considered for a United Nations Educational, Scientific, and Cultural Organization ("UNESCO") designation as a World Heritage Site in 2007.[16] This paper explores how the East option might affect the bid for the Canadian Boreal Forest Network to attain a World Heritage Site designation, as it would require routing through this region of the Boreal Forest Network. Also, this paper considers whether or not a successful World Heritage Site designation would preclude the possibility of subsequently running transmission lines through Eastern Manitoba, as the World Heritage Centre ("WHC") requires that protection measures be taken by host countries with regards to their World Heritage Sites. This paper will consider the selection criteria for World Heritage Sites, the guidelines for management of existing sites, and the overarching principles of sustainable development which drive the UN, and accordingly, UNESCO and the WHC.

Having considered whether or not the Minnesota legislation and the World Heritage Site requirements need to be taken into consideration by Manitoba Hydro, this paper concludes by commenting on which option—East or West—Manitoba Hydro would be best positioned to justify to Minnesota or the World Heritage Centre.

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[15] Alexandra Paul, "Save trees, help world, Canada told" *Winnipeg Free Press* (15 May 2007) A7.

[16] Poplar River First Nation, "World Heritage Site", online: Poplar River First Nation <http://www.poplarriverfirstnation.ca/poplar_river_world.htm>.

MINNESOTA *BILL SF2096*

MINNESOTA DIRECTLY BORDERS MANITOBA and currently places significant reliance on Manitoba for its energy.[17] With its *Bill SF 2096*, however, Minnesota has expressed some concern over the treatment of communities in Northern Manitoba arising from power generation projects. Particularly, in the early 1970s, flooding arising from hydro-electric power generating projects created significant damage to the environment and as a result, local aboriginal groups suffered as well.[18] Land was lost due to flooding exceeding projected figures. This led to a number of problems including mercury contamination, reduced availability of food, and an alleged loss of taste in food. This loss of habitat and disruption to local aboriginal groups' ways of life are said to have caused a perceived loss of control within these communities, resulting in many social problems, such as alcoholism, drug abuse, and suicide.[19] Destruction of traditional subsistence hunting, fishing, and trapping sites have also contributed to mass poverty, high unemployment, ill-health, and epidemic rates of suicide.[20] For the communities affected by the floods, it took until 1977 for any compensation arrangements to be made.[21] Now, four of five First Nations have reached settlement, but the process is still continuing with the Pimicikamak Cree Nation.[22]

Starting in January 2008, under its new legislation, Minnesota's LEETF will be required to request information from Manitoba Hydro pertaining to the environmental impact and effects on local communities

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[17] Mike Mosedale, "Minnesota by the numbers: The nation's biggest importer of electricity" *The Blotter* (30 December 2005), online: <http://blogs.citypages.com/blotter/2005/12/minnesota_by_th_7.asp>.

[18] Martin Loney, "Social Problems, Community Trauma and Hydro Project Impacts" at 239 [unpublished, archived at Brandon University Library]. See also Peter Kulchyski, *The town that lost its name: the impact of hydroelectric development on Grand Rapids, Manitoba* (Ottawa: Canadian Centre for Policy Alternatives, 2006).

[19] Loney, *ibid.* at 246.

[20] United Nations Commission on Human Rights, *Oral intervention by the International Indian Treaty Council, Agenda Item 7: The Right to Development*, 57th Sess., (2001), online: International Indian Treaty Council <http://www.treatycouncil.org/new_page_5246.htm>.

[21] Indian and Northern Affairs Canada, "Backgrounder: Manitoba Northern Flood Agreement Implementation—Cross Lake First Nation" (23 April 2004), online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/pr/info/baccros_e.html>.

[22] "Band Occupies Manitoba Power Station" *CBC News* (16 April 2007), online: cbc.ca <http://www.cbc.ca/canada/manitoba/story/2007/04/16/jenpeg-protest.html>.

arising from Manitoba Hydro's hydro-electric projects.[23] As this legislation targets Manitoba Hydro specifically, and does not include any other energy suppliers, Canadian Federal Trade officials and Manitoba Premier Gary Doer protested to legislators in the days leading up to passage of the law, alleging that the new law would violate *NAFTA*[24] provisions, but to no avail.[25]

It appears that the new Minnesota laws attempt to prevent a repeat incident of the flooding problems of the 1970s. By having the LEETF seek out information basically dealing with environmental impacts and the treatment of aboriginal peoples in the communities affected by the hydro-electric projects, Minnesota State aims to hold Manitoba Hydro accountable. Accordingly, Manitoba Hydro might want to consider whether the East or West option would allow them to offer a better report to the LEETF. At first sight, it seems that the West option would cause less disruption to the environment because it would mirror an existing route, leaving the pristine Canadian Boreal Forest Network alone. However, in considering which option best affects the local aboriginal communities, a more polarized debate exists.

Northern Manitoba represents the poorest region of Canada, where suicide, poverty, and rates of disease are all high.[26] Incidents of diseases thought to be absent in Canada, such as tuberculosis, can be found in some communities in Northern Manitoba.[27] Additionally, these communities lack basic infrastructure—there are no roads and basic sewer systems are rare.[28] Not surprisingly, there are also few jobs available. The construction of a transmission line through the Eastside of Northern Manitoba can bring much needed development in terms of roads, education, and employment. This project has the potential to help aboriginal groups in the region attain economic sustainability and diversification, resulting in fewer young people leaving their communities for the big cities in search of jobs, which could ultimately help aboriginal groups in these communities preserve their way of life. Studies on regional development in the 1970s involving the Northern Cree in Quebec have in fact shown that economic diversification can be beneficial in many ways.[29] Diversification has resulted in an increase in monetary

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[23] M.S.A., *supra* note 11.
[24] *NAFTA*, *infra* note 35.
[25] Staff, *supra* note 10.
[26] Harper & Schwartz, *supra* note 5. See also Kemp, *supra* note 6.
[27] See Dr. Gary Podolsky, "Tuberculosis in Manitoba", online: Skylark Medical Clinic <http://skylarkmedicalclinic.com/TubercuosisinManitoba.htm>. See also Michael Clark & Dr. Peter Riben, *Tuberculosis in First Nations Communities* (Health Canada, 1999) at 8 & 25. See also Harper & Schwartz, *supra* note 5.
[28] Harper & Schwartz, *ibid.*
[29] Richard F. Salsbury, *A Homeland For The Cree: Regional Development in James Bay, 1971-1981* (McGill-Queen's University Press, November 1986) at 7.

wealth, allowing for the purchase of equipment to be used for traditional activities such as hunting. Diversification also has the potential to allow individuals to reinforce their cultural values with activities other than traditional activities such as hunting. For example, opportunities in education and tourism may arise. Moreover, economic diversification reduces the economic vulnerability that a community faces based on natural fluctuations in the availability of game that is available to hunt.[30] As the UN has recognized the right to development as an inalienable human right[31] and the Manitoba Hydro transmission lines may be the last opportunity for development that this region of Canada receives for a long time, the East option should be given due consideration.

On the other hand, there are those who oppose development, as they believe it could taint the aboriginal way of life. Academics note that while development has the potential to bring jobs and therefore a more stable means of economic resources to a community, the temporary form of development that construction projects bring can create an inappropriate reliance on government investment and result in a future dependency on government transfers.[32] Meanwhile, the employment policies of Manitoba Hydro have been criticized for training and hiring local workers only for low-level employment, while failing to offer any locals training for management positions.[33] Some academics also suggest that statistics may reflect an inaccurate picture of the wealth of communities in Northern Manitoba. Statistical data on hunters, for example, would consider them to be unemployed.[34] Accordingly, it is suggested that the development that some First Nations leaders seek is not justifiable by poverty statistics and that it is in fact unnecessary. With First Nations communities relying heavily on their environment to sustain their way of life, a transmission line, because of its environmental disruption, could arguably reduce the standard of living for those who hunt for a living and thus, further exacerbate the alleged poverty problem.

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[30] *Ibid.*

[31] *Declaration on the Right to Development*, GA Res. 41/128, UN GAOR, 1986, Supp. No. 53, U.N. Doc. A/RES/41/128, art. 1.

[32] Steve Hoffman, "Engineering Poverty: Colonialism and Hydroelectric Development in Northern Manitoba" (Presented to the Old Relationships or New Partnerships: Hydro Development on Aboriginal lands in Quebec and Manitoba Conference at the University of Winnipeg, 23 February 2004) [unpublished].

[33] Peter Kulchyski, "Nisichawayasihk Cree Nation and the Wuskwatim Project" (May 2004) at 7 (Presented to the Old Relationships or New Partnerships? Hydro Development on Aboriginal Lands in Quebec and Manitoba Conference at the University of Winnipeg, 23 February 2004) [unpublished].

[34] *Ibid.*

Are The Minnesota Laws Consistent With International Free Trade Obligations?

It seems clear that there is a legitimate debate as to which option would best serve the Northern communities of Manitoba. This debate is not the focus of this paper. Rather, this article will consider the international free trade obligations of the United States, and what Minnesota State, according to these obligations, may do with the information gathered by its LEETF. Specifically, this paper considers the possibility of implementing further regulations and using the information gathered to make energy purchase decisions. In addition, this paper considers whether the legislative requirement that the LEETF ask Manitoba Hydro for information itself is a violation of free trade obligations.

Is it a violation simply to ask for information?

The Legislative Electric Energy Task Force ("LEETF"), as noted above, is an investigatory body that has the power only to make recommendations for legislation. Therefore, any report received by the LEETF, or a refusal by Manitoba Hydro to provide a report, would be followed by no immediate consequences. The worst that could happen would be legislative recommendations for a reaction by the State of Minnesota. This is a key point in considering potential violations of free trade obligations, which generally stipulate equal treatment of similar products. These obligations will be discussed in further detail below. At this point, however, it can be said that the mere asking for information is unlikely to violate any free trade obligations, as Manitoba Hydro is not *legally required* to do anything differently.

States, through their investigatory bodies, should be free to request information as they please and this should be consistent with free trade obligations, so long as a refusal to provide information has no immediate or inevitable consequence. Thus, unless the information being requested has no likely use other than to provide a starting point for breaching international free trade obligations, *Bill SF2096* provisions requiring the LEETF to request information from Manitoba Hydro are probably legal under international law. As the LEETF is responsible for studying energy sources and making recommendations for legislation that provides environmental and economic sustainability, studying imported hydro-electric energy and the consequences of its production falls within their mandate. Therefore, recommendations for activities such as state investment into domestic energy production or lobbying the Federal Government to get involved in international environmental or aboriginal rights treaties would be perfectly legal, and accordingly, it can be said that there are conceivable legal legislative responses that could

follow reports made to the LEETF. Thus, it is most likely the case that provisions in *Bill SF2096* requiring the LEETF to request information from Manitoba Hydro do not themselves breach any international free trade obligations.

What can Minnesota do with the information provided in the report, or in response to a refusal to provide a report?

Is the State of Minnesota able to implement import quotas, tariffs, or outright bans based on unflattering figures provided in Manitoba Hydro's report, or the refusal to provide such a report? Would Minnesota be justified in simply refusing to do business with Manitoba Hydro in the future? The answers to these questions lie in the interpretation of international free trade obligations. The *North American Free Trade Agreement* ("*NAFTA*")[35] and several treaties stemming from the World Trade Organization ("WTO") regulate the elimination of barriers to trade, and from these treaties arise three key obligations that will be discussed: a) national treatment, b) most-favoured nation treatment, and c) government procurement obligations.

National Treatment and MFN Treatment

National treatment provisions can be found in the *General Agreement on Tariffs and Trade* ("*GATT*"),[36] the *General Agreement on Trade in Services* ("*GATS*"),[37] and *NAFTA*.[38] National treatment obliges signatory nations to give import products the same treatment as domestic products. With a general principle of non-protectionism established by Article III:1 of *GATT* and similar principles prevalent in other treaties, national treatment obligations prevent signatory states from implementing any laws or regulations regarding products that would provide domestic producers with an unfair advantage.[39]

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[35] *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*].

[36] *General Agreement on Tariffs and Trade*, 30 October 1947, 58 U.N.T.S. 187, Can T.S. 1947 No. 27 (entered into force 1 January 1948), art. III [*GATT*].

[37] *General Agreement on Trade in Services*, art. XVII, Annex IB to the *Agreement Establishing the World Trade Organization*, online: World Trade Organization <http://www.wto.org/English/docs_e/legal_e/26-gats.pdf>.

[38] *NAFTA, supra* note 35, c. 3.

[39] Michael J. Trebilcock & Robert Howse, *The Regulation of International Trade: Political Economy and Legal Order*, 3d ed. (New York: Routledge, 2005) at 83-85 & 100.

By legislatively bringing to the table the future impacts on Canadian communities and the Canadian environment, as well as the existing state of affairs in Canada, it seems that the Minnesota legislature may be preparing to erect an illegal barrier to trade. While *Bill SF2096* requires the LEETF, an investigatory body, to simply request information from Manitoba Hydro, if this information gathering results in new regulations affecting Manitoba Hydro's ability to export or their competitiveness as an energy supplier, these regulations could violate national treatment obligations, as such regulations would seemingly discriminate against imported energy. According to national treatment obligations, like-products, whether they be domestic or imported, should be given equal treatment. Disputes over the definition of like-products usually involve products that are argued to be commercially substitutable for one another. In the case of energy, the end-product of Manitoba Hydro's energy is identical to energy produced elsewhere and energy produced by other means. WTO jurisprudence has found that in determining like-products, it is the end product that is relevant.[40] Accordingly, it is clear that Manitoba Hydro's energy exports would be entitled to treatment equal to that of other energy products produced domestically, and any discriminatory regulations would thus be inconsistent with national treatment obligations.

Most-favoured nation treatment, also provided for in *GATT*,[41] essentially provides for the equal treatment of all signatory nations with regards to imports, exports, and related regulations.[42] MFN provisions prohibit regulations that provide unfair advantages to certain nations but not others. The rationale for the MFN principle is that it improves international relations by avoiding tensions that result from discriminatory policies. It aims to prevent governments from employing "*ad hoc* principles based on political considerations."[43]

An example of an MFN dispute is where the European Community, in 1996, passed legislation providing special treatment for soluble coffee originating from Andean and Central American Common Market countries that had anti-drug production and anti-drug trafficking programs in place. Brazil launched a complaint to the WTO in December 1998, suggesting that these provisions were inconsistent with MFN treatment obligations under *GATT*.[44] However, like many WTO disputes,

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[40] See *US Tuna/Dolphin I* and *US Tuna/Dolphin II*, *infra* notes 45 & 46.
[41] *GATT, supra* note 36, art. I.
[42] Trebilcock & Howse, *supra* note 39 at 49.
[43] *Ibid.* at 51.
[44] WTO, *European Communities—Measures Affecting Differential and Favourable Treatment of Coffee: Request for Consultations by Brazil*, WTO Doc. WT/DS154/1, online: WTO <http://www.wto.org/English/tratop_e/dispu_e/cases_e/ds154_e.htm >.

this dispute fell off the radar, as a panel was never assembled to resolve the dispute nor was any settlement reported.

While the MFN principle is generally thought of as preventing signatory nations from extending positive special treatment, it also prohibits unfair negative discrimination. By implementing discriminatory provisions based on the welfare of certain Canadian communities, tension with Canada would certainly arise. For this reason, MFN obligations would prevent such discriminatory action.

As an extension of the national treatment argument then, it can be argued that legislation restricting energy imports from Manitoba Hydro based on LEETF recommendations will be inconsistent with MFN obligations under *GATT*, as such legislation would unfairly restrict imports coming from one particular country—Canada.

In the *US-Tuna/Dolphin I*[45] and *US–Tuna/Dolphin II*[46] cases, panels held that import bans of tuna caught using purse-seine nets[47] were contrary to *GATT* Article III, which prohibits discrimination between 'like products.' The debate in this case revolved around defining 'like products,' specifically, whether or not differences in processes could amount to a difference in product for the purposes of *GATT* provisions. The panel in *US-Tuna/Dolphin I* found that processes could not be taken into account in determining the 'likeness' of products and accordingly, the United States import ban was inconsistent with *GATT* principles. However, this panel decision was not actually adopted, as the United States and the complainant Mexico settled the dispute bilaterally.[48]

Maintaining this distinction between process and product, it is clear that energy available for export by Manitoba Hydro is a 'like product' in comparison to energy produced elsewhere, as in the end, energy is energy. Accordingly, import restrictions based on processing effects adverse to communities near processing sites would be inconsistent with *GATT* principles of MFN treatment.

However, it is important to note that with government procurement obligations, which will be discussed below, this product-process distinction may not be the same. Provisions in the *Government*

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[45] GATT Panel Report, *United States—Restrictions on Imports of Tuna*, DS21/R, DS21/R, 3 September 1991, unadopted, BISD 39S/155 [*US-Tuna/Dolphin I*].

[46] GATT Panel Report, *United States—Restrictions on Imports of Tuna*, DS29/R, 16 June 1994, unadopted [*US-Tuna/Dolphin II*].

[47] Purse seine fishing is an aggressive method of fishing which aims to capture "large, dense shoals of mobile fish." In the Eastern Tropical Pacific, this method often includes 'dolphin-fishing,' which surrounds dolphins in order to catch the tuna swimming below them. See FishOnline, "Fishing Methods: Purse seining", online: Fish Online <http://www.fishonline.org/caught_at_sea/methods/#purse_seining>.

[48] World Trade Organization, "Mexico etc versus US: 'tuna-dolphin'", online: WTO <http://www.wto.org/English/tratop_e/envir_e/edis04_e.htm>.

Procurement Agreement[49] dealing with technical specifications address the "characteristics of the products or services […] or the processes and methods for their production."[50] If products, services, and production processes are grouped together, and thus, given no distinct treatment in the basic words of the agreement, it can be argued that in determining 'like products,' differences in production processes can indeed distinguish products, just as differences in the products or services themselves could. In the context of the Minnesota Energy debate, this would mean that Minnesota energy distributors would be justified in selecting an energy supplier other than Manitoba Hydro because they had an issue with the effects of production, even if Manitoba Hydro rates were the lowest.

The *US-Tuna/Dolphin I* dispute also discussed Article I:1 of *GATT*, which sets out that the MFN obligation should be unconditional. Prior to this decision, a debate arose regarding the extent of this obligation. Suppose that free trade for a given product was offered as a concession, would this mean that no conditions could be imposed that might impede this trade?[51]

In *US-Tuna/Dolphin I*, a challenge was also made to conditions in the *Dolphin Protection Consumer Information Act*,[52] which regulated the use of 'Dolphin Safe' labels.[53] Dolphin Safe labels were used as evidence showing that tuna products were not harvested by techniques involving encircling dolphins with purse-seine nets. The *GATT* dispute panel examined conditions imposed on tuna suppliers and found that the conditions imposed in this case were perfectly legal, as they did not result in discrimination. The labeling regulations applied to all countries in the geographical region where purse-seine fishing was conducted; nothing discriminated against goods based on their Mexican origin. Following this decision, it can be said that labeling or product information conditions may be imposed on products so long as they do not amount to discrimination based on the country of origin.[54]

Minnesota regulations implementing a certification of environmentally safe energy could thus meet MFN obligations according

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[49] *Agreement on Government Procurement*, 15 April 1994, *Marrakesh Agreement Establishing the WTO* (entered into force 1 January 1996), art. VI [*GPA*].

[50] See *Agreement on Government Procurement*, art. VI (1) - (2), Annex 4(b) to the *Agreement Establishing the World Trade Organization*, online: WTO <http://www.wto.org/english/docs_e/legal_e/gpr-94.pdf>. See also Christopher McCrudden, "International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of 'Selective Purchasing' Laws under the WTO Government Procurement Agreement" (1999) 2 J. Int'l Econ. L. 3 at 36.

[51] Trebilcock & Howse, *supra* note 39 at 59.

[52] 16 U.S.C. §1385 (1990).

[53] Trebilcock & Howse, *supra* note 39 at 60.

[54] *Ibid.*

to the *US-Tuna/Dolphin I* decision. Such a regulation in the name of consumer choice, according to *US-Tuna/Dolphin I*, would not violate MFN treatment obligations, given that the same system applied to energy from all sources. The problem is that in the case of consumers purchasing tuna, the 'Dolphin Safe' certification is likely to impact consumer behaviour whereas in the case of energy, consumers have fewer options and would generally make their decisions based solely on price. Governments, quasi-government entities, and a select group of large corporations distribute power to end consumers. Consumers enter into long-term energy contracts and are unable to easily change their service provider based on opposition to environmental impacts arising from energy generation. Thus, it is unlikely that information attained pursuant to *Bill SF2096* will be used to create mere labeling regulations. One option, however, is to include LEETF-gathered information in State reports on energy sources that could be provided to energy distributors in the name of education. This could be an attractive option which would be legal from an international law perspective, given that reports included information from all energy sources, both foreign and domestic, as there would then be no discrimination.

Exceptions to National Treatment and MFN Treatment—*GATT* Article XX

Article XX of *GATT* sets out exceptions to national treatment and MFN obligations. Having exceptions is not surprising considering the moral obligations of nations, for example, to combat universally chastised practices such as slavery,[55] even if it involves disrupting trade. These exceptions excuse nations from breaching *GATT* obligations, such as national treatment obligations or MFN treatment obligations. This means that if an exception were to fit, Minnesota would be justified in implementing energy import regulations based on impacts on the Canadian environment or impacts on Canadian communities. While numerous exceptions are set out, the items relevant to Minnesota's *Bill SF2096* are for matters: (b) necessary to protect human, animal or plant life or health,[56] and (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.[57]

When a country claims an exception under Article XX, it must firstly show that one of the sub-paragraphs under the Article applies, and secondly, that the measure is in compliance with the lead paragraph

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[55] One of the *GATT* exceptions deals with products of prison labour, which would apply to products of slavery. See *GATT*, *supra* note 36, art. XX(e).
[56] *Ibid.*, art. XX(b).
[57] *Ibid.*, art. XX(g).

of the Article. This latter requirement is often referred to as "meeting the chapeau."

Generally speaking, in order to demonstrate that an Article XX exception applies, a sufficient nexus must be shown between the measures imposed and the goal of the measure, e.g. protection of human life, conservation of exhaustible natural resources, etc. That being said, the law must be primarily aimed at the goal or in other words, the ends must exhibit a close relationship to the means.[58] What has become an area of contention in WTO disputes, however, has been defining the scope of these exceptions. Because of the different wording of Article XX exceptions ("necessity," "in relation to," "in pursuance of," "essential to," etc.), different tests have been applied in determining the applicability of the various exceptions.

In order to demonstrate compliance with the lead paragraph of Article XX (i.e. in order to meet the chapeau) a country is required to show that in its application, the restricting measure does not arbitrarily discriminate, unjustifiably discriminate, or constitute a disguised barrier to trade. While no clear test has been set out to make these determinations, the *US Shrimp-Turtle* case[59] sets out examples of what would not meet the chapeau.[60]

In the context of the debate at hand, the key question deals with the first hurdle—determining whether or not an Article XX exception applies. Do *GATT* Article XX subsections (b) and (g) apply only to domestic health and natural resource concerns (i.e. within the United States only), to extra-territorial or global concerns (i.e. concerning the United States and other sovereign states), and can they go so far as to apply strictly to local concerns (i.e. issues located solely in another sovereign state)? In other words, what proximity of interest is required for the United States to fit under an Article XX exception?[61]

While it was not worded as such, this issue was raised in the *US-Tuna/Dolphin* cases and the *Shrimp-Turtle* case. In *US-Tuna/Dolphin I*, the panel held that Article XX exceptions did not apply. The panel discussed the exception set out in subparagraph (b) and found that it applied only to allow trade restricting measures to protect domestic concerns of human, animal, or plant life or health. However, in obiter, the panel considered the possibility of allowing measures to protect

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[58] Andrew Green, "The WTO, Science, and the Environment: Moving Towards Consistency" (2007) 10 J. Int'l Econ. L. 285 at 297.

[59] WTO, *Panel Report on United States—Import Prohibition of Certain Shrimp and Shrimp Products*, (6 April 1998) WTO Doc. WT/DS58/R, online: WTO <http://www.wto.org/English/tratop_e/dispu_e/cases_e/ds58_e.htm>.

[60] See *ibid.*

[61] See generally Bradly J. Condon, "GATT Article XX and Proximity of Interest: Determining the Subject Matter of Paragraphs B and G" (2004) 9 UCLA J. Int. L. & Foreign Aff. 137.

extra-territorial concerns as well, suggesting this might be acceptable given that all other avenues of protection (i.e. negotiation of treaties) had been exhausted. Indications from the negotiating history of Article XX (b) suggest that it was intended to cover only domestic concerns, however, as references to sanitary regulations were frequently being made, and the sanitary and phytosanitary exception now found in *GATT*[62] apply only to domestic concerns.[63] In a subsequent complaint involving the same issue, the panel in *US-Tuna/Dolphin II* found that nothing in subparagraphs (b) and (g) excluded measures aimed at extra-territorial protection of the subparagraph (b) and (g) elements. However, the United States failed to meet the chapeau, so the result was the same as the previous complaint, in that U.S. measures were still found inconsistent with *GATT* obligations.

Also limiting the extra-territorial application of Article XX (b) is the decision from the *EC—Tariff Preferences* dispute. In this dispute, preferential treatment was given to illicit drug producing countries by the EC, with hopes that illicit drug production could be replaced by the production of legitimate goods. The WTO dispute panel ruled, however, that the Article XX (b) exception could not apply as an exception for a measure intended to protect purely extra-territorial (i.e. local) human health concerns.

In the *US Shrimp-Turtle* dispute, a similar question about the extra-territorial reach of Article XX exceptions was asked with regards to subsection (g), relating to the protection of exhaustible natural resources. While it can be said that the protection of sea turtles would also fall under Article XX (b), the case was not argued under this exception.

In the *US Shrimp-Turtle* dispute, at issue was a U.S. ban on the importation of shrimp from countries that failed to implement adequate measures to protect turtles from being caught in shrimp nets. Under the *US Endangered Species Act of 1973*, U.S. shrimp trawlers were required to use turtle exclusion devices in their nets. In 1989, the U.S. enacted a law addressing imports. Section 609 of *US Public Law 101-102* stipulated that shrimp harvested with technology that could adversely affect turtles was prohibited from being imported unless the exporting country was found to have a regulatory programme similar to that of the U.S., such that incidental damage to turtles could be shown to be minimal.[64]

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[62] GATT, *Agreement on Sanitary and Phytosanitary Measures, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations,* 15 April 1994, art. 5.7.

[63] Condon, *supra* note 61. See also Bradly Condon, "Multilateral Environmental Agreements and the WTO: Is the Sky Really Falling?" (2000) 9 Tulsa J. Comp. & Int'l L. 533 at 541-542.

[64] World Trade Organization, "India etc versus US: 'shrimp-turtle'", online: WTO <http://www.wto.org/english/tratop_e/envir_e/edis08_e.htm>.

The *US Shrimp-Turtle* dispute took place after the *US-Tuna/Dolphin* cases and these decisions seem to provide conflicting opinions as to the extra-territorial application of *GATT* Article XX exceptions. In the *US-Tuna/Dolphin* cases, the panels found that the ban of "dolphin unfriendly" tuna violated MFN treatment obligations and could not be justified under Article XX (b), as this exception could not extend to interests beyond U.S. borders.[65] However, the panel decisions were never actually adopted by the WTO, as the disputes were settled by the parties. Accordingly, some would argue that *US Shrimp-Turtle*, having been adjudicated by the WTO Appellate Body and having actually been adopted, is the leading authority on principles of *GATT* Article XX extra-territorial application generally.[66] Yet it must be noted that the WTO does not officially bind itself by precedents.

In the WTO appellate panel decision for *US Shrimp-Turtle*, it was held that the U.S. measures were inconsistent with *GATT* obligations, as they failed to meet the chapeau—that is, they failed to comply with the lead paragraph of Article XX because they were not applied consistently for all WTO member nations.[67] However, the panel also said that measures to protect sea turtles, if they did not discriminate, would be perfectly acceptable and countries generally have the right to use trade measures to protect the environment. The problem in this case was that the United States, in applying their trade measures, gave certain countries technical assistance, financial assistance, and longer deadlines to begin using turtle exclusion devices.[68]

The United States subsequently revised its laws, eliminating discriminatory provisions. Yet Malaysia still challenged the laws, suggesting that a complete lift on import bans was necessary. The WTO appellate panel recognized the need for international cooperation in protecting sea turtles, and held that because the United States had engaged in good faith negotiations to implement a sea turtle protection agreement, it was justified in continuing its import restrictions.[69] Some suggest that the wording of the U.S. regulations was also of great

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[65] WTO, *supra* note 44.

[66] C. O'Neal Taylor, "Impossible Cases: Lessons from the First Decade of WTO Dispute Settlement" (Summer 2007) 28 U. Pa. J. Int'l Econ. L. 309 at 398. See also Trebilcock & Howse, *supra* note 39 at 16.

[67] WTO, *Report of the Appellate Body on United States—Import prohibition of certain shrimp and shrimp products*, (1998) WTO Doc. DS58/AB/R, para. 187(c), online: WTO <http://www.wto.org/English/tratop_e/dispu_e/cases_e/ds58_e.htm>.

[68] *Ibid.* at para. 186.

[69] WTO, *Article 21.5 Report of the Appellate Body on United States—Import prohibition of certain shrimp and shrimp products*, (2001) WTO Doc. WT/DS58/AB/RW at para. 134, online: WTO <http://www.wto.org/English/tratop_e/dispu_e/cases_e/ds58_e.htm>.

importance, as it did not require the actual of use of turtle exclusion devices. Rather, it provided flexibility in simply requiring results comparable to those achieved by use of TEDs.[70] In the end, the *US Shrimp-Turtle* dispute supports the notion that Article XX exceptions, perhaps generally speaking, or perhaps just for subparagraph (g), can extend to protect extra-territorial interests.[71]

Following this case, Minnesota might argue that it would be justified in regulating against imports of energy that result in adverse impacts to human rights or on the environment, based on this extra-territorial application of Article XX exceptions. The environmental exception in sub-paragraph (g), which was the focus of the *US Shrimp-Turtle* dispute, however, would probably not work, as the Canadian Boreal Forest has no relation to U.S. restrictions on domestic production or consumption. That is, there is no connection with sufficient proximity to United States interests to justify the imposition of trade measures.

While it may seem that the decision in *US Shrimp-Turtle* illustrates a shift in WTO dispute resolution policy, allowing for trade measures to be used in the protection of extra-territorial interests, an important line can be drawn, requiring at least some proximity of interest for an Article XX exception to apply. The *US Shrimp-Turtle* decision never went so far as to suggest that Article XX exceptions could apply to strictly local interests. Sea turtles, as an endangered species, are a global interest. Due to U.S. membership in the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* ("*CITES*"), the United States has a legal interest in protecting sea turtles. The existence of such a multilateral environmental agreement ("MEA") has been suggested as a key element in allowing extra-territorial applications of *GATT* exceptions by some academics.[72] Furthermore, as the United States is a part of the sea turtle migratory pattern, sea turtles also have a jurisdictional connection to the U.S., as they are in part, a type of U.S. marine wildlife.[73]

With regards to aboriginal communities in Northern Manitoba and the Canadian Boreal Forest, however, the United States has no real proximity of interest, aside from a global interest in clean air. Such a universal interest cannot be used to justify an Article XX exception, however, as it would then become too easy to justify any breaches of *GATT* provisions, as actions with negative impacts on air quality occur regularly in countries across the globe. In the case of the United States, its decision not to sign onto the *Kyoto Protocol* makes using air quality

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[70] Nita Ghei, "Evaluating the WTO's two step test for environmental measures under Article XX" (2007) 18 Colo. J. Int'l Envt'l L. & Pol'y 117 at 148-149 (WL).
[71] "Multilateral Environmental Agreements and the WTO," *supra* note 63 at 545.
[72] *Ibid.* at 552.
[73] Condon, *supra* note 61 at 146-147.

concerns to justify trade measures even more difficult.[74] In light of multilateral negotiations for the protection of the environment, the United States opted not to participate in the agreement. Accordingly, they cannot be said to have passed the good faith negotiations requirement set out in the *US Shrimp-Turtle* second panel decision.

With regards to a claim based on human health and life based on Article XX (b), a similar question of good faith negotiations would arise. In the face of international efforts to establish a *Declaration on the Rights of Indigenous Peoples*[75] through the United Nations, the United States expressed opposition to this declaration based on the text allegedly being fundamentally flawed.[76] While some would believe that the U.S. simply would have preferred further negotiations to perfect the text of the declaration, others would argue that this was simply opposition to the declaration in general,[77] which would mean that the U.S. would not be justified in implementing trade measures based on the protection of aboriginal rights. However, it should be noted that the United States, through its participation in the Organization of American States, has previously worked towards solidifying aboriginal rights.[78] Regardless, the treatment of aboriginal peoples or Canadian communities in general, lacks the proximity of interest necessary to establish an Article XX exception. No domestic resource argument can be made and no legal connection exists, as no treaty is in place that deals with the extra-territorial protection of aboriginal communities. Accordingly, as the treatment of aboriginal peoples in Canada is a purely local interest touching the heart of Canadian sovereignty, no Article XX exception will be available to Minnesota to justify a potential breach of their national treatment or MFN treatment obligations.

Government Procurement

Government procurement often makes up a large proportion of expenditures made in a country's economy. What makes government

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[74] "Conference of the Parties to the Framework Convention on Climate Change: Kyoto Protocol" 37 I.L.M. 22 (1998).

[75] UN Commissioner for Human Rights, *Declaration on the Rights of Indigenous Peoples*, 2006/2, online: UNCHR <http://www.ohchr.org/english/issues/indigenous/docs/declaration.doc>.

[76] Indian and Northern Affairs Canada "Canada's Position—United Nations Declaration on Rights of Indigenous Peoples" (29 June 2006), online: INAC <http://www.ainc-inac.gc.ca/nr/spch/unp/06/ddr_e.html>.

[77] Haider Rizvi, "Native Peoples Renew Call for U.N. Recognition" Inter Press Service News Agency, online: IPS <http://www.ipsnews.net/news.asp?idnews=38593>.

[78] Organization of American States, "American Declaration On The Rights Of Indigenous Peoples" (5 June 2001) AG/RES. 1780 (XXXI-O/01).

procurement distinct from private expenditures, however, is that governments may use their purchasing power to promote various domestic political, social, and economic policies.[79] Generally speaking, there is nothing wrong with such a use of a government's economic and financial power.[80] Government procurement policies in particular have historically been used to influence foreign government's policies on many occasions. Two well known examples of this from the United States are the *Helms-Burton* law,[81] which extends trade embargo sanctions on foreign companies that deal with Cuba,[82] and the *Iran and Libya Sanctions Act*,[83] which restricts foreign companies that do business in Iran and Libya from winning government contracts.[84] Other examples involve combating Apartheid in South Africa, Holocaust-related deposits in Switzerland, Indonesian activities in East Timor, and the list goes on.[85] As international interest in human rights issues such as abusive labour conditions continue to grow, the temptation of governments to continue to attempt to influence the practices of foreign governments becomes even greater.[86] From a moral standpoint, this use of government procurement policies seems to be a positive thing.

Yet government procurement obligations under international agreements such as the *GPA* and *NAFTA* prevent this type of government behavior. Such obligations are aimed at protecting the sovereignty of nations involved in international trade, as ideally, political disagreements should not disrupt trade. When considering *Bill SF2096* from this standpoint, it becomes more apparent why it may violate international free trade obligations. Political considerations such as the welfare of communities in Northern Manitoba, especially aboriginal communities, are concerns that should be for the Canadian government to deal with. Thus, trade regulations made pursuant to *Bill SF2096* reports may be contrary to the spirit of government procurement obligations.

On point is the case of *United States—Measure Affecting Government Procurement (Massachusetts-Myanmar)*. In 1996, the Massachusetts state legislature passed an Act that prevented public authorities of the state from procuring any goods or services from any persons who did business with Myanmar (Burma). The European

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[79] Trebilcock & Howse, *supra* note 39 at 292.
[80] McCrudden, *supra* note 50 at 11.
[81] *Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996*, Pub. L. No. 104-114, 110 Stat. 785 (more commonly known as the *Helms-Burton Act*).
[82] American University "Helms-Burton Case, Fate of the Cuba Embargo", online: American University <http://www.american.edu/TED/helms.htm>.
[83] *Iran and Libya Sanctions Act of 1996*, Pub. L. No. 104-172, 110 Stat. 1541.
[84] Cable News Network, "Clinton signs Iran-Libya sanctions act" (5 August 1996), online: CNN.com <http://www.cnn.com/US/9608/05/clinton/>.
[85] McCrudden, *supra* note 50 at 6-7.
[86] *Ibid.* at 6, f.n. 9.

Community and Japan brought forth complaints to the WTO alleging that these provisions violated agreements under the *GPA*. They argued that the Massachusetts legislation was in contravention of: Article VIII(b), as it imposed conditions on tendering companies that were irrelevant to the firm's capability of fulfilling the contract; Article X, as it imposed "*qualification* criteria based on political rather than economic considerations"; and Article XIII, to the extent that the statute allowed the "*award* of contracts to be based on political instead of economic considerations."[87]

Unfortunately, from the perspective of those seeking legal certainty, the Massachusetts legislation was set aside by American courts because it intruded on federal jurisdiction to impose trade sanctions.[88] The court, in making its decision, relied in part on the fact that complaints were brought to the WTO in rendering its decision.[89] Because of this decision, the WTO dispute panel never had an opportunity to answer the question of whether or not the Massachusetts legislation violated *GPA* obligations. It is interesting to note, however, that when the legislation was passed, Massachusetts legislators admittedly were not even aware of *GPA* obligations.[90]

Although no formal ruling was ever made, academics still discuss the legality of the Massachusetts law with respect to international trade obligations.[91] One author concludes that the law was in fact inconsistent with government procurement obligations and discusses potential methods of compliance.[92] He suggests the possibility of simply insisting, as a term of contract, that businesses refrain from doing business with Myanmar. Such an arrangement might be legal from an international law standpoint, as it would not impose any conditions making it more difficult for companies doing business with Myanmar to win a contract. However, it can be argued that by imposing terms on the contract that cannot be imposed as qualifications, a purchaser would be taking a "backdoor" approach to something that would otherwise be prohibited.[93] Furthermore, even if such an approach were acceptable from a policy standpoint, a breach of these terms could not be punished, as no value to damages could be claimed.

While the *Massachusetts-Myanmar* case never went to a WTO panel, the controversy that it stirred up and the challenge raised by the

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87 *Ibid.* at 25. (emphasis in original)
88 See *National Foreign Trade Council v. Andrew S. Natsios (Massachusetts)*, 181 F.3d 38 (1st Cir. 1999).
89 Mitsuo Matsushita, "Major WTO Dispute Cases Concerning Government Procurement" (September 2006) 1 Asian J. WTO & Int'l Health L. & Pol'y 299.
90 McCrudden, *supra* note 50 at 6.
91 *Ibid.* at 30.
92 See *ibid.*
93 *Ibid.* at 31.

international community suggest that tenable arguments opposing the legality of such a prohibition can be made. Returning to the East vs. West debate and considering the question of what the State of Minnesota might do with the information that the LEETF seeks to obtain, it might be inappropriate, based on international free trade obligations, and ineffective, for Minnesota energy distributors to impose environmental accountability or proper treatment of aboriginal communities in Northern Manitoba as a term of contract. Of course, including such criteria as a necessary qualification for a contract would also be inappropriate.

a. WTO Procurement Obligations Under the Agreement on Government Procurement

As a part of the free trade movement, under the *Agreement on Government Procurement* ("*GPA*"),[94] countries can no longer impose their values on foreign governments so freely. Free trade, arguably for better or worse, has taken priority over human rights to some degree due to international agreements.[95] Under the *GPA*, signatory nations are obliged to follow certain practices when listed government entities undertake to purchase goods or services of significant value. These obligations are echoed in *NAFTA*, where provisions dealing with government procurement are nearly identical.[96]

The *GPA* requires signatory states to go through a tendering process, whereby tenders are selected based upon technical specifications that are made by "performance rather than design, and [are] based on international standards, where they exist, or otherwise on national technical regulations, recognized national standards, or building codes."[97] Ultimately, the agreement aims to promote non-protectionist obligations, preventing signatory states from discriminating against foreign bids based on irrelevant technical specifications.

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[94] *GPA*, *supra* note 49.

[95] See World Trade Organization, "What's wrong with the WTO? You must subordinate human rights to free trade", online: World Trade Organization <http://www.speakeasy.org/~peterc/wtow/wto-hrs.htm>. See also "What's wrong with the WTO? You cannot restrict trade in a good based on how it is produced", online: World Trade Organization <http://www.speakeasy.org/~peterc/wtow/wto-ppm.htm>.

[96] Compare *GPA* arts. VIII, X & XIII (*supra* note 50) with *NAFTA* arts. 1003 & 1007 (*supra* note 35).

[97] World Trade Organization, "Overview of the Agreement on Government Procurement," online: WTO <http://www.wto.org/english/tratop_e/gproc_e/over_e.htm>. See also title of Annex 3 to Appendix I of the *Government Procurement Agreement*), *supra* note 50, which covers "[a]ll other entities which procure in accordance with the Agreement, in general public enterprises or public authorities such as utilities."

Bill SF2096 suggests that the state of affairs in communities of Northern Manitoba might become a factor in the selection process for Minnesota's purchase of energy. This factor would not be based on performance, international standards, technical regulations, or building codes, as would be required by provisions in the *GPA*. The *GPA* arguably prevents Minnesota from considering the information sought out by the LEETF in making their decision to purchase energy from Manitoba Hydro.

An issue as to the applicability of the *GPA* arises here, however. While the Agreement envisions the inclusion of government entities, sub-central government entities, and "other entities such as utilities,"[98] only procuring entities that member states have listed in their respective schedules are bound by terms of the agreement. Under Annex 1 of the *GPA*, the United States Federal Department of Energy is listed.[99] Annex 2 of the *GPA* sets out the U.S. sub-central governmental entities covered by the agreement, and for Minnesota, "Executive Branch Agencies" are listed.[100] The relevant agency would thus be the Department of Natural Resources, and under this department, the Public Utilities Commission. However, neither of these bodies actually purchases and distributes energy. The Public Utilities Commission merely regulates the practices of private energy companies.

In Minnesota, the importing of energy produced by Manitoba Hydro is done by private corporations, and thus, energy purchases may not be considered acts of government procurement. The issue therefore becomes one of analyzing the connection between Minnesota State, the LEETF, the Public Utilities Commission, and the private entities running the energy trade and determining whether it is sufficiently close such that *GPA* provisions might apply. This question was the focus of the *Korea—Measures Affecting Government Procurement (Airport Construction)* dispute.

In 1999, the United States launched a complaint against Korea for alleged violations of *GPA* obligations. An airport was being built in Korea and certain provisions regarding bid deadlines and licensing requirements based on local investment were allegedly in conflict with the *GPA*. Since it was not a *GPA*-listed Korean governmental authority itself that was responsible for the airport construction, there was an issue as to the applicability of the *GPA*. Ultimately, it was found that *GPA* provisions did not apply to the entity responsible for airport construction. However, the complainant United States argued that they could still implement responsive measures based on impairment of their benefits

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[98] WTO, "Overview of the Agreement on Government Procurement", online: WTO <http://www.wto.org/English/tratop_e/gproc_e/over_e.htm>.
[99] See *GPA*, *supra* note 50, *Appendix I—United States—Annex 1* at 13.
[100] See *ibid.*, *Appendix I—United States—Annex 2* at "Minnesota."

under the *GPA*, despite a finding that Korea had not actually violated its obligations. In the end, this argument was also rejected.

In this dispute, a test was set out to determine whether or not a government entity would be covered by *GPA* obligations:

> [O]ur view is that the relevant questions are: (1) Whether an entity [...] is essentially a part of a listed central government entity [...]—in other words, are the entities, legally unified? and (2) Whether [the recipient-of-power agency] and its successors have been acting on behalf of [the donor-of-power agency].[101]

As mentioned earlier, according to the Annex of obligations for the United States, the Federal Department of Energy and Minnesota's Executive Branch Agencies are included in the *GPA*.[102] Thus, in the case of Minnesota power companies, the relevant questions are whether or not the energy distributors are legally unified with the Department of Energy or the Minnesota Department of Natural Resources, and whether in purchasing and distributing energy, they act on behalf of these agencies. While it may be the responsibility of the Department of Energy and the Public Utilities Commission, a branch of the Department of Natural Resources, to implement regulations that ensure that power is readily available, legal unification seems to be missing. As there are four electric and six natural gas utility companies in Minnesota, including publicly traded companies,[103] it is apparent that government entities covered under the *GPA* and private energy distributors are not legally unified. Accordingly, *GPA* provisions do not apply.

The analysis does not end here, however. Seeing as government procurement obligations are always open to extend to more entities as negotiations continue, it is important to consider another factor that was discussed in the *Korea—Government Procurement* case[104]—the claim for relief based on the impairment of benefits.

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[101] WTO, *Report of the Appellate Panel on Korea—Measures Affecting Government Procurement*, WTO Doc. WT/DS163/R, (1 May 2000) online: WTO <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds163_e.htm> at para. 7.59.

[102] *GPA*, *supra* note 50, *Appendix I—United States—Annex 1* at 13. See also *GPA*, *supra* note 50, *Appendix I—United States—Annex 2* at "Minnesota."

[103] For example, see Xcel Energy, "Overview", online: Xcel Energy <http://phx.corporate-ir.net/phoenix.zhtml?c=89458&p=irol-IRHome>. See also the parent company for Minnesota Power, ALLETE, "Investors", online: ALLETE <http://www.allete.com/invest/index.html>.

[104] *Report of the Appellate Panel on Korea—Measures Affecting Government Procurement*, *supra* note 101.

Regarding this claim, the panel in this case recognized the criteria set out in *Japan—Film*:[105]

> The text of Article XXIII:1(b) establishes three elements that a complaining party must demonstrate in order to make out a cognizable claim under Article XXIII:1(b): (1) application of a measure by a WTO Member; (2) a benefit accruing under the relevant agreement; and (3) nullification or impairment of the benefit as the result of the application of the measure.[106]

The United States, in their argument, characterized these criteria slightly differently:

> The United States slightly re-arranges the test enunciated by the *Japan—Film* panel and proposes that a successful determination of a non-violation nullification and impairment in the GPA requires the finding of the following three elements: (1) a concession was negotiated and exists; (2) a measure is applied that upsets the established competitive relationship; and (3) the measure could not have been reasonably anticipated at the time the concession was negotiated.[107]

The Panel accepted the U.S. characterization, but ultimately found that the first criterion was not met—there was no negotiation concession regarding procurement by airport authorities, as the airport authorities in this case were not found to be covered by the *GPA*. However, had these authorities been included, if the United States suffered impairment of their reasonably expected benefits, they would be justified in applying reactionary measures, regardless of whether or not Korea had actually violated any obligations under the *GPA*. According to the Panel in the *Korea-Government Procurement* case, the non-violation remedy is used to enforce the basic principle that under *GATT*/WTO jurisprudence, Members should not take actions, even if consistent with

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105 WTO, *Report of the Panel on Japan—Measures Affecting Consumer Photographic Film and Paper*, Panel Report, WTO Doc. WT/DS44/R, online: WTO <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds44_e.htm>.

106 *Report of the Appellate Panel on Korea—Measures Affecting Government Procurement*, *supra* note 101 at para. 7.85, citing *Japan—Film*, at para. 10.41, citing, *EEC—Oilseeds*, BISD 37S/86, paras. 142-152; *Australian Subsidy on Ammonium Sulphate*, BISD II/188, 192-193.

107 *Ibid.* at para. 7.88.

their enumerated obligations, that might undermine the reasonable expectations of other Members.[108]

Returning to the issue of the East vs. West transmission line debate, this means that if the potential energy purchasers of Minnesota were covered by the *GPA*, their use of information gathered by the LEETF could justify a non-violation remedy for Canada, whether or not the use of the information gathered is actually inconsistent with *GPA* provisions. This becomes clear when the elements outlined in *Japan—Film* and *Korea—Measures Affecting Government Procurement* are considered. Implementing the Manitoba Hydro investigative measure set out in *Bill SF2096* would upset the established competitive relationship if the findings were unflattering. It cannot be said that such investigative measures were reasonably anticipated at the time the *GPA* was put into effect either. Thus, if the *GPA* were to cover energy distributors in Minnesota, *Bill SF2096* could lead to remedial action for the benefit of Manitoba Hydro.

It should be noted that actually attaining the remedy granted could always be an issue, however, as the United States has demonstrated an unwillingness to honour adverse judgments handed out from WTO panels in the past.[109] With respect to making challenges based on *GPA* obligations, it is also clear that challenging the validity of legislation through U.S. courts is not an option. Section 102(c) of the *Uruguay Round Agreements Act*,[110] which implemented the Uruguay Round Agreements (establishing the WTO, *GATT 1994*, the *GPA*, *inter alia*.) in the United States, prohibits private actions based on these agreements in U.S. Courts.[111]

b. Procurement Obligations under NAFTA

Government procurement requirements under *NAFTA* Chapter 10 are essentially the same as those required under the *GPA*, with clauses requiring national treatment,[112] non-discrimination against foreign bids,[113] and technical specifications based on performance or national/international standards.[114] However, under *NAFTA*, the issue of

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[108] *Ibid.* at para. 7.93.

[109] For example, consider the Antigua gambling dispute. See ICTSD, "US-Antigua Gambling Dispute Raises Systemic Issues" *Bridges Weekly Trade News Digest* 8:40 (24 November 2004), online: International Centre for Trade and Sustainable Development <http://www.ictsd.org/weekly/04-11-24/story4.htm>.

[110] *Uruguay Round Agreements Act*, Pub. L. No. 103-465, § 102(c)(1)(b), 108 Stat. 4809 (1994).

[111] McCrudden, *supra* note 50 at 22-23.

[112] *NAFTA*, *supra* note 35, art. 1003.

[113] *Ibid.*

[114] *Ibid.*, art. 1007.

applicability has an additional factor to consider, as the scope of coverage extends to "government enterprises" of US$250,000 and over for contracts of goods and services.[115] Under the definitions section, "enterprise" is defined as "any entity [...] whether privately-owned or governmentally-owned, including any corporation [...]."[116] With the elimination of the private vs. public distinction, it would seem that the purchase and distribution of energy by any Minnesota distributors would fall under *NAFTA* government procurement obligations.

Looking at *NAFTA* Annex 1001.1a-1, the Schedule of the United States,[117] the Department of Energy is covered as a federal government entity under the agreement. However, negotiations have not yet gone so far as to have state departments or provincial government entities included under *NAFTA* government procurement agreements. Thus, Minnesota State, its Department of Natural Resources, and the Public Utilities Commission are not currently covered by *NAFTA* government procurement obligations. Similarly, private energy distributors operating in Minnesota are also not covered by *NAFTA* government procurement provisions. Thus, at this point in time, it appears that *NAFTA* does nothing to inhibit the ability of Minnesota energy distributors from taking into account the environmental impact of Manitoba Hydro projects in assessing potential suppliers of energy.

Ultimately, while international government procurement obligations under the *GPA* and *NAFTA* might have prevented entities covered under these agreements from discriminating against Manitoba Hydro based on potential adverse impacts on communities near power generating sites or the environment, it seems that these obligations do not apply to Minnesota energy distributors. Accordingly, damage done by Manitoba Hydro's generating projects, even those from the past, may adversely affect future Manitoba Hydro bids to sell energy.

Conclusion on Legality of Minnesota *Bill SF2096*

While simply having the LEETF request information may be consistent with international free trade obligations, it appears that international free trade obligations would prevent import restrictions or new regulations from being passed based on environmental impacts or adverse impacts on local communities of Manitoba Hydro projects in Canada. However, they would not go so far as to prevent the publication of a LEETF report card, given that such reports are made for all energy providers, both domestic and foreign. *GATT*/WTO jurisprudence has

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[115] *Ibid.*, art. 1001(1)(c)(ii).
[116] *Ibid.*, art. 201.
[117] *Ibid.*, Annex 1001.1a.

shown that consumer awareness practices, given that they are not discriminatory, are perfectly acceptable.

It seems that at this point, government procurement obligations do not impact Minnesota energy distributors, and therefore, these energy distributors may very well opt not to purchase from Manitoba Hydro based on Canadian environmental or local community impact concerns. Accordingly, Manitoba Hydro must be wary in scaring away their Minnesota customer base through reckless behavior or their unwillingness to clean up past mistakes. The need for Manitoba Hydro to take better care in minimizing environmental damage, cleaning up its messes, and working towards positive and sustainable development, where it is welcomed, in communities near any energy generation or distribution projects, becomes more than just an issue of morality—it becomes a major marketing concern. If Manitoba Hydro wishes to retain its Minnesota customer base, future project development must be more diligently planned and current practices must be refined such that come January 2008, Manitoba Hydro will be able to produce for the LEETF a positive report.

As will be discussed below, the case can be made that the East option is potentially superior from the environmental perspective and also that of alleviating poverty, which is a key element of the larger principle of international law—that States should be promoting sustainable development. While it is legitimate to wonder whether the East route will create a damaging perspective in the eyes of potential buyers in Minnesota, it might be argued that pursuing the West option has the potential to raise objections that are, in logic and fact, more powerful. The practical politics may be that thus far, the cries of high-profile environmentalists have been in relation to a potential East option. However, if the West option is chosen, Manitoba authorities may eventually have to answer some embarrassing questions about why it has chosen to waste a massive amount of renewable energy and how it missed an opportunity to involve some of Canada's poorest and least healthy communities in opportunities for development. It may well be true that any visible damage, even if minor, to the Eastside, would trigger more objections from the United States and from environmentalists than the invisible damage caused by wasting hydro power would. It is not a certainty, however, that the latter will continue to be overlooked.