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*by Tina R. Goel**

The Copenhagen negotiations did not result in the global environmental treaty desired by many, but, instead, in plans to reduce greenhouse gas ("GHG") emissions or carbon intensity from fifty-five nations, including China, India, and the United States.[1] The U.S. pledge, to reduce emissions by seventeen percent, came with a catch: Congressional action.[2] Enacting federal climate change legislation in the United States has been difficult because policymakers fear that increased regulation may place domestic industry at a competitive disadvantage, and that production facilities will relocate, thereby causing carbon leakage—the movement of emissions to a less regulated country—and associated U.S. job losses.[3] Manifesting these fears, the Senate resolved, in 1997, that the United States should not consent to an international agreement that does not limit emissions from developing countries.[4]

Monumentally, in June 2009, the U.S. House of Representatives passed H.R. 2454, the American Clean Energy and Security Act ("ACES"):[5] legislation designed, in part, to reduce GHG emissions by placing a cap on emissions and issuing a certain number of permits, or allowances, for the release of the emissions.[6] One measure, intended to alleviate carbon leakage, grants to eligible domestic sectors allowance rebates, and another, the International Reserve Allowance Program ("IRAP") requires importers of foreign goods to submit international reserve allowances ("IRA").[7] Although Congress is unlikely to enact ACES, due in part to a similar Senate bill, future legislation is likely to contain comparable language.[8]

Domestic rebates and importer allowance requirements, such as those in ACES, are likely to violate U.S. obligations under the General Agreement on Tariffs and Trade ("GATT").[9] GATT prohibits the use of trade-restrictive measures, i.e., taxes, laws and regulations, to protect domestic industry, but it allows their use to achieve legitimate environmental goals.[10] In particular, Article I prohibits discrimination by member nations between "like" products from different nations, and Article III prohibits discrimination between "like" imported and U.S. goods.[11] These rules are tempered by the Article XX General Exceptions, pursuant to which member nations may employ measures violating substantive provisions for the achievement of limited policy goals, including the "conservation of exhaustible natural resources."[12]

The importer allowance requirement in ACES is likely to violate GATT Articles I and III because it treats "like" products dissimilarly. IRAP requires importers to submit IRAs based upon a "general [calculation] methodology" to ensure that imported and U.S. goods are subject to similar GHG emissions requirements.[13] The calculation is likely to violate Article I if it treats "like" foreign goods from two countries dissimilarly based upon non-product specific factors such as sector or economy-wide GHG emissions.[14] Five exceptions to IRAP largely exclude imported goods from the program based upon factors that indirectly indicate if the imported goods are regulated similarly to "like" U.S. goods, e.g., whether the imported goods originate in countries with a binding emissions agreement, rather than whether fewer emissions were actually released during the manufacture of the product.[15] These exceptions are also likely to treat "like" domestic and imported products differently, violating Article III.

ACES is also likely to violate Article III by failing to provide equality of competitive conditions for "like" U.S. and imported goods by providing domestic actors avenues to lower compliance costs unavailable to foreign producers. Domestic actors may demonstrate compliance by holding international and domestic allowances, offset credits, and compensatory allowances; banking and borrowing allowances; submitting allowances received for "free;" or paying a penalty for non-compliance, while importers may only submit and bank IRAs.[16] As a result, only domestic actors may determine whether it is cost-effective to violate ACES and pay a penalty or invest in forestry projects to earn offsets rather than buy allowances, while importers do not have such options.[17]

Nonetheless, GATT Article XX permits certain trade-restrictive environmental measures and arguably should permit the use of measures that "accurately assess carbon leakage and competitiveness losses" and impose a "fair" price upon imported products.[18] To ensure that U.S. legislation is covered by the Article XX exception, IRAP and its implementing regulations should require importers to submit allowances based upon a methodology that accurately accounts for emissions. To avoid disparate treatment between "like" products of two countries or between "like" imported and domestic products, IRAP should calculate allowance requirements based upon product-specific GHG emissions rather than economy-wide or sector-specific emissions. In addition, importers should be permitted to submit offset credits, as well as other allowances, and borrow allowances to equalize competitive conditions between "like" domestic and imported products. Moreover, to further the goals of ACES, exceptions should only be granted when an imported product is manufactured with fewer emissions than a "like" U.S. product, thereby challenging domestic actors to reduce emissions.

Endnotes: U.S. Climate Change Policy v. International Trade Rules: Complying with GATT *continued on page 64*

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[1] *See* John M. Broder, *Countries Submit Emissions Goals*, N.Y. TIMES, Feb. 2, 2010, at A10 (discussing the emissions goals); Richard Black, *U.S. Bill 'Crucial' for Climate Talks*, BBC NEWS, Sept. 30, 2009, http://news.bbc.co.uk/go/pr/fr/-/2/hi/science/nature/8283655.stm (last visited Mar. 1, 2010) (noting expectations for the Copenhagen talks).

[2] *See A Refreshing Dose of Honesty: Maria Cantwell and the Politics of Global Warming*, THE ECONOMIST, Feb. 6, 2010, at 38 (discussing the commitment, the "catch," and Senator Cantwell's cap-and-dividend proposal).

[3] *See* Black, *supra* note 1 (noting that in August 2009 Democratic senators wrote to President Obama declaring that to attract their support, any bill regulating GHG emissions would have to protect the competiveness of U.S. companies); J.D. WERKSMAN & T.G. HOUSER, WORLD RES. INST., COMPETITIVENESS, LEAKAGE AND COMPARABILITY: DISCIPLINING THE USE OF TRADE MEASURES UNDER A POST-2012 CLIMATE AGREEMENT 1-6 (2008), *available at* http://pdf.wri.org/working_papers/competitiveness_leakage_and_comparability.pdf (discussing protective measures proposed in the U.S. legislature and considered by the European Union in recent years); Committee on Ways and Means, Subcommittee on Trade, *Chairman Levin Announces Hearing on Trade Aspects of Climate Change Legislation*, Mar. 17, 2009, http://waysandmeans.house.gov/press/PRArticle.aspx?NewsID=10883 (last visited Mar. 1, 2010) (announcing a hearing to discuss the trade aspects of climate change focused upon methods to reduce carbon leakage and protect U.S. competitiveness). *See also* CHRIS WOLD, DAVID HUNTER & MELISSA POWERS, CLIMATE CHANGE AND THE LAW 445 (2009) (noting that the carbon leakage could be "significant"); Pew Center on Global Climate Change, *Implications for U.S. Companies of Kyoto's Entry into Force without the United States* 4-5 (2002), http://www.pewclimate.org/docUploads/Kyoto-USBusiness.pdf (last visited Mar. 1, 2010) (opining about the potential competitive advantage enjoyed by U.S. companies relative to companies in Kyoto Protocol signatory countries to the extent that economic costs are significant). *But see* WTO/UNEP REPORT (UNITED NATIONS ENVIRONMENT PROGRAMME), Trade and Climate Change vii, xviii (2009) (noting that studies to date illustrate that the cost of compliance with an emission trading scheme is relatively minor when compared to a firm's overall costs, but that such schemes are relatively young and more stringent emissions requirements may change those findings); WOLD, *supra* note 3, at 445 (arguing that the negative effects upon competitiveness are not apparent because pollution abatement costs are generally a small portion of total operating costs and that both businesses and environmentalists argue that regulation will result in relocation, but that only the latter believes the unregulated country will become a "pollution haven").

[4] *See* Byrd-Hagel Senate Resolution, S. Res. 98, 105th Cong. (1997) (expressing that "the United States should not be a signatory to any protocol to, or other agreement regarding, the United Nations Framework Convention on Climate Change of 1992 . . . which . . . (B) would result in serious harm to the economy of the United States").

[5] American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (as passed by House, June 26, 2009). This bill is also referred to by the names of its sponsors, Congressmen Waxman and Markey.

[6] *See* John M. Broder, *Obama Opposes Trade Sanctions in Climate Bill*, N.Y. TIMES, June 29, 2009, at A1 (reporting that President Obama has said that ACES, along with the new automobile mileage standards and stimulus spending on research and home weatherization, represents a change in American energy policy). The bill aims to reduce GHG emissions to eighty-three percent below 2005 levels by 2050. *See* H.R. 2454 *supra* note 5, § 702 (establishing interim levels of three percent below 2005 in 2012 and forty-two percent below 2005 in 2030).

[7] *See* H.R. 2454 *supra* note 5, § 762 (defining carbon leakage as a substantial increase of GHG emission, as determined by the Administrator, in other countries from industrial entities, if the increase is caused by an increased incremental cost of production in the U.S. as a result of implementing this Act); *id.* §§ 763-64 (providing allowance rebates to eligible domestic sectors); *id.* § 768 (establishing the International Reserve Allowance Program).

[8] *See* Broder, *supra* note 6 (noting the legislative activity from Congress is far from certain); MICHAEL DWORSKY, ET AL., STANFORD INST. FOR ECON. POL'Y RES., POL'Y ANALYSIS MEMO: PROFIT IMPACTS OF ALLOWANCE ALLOCATION UNDER THE AMERICAN CLEAN ENERGY AND SECURITY (ACES) ACT 1 (2009), *available at* http://www-siepr.stanford.edu/GoulderSep2009.pdf (stating that if the Senate approves its own proposal that the entire legislature would then vote on a integrated version); Black, *supra* note 1 (noting that the Boxer-Kerry proposal introduced in the Senate on Sept. 20, 2009 aims for a higher initial emissions cut than Waxman-Markey and leaves certain provisions, such as the allocations of emissions, open for discussion). *See also* ALINA SYUNKOVA, NAT'L FOREIGN TRADE COUNCIL, INC., WTO – COMPATIBILITY OF FOUR CATEGORIES OF

U.S. Climate Change Policy (2007), *available at* http://www.nftc.org/default/Trade%20Policy/Climate_Change/Climate%20Change%20Paper.pdf (discussing previous legislative proposals to address climate change). If a parallel bill passes in the Senate, a joint committee must be formed to craft a compromise. *See* H.R. Con. Res. 93, 108th Cong. (2003) (educating the public about how laws are enacted).

[9] General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instrument — Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter GATT]. *See* Broder, *supra* note 6 (noting that the bill contains a provision requiring the President to impose a tariff on goods imported from countries that do not act to limit their global warming emissions and that President Obama thinks such a provision could be "illegal and counterproductive").

[10] *See* Wold, *supra* note 3, at 447 (noting that GATT has been successful in significantly reducing tariffs over the past 60 years); Slayde Hawkins, Note, *Skirting Protectionism: A GHG-Based Trade Restriction under the WTO,* 20 Geo. Int'l Envtl. L. Rev. 427, 430 (2008) (noting that such limitations on trade barriers are in place because they have the potential to negatively affect the world economy).

[11] GATT, *supra* note 9, at arts. I, III. S*ee* Wold, *supra* note 3, at 447-8 (recognizing that Articles I and III also apply under the General Agreement on Trade in Services ("GATS") and Technical Barriers to Trade ("TBT") Agreement).

[12] *See* GATT, *supra* note 9, at art. XX (permitting measures: "(b) necessary to protect human, animal or plant life or health . . . ; [or] (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption . . . "). Such measures must "not [be] applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." *Id.*

[13] *See generally* H.R. 2454 *supra* note 5, § 768 (establishing the international reserve allowance program).

[14] *See* Hawkins, *supra* note 10, at 442 (discussing similar provisions in the Lieberman-Warner bill, S. 2191, 110th Cong. (2007) and concluding that requiring different allowances from different countries for "like" products violates Article I); *see* H.R. 2454 *supra* note 5, § 768(a)(1)(A) (specifying that the Administrator shall issue regulations regarding the details of IRAP); *id.* § 768(b) (establishing that the number of IRAs required for a covered good in an eligible industrial sector shall be adjusted for the benefit conferred by free allowances and the value of emission allowance rebates distributed to eligible domestic sectors).

[15] *See* H.R. 2454 *supra* note 5, § 768(a)(1)(E) (excepting goods that originate in "the least developed of developing countries," countries with de minimus GHG emissions, and countries that are party to a nationally-enforceable international agreement). Because international trade agreements provide different standards for developing countries in other circumstances, the exception for goods originating in "any foreign country that the United Nations has identified as among the least developed of developing countries" may be considered appropriate. *See id.* § 768(a)(1)(E)(ii).

[16] *See* H.R. 2454 *supra* note 5, § 722(b) (establishing the methods of demonstrating compliance for domestic actors); *id.* § 722(d) (listing the rules regarding the use of offset credits, term offset credits, and international emissions allowances); *id.* §§ 728, 737, & 743 (discussing the terms of international emissions allowances, international offset credits and domestic offset credits); *id.* §§ 725, 782 (establishing the allocation, banking, and borrowing of allowances for domestic actors); *id.* § 721(f) (compensatory allowances are permitted, under certain circumstances, for the destruction of fluorinated gases). *See also* Dworsky, *supra* note 8, at 5 (concluding that ACES provides industry with more allowances than needed to maintain profits and that as a result the "most energy-intensive industries are likely to enjoy increased profits"). *Cf.* Matthew Nicely & Valerie Ellis, *The Potential Clash of Climate Change Policy and International Trade Law*, 4 Bus. L. Brief (Am. U) 4, 7 (2007) (noting that importers were largely ineligible for subsidies such as low-cost allowances through early reduction efforts, international and domestic offsets, and sequestration projects in the Low Carbon Economy Act of 2007, S. 1766, 110th Cong. (2007)). *But see* WTO/UNEP Report, *supra* note 3, at xviii (noting that the potential insufficiency of alleviations and exemptions begs the question as to whether measures to protect competitiveness and reduce carbon leakage are necessary).

[17] *See* Nicely & Ellis, *supra* note 16, at 7 (discussing such provisions in the Low Carbon Economy Act of 2007, S. 1766, 110th Cong. (2007) and finding that opportunities for domestic industries to earn allowances at lower prices due to the time of the year, along with additional avenues to earn permits to emit greenhouse gases that are not available to importers, can result in an accusation that the U.S. is treating imported products less favorably than domestic products, because such measures lower costs of production and manufacturing for domestic producers); Wold, *supra* note 3, at 491 (offering that some advocates claim that offsets stifle innovations because permitting compliance via investing in forest conservation is a "low-tech" solution). *See also* Wold, *supra* note 3, at 491 (noting that advocates believe that banking promotes early action by lowering costs). However, banking has the possibility to disrupt emissions trading by: a) limiting innovation; b) decreasing the rates of overall emissions reductions; and c) lowering the value of allowances. *Id.*

[18] WTO/UNEP Report, *supra* note 3, at xviii. Border adjustments, to compensate for internal taxes, are a common measure upon the sale and consumption of goods such as cigarettes or alcohol. *Id.* at xix. *See generally* WTO, Trade and Environment, http://www.wto.org/english/tratop_e/envir_e/envir_e.htm (last visited Mar. 1, 2010).