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U.S. Climate Change Policy v. International Trade Rules: Complying with GATT

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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Endnotes: U.S. Climate Change Policy v. International Trade Rules: Complying with GATT
continued from page 48


2 See Rosenfeld, supra note 27, at 29 (opining that the same reflectivity of roofs may be implemented in automobiles).

3 Canadell, supra note 12, at 1456.


5 See National Geographic, supra note 10 (citing deforestation as a contributing factor to climate change).

6 IPCC, supra note 18, at 33.

7 Id. at 36.


9 Canadell, supra note 13, at 1456.

10 Id.

11 Id.

12 Id.

13 Id. at 1457.
ENDNOTES:  EQUITABLE BUT INEFFECTIVE:  HOW THE PRINCIPLE OF COMMON BUT DIFFERENTIATED RESPONSIBILITIES HOBLES THE GLOBAL FIGHT AGAINST CLIMATE CHANGE continued from page 53


4 See Juliet Eilperin, Developing Nations Plan Emission Cuts, WASH. POST, Dec. 12, 2008, at A10 [hereinafter Eilperin, Developing Nations] (reporting that getting emerging economies like China to limit their GHG emissions is considered crucial to the success of a global climate regime); see also PEW CENTER ON GLOBAL CLIMATE CHANGE AND THE ASIA SOCIETY, COMMON CHALLENGE, COLLABORATIVE RESPONSE: A ROADMAP FOR U.S.-CHINA COOPERATION ON ENERGY AND CLIMATE CHANGE 18 (Jan. 2009) [hereinafter Pew Center Report] (emphasizing that China, along with the United States, must actively work to reduce GHG emissions in order to solve the global climate change problem).

5 Barbara Finamore, China’s Recent Steps Towards Meeting Its Climate Commitments, Mar. 5, 2010, http://switchboard.nrdc.org/blogs/bfinamore/china_pushesAhead.html (last visited Mar. 18, 2010) (reporting from a post-Copenhagen round-up conference in Beijing that China views Copenhagen as representing an unprecedented common political effort on a global scale to address climate change and expressing optimism that “China is not sitting still when it comes to addressing climate change”).

6 United Nations Framework Convention on Climate Change Conference of the Parties, Copenhagen Accord (advance unedited version) at 3 (Dec. 18, 2009) [hereinafter Copenhagen Accord] available at http://unfccc.int/files/meetings/cop_15/application/pdf/cop15_cph_auv.pdf (agreeing that Non-Annex I Parties like China will report their mitigation actions, and these reports “will be subject to international measurement, reporting and verification”).