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International Trade Law and the "Carbon Leakage" Problem:

Are Unilateral U.S. Import Restrictions the Solution?

*by Bernd G. Janzen**

Introduction

At the December 2007 United Nations Climate Change Conference in Bali, Indonesia, negotiators overcame tremendous differences to agree on a "Bali Roadmap" process intended to determine a successor to the Kyoto Protocol to the United Nations Framework Convention on Climate Change ("UNFCCC"),[1] whose current commitments to reduce global greenhouse gas ("GHG") emissions expire in 2012.[2] While the United States rejected the Kyoto Protocol,[3] there appear to be decent prospects that it will join its post-2012 successor.[4]

Among other ambitious goals, the Bali Roadmap process, through the "Bali Action Plan" agreement, calls for the development of both national and international measures to mitigate climate change, based on a "shared vision for long-term cooperative action."[5] However, reflecting a deep rift between developed and developing countries, the Bali Action Plan prescribes "common but differentiated responsibilities"[6] in which developed countries commit to quantified and verifiable GHG emission reductions, but developing countries are only required to contribute "appropriate mitigation actions . . . in the context of sustainable development."[7] In short, under the Bali Roadmap, only developed countries must actually reduce GHG emissions.

This core doctrine of "common but differentiated responsibilities" in the Bali Roadmap may have been politically indispensable to reaching agreement in Bali, but it has substantial complicating implications for international trade in goods and the competitiveness of U.S. industries. The problem, in a phrase, is "carbon leakage."[8] If developed economies like the United States and EU impose higher costs on carbon dioxide ("CO_2") and other GHG emissions (the economic consequence of setting and tightening caps on such emissions) than do developing countries, one result will be an incentive to shift GHG-intensive manufacturing from the former to the latter. This could lead to the reduction of such production in developed countries and an increase in exports of GHG-intensive goods from developing to developed countries.[9] In the context of China's massive and growing trade surpluses and its emergence as the world's largest emitter of CO_2,[10] lawmakers in the United States and other developed countries face a tricky challenge—how to proceed with the urgent task of imposing meaningful national curbs on GHG emissions while ensuring that domestic industries are not disadvantaged by imports produced pursuant to less onerous emissions requirements.

In the United States, unilateral trade restrictions appear to be emerging as a mechanism of choice as Congress evaluates its options for legislating a solution to the carbon leakage problem.

In the United States, unilateral trade restrictions appear to be emerging as a mechanism of choice as Congress evaluates its options for legislating a solution to the carbon leakage problem. However, it is far from clear if the trade restrictions under consideration comply or conflict with current global trading rules under the World Trade Organization ("WTO"). Such restrictions also do not appear to mesh well with U.S. trade policy, which generally favors trade liberalization. Unilaterally imposed national trade restrictions would also, at first blush, appear inconsistent with the goal established in the Bali Action Plan of a globally coordinated approach to the reduction of greenhouse gas emissions. This Article examines the most visible proposed legislative solution to carbon leakage currently under consideration in the United States in light of WTO rules, U.S. trade policy, and the multilateral goals espoused in the Bali Action Plan. This Article also proposes that current U.S. trade remedy laws provide a useful analogy for understanding and addressing the concerns of domestic manufacturing industries as they grapple with the carbon leakage problem.

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Regulating U.S. Imports to Ensure Fair Competition

Of the various recent legislative proposals that would reduce U.S. emissions of GHGs, the most prominent is the America's Climate Security Act of 2007 ("ACSA"), introduced by Senators Joe Lieberman (D-CT) and John Warner (R-VA) on October 18, 2007.[11] ACSA would establish a national emissions cap on six GHGs, including CO_2, which would decline from 2012 through 2050,[12] and would institute mechanisms to allocate emissions allowances to a range of covered U.S. GHG-emitting industries.[13] Senators Lieberman and Warner introduced ACSA in the Senate two months prior to the release of the Bali Action Plan, and the ACSA is not expressly tied to that multilateral process. However, both measures are a clear reflection of the strong political will in the United States and in many other countries to move quickly and in a globally coordinated fashion to reduce GHG emissions and stave off the worst expected effects of climate change.

Recognizing the adverse competitive effects that could result to U.S. manufacturing industries competing against foreign industries not subject to such measures—i.e., the carbon leakage problem—ACSA would require the Administration to urge other countries to adopt comparable measures to reduce GHG emissions.[14] Otherwise, U.S. industries would have systemically higher compliance costs than their foreign competitors—and such an imbalance would only increase over time as U.S. emissions caps decline. But also recognizing that a globally coordinated approach to reducing GHG emissions may or may not occur, ACSA would, as of 2020, require importers of GHG-intensive products to declare to U.S. Customs and Border Protection ("CBP") either that: (1) the imported goods are covered by special international allowances created under ACSA,[15] or (2) the exporting country is one deemed under ACSA to have taken measures to reduce GHG emissions comparable to those taken by the United States.[16] The import provisions expressly cover GHG-intensive manufactured goods such as iron, steel, aluminum, cement, bulk glass, and paper, and would extend to any manufacturing production process that generates GHG emissions "comparable" to the expressly covered products.[17] Thus, ACSA has the obvious potential to impose very substantial compliance costs on U.S. importers of a wide range of manufactured goods, and seems certain to alter the competitive balance between U.S. and foreign firms supplying ACSA-covered goods to the U.S. market. While these added import compliance costs (in essence, constituting a trade restriction) would be justified from the U.S. perspective as attempting to restore the competitive balance of U.S. industries harmed by imports from countries with less stringent emissions restrictions, it seems unlikely that U.S. trading partners would willingly accept such unilateral import restrictions.

ACSA's import restrictions are not the only type of mechanism under consideration as the U.S. Congress examines how to address competitive disadvantages to U.S. industries resulting from the carbon leakage problem. The U.S. House of Representatives Committee on Energy and Commerce identified two other possible mechanisms to address the competitiveness concerns for U.S. industry associated with carbon leakage in a widely cited January 2008 White Paper.[18] One is the adoption of carbon intensity standards for energy-intensive products, which would apply to all such products sold in the United States regardless of their origin.[19] Fees would presumably be imposed on products that do not meet those carbon intensity standards, to compel the sale in the United States of only those products that do meet those standards.[20] The American Iron and Steel Institute and the Steel Manufacturers Association are major proponents of carbon intensity standards, and have criticized the proposed ACSA import mechanism for, among other things, encouraging foreign governments to provide subsidies to their exporters to the United States of greenhouse gas-intensive goods.[21]

The EU is also contemplating unilateral trade measures that could restrict imports as part of its ambitious drive to reduce carbon emissions across a wide range of industries by twenty percent by 2020.

The third possible option for addressing carbon leakage identified in the White Paper would make foreign countries' access to U.S. carbon markets contingent on their imposition of GHG emissions restrictions comparable to those adopted in the United States.[22] Such incentives could take several forms, such as more generous terms of access for countries that agree more quickly to emissions caps comparable to those imposed in the United States.[23] However, import restrictions along the lines of those proposed by ACSA, while contentious, are generally seen at this point as having the best chances of passage in the U.S. Congress.

The EU is also contemplating unilateral trade measures that could restrict imports as part of its ambitious drive to reduce carbon emissions across a wide range of industries by twenty percent by 2020.[24] While no such import measure is currently in effect, EU leaders such as French President Nicolas Sarkozy and European Commission President Jose Manuel Barroso have

repeatedly referred to the possibility of imposing a carbon tax or allowance requirement (similar to the scheme contemplated by ACSA) on imports from countries not in compliance with Kyoto Protocol emission reduction requirements (i.e., the United States).[25] These suggestions have drawn strong criticism from U.S. trade officials, who warn that such proposals could facilitate WTO-inconsistent trade protectionism under the guise of environmental protection.[26]

Notably, the recent proposed directives of the European Commission that form the centerpiece of the ambitious EU climate change package do not, with certain limited exceptions, impose restrictions on imports.[27] However, the economic burden of the carbon leakage problem is potentially just as acute for EU industries as it is for U.S. industries. It therefore seems inevitable that the EU will eventually need to contemplate some scheme akin to the ACSA import restrictions to address the competitiveness concerns of its carbon-intensive industries as emissions restrictions begin to increase production costs. Indeed, European steelmakers recently threatened to delay expansion plans in Europe pending EU adoption of appropriate measures to account for the competitive impact of carbon-intensive imports.[28]

Testing ACSA's Import Provisions Under the WTO and U.S. Trade Policy

The trade provisions of ACSA clearly raise the question of U.S. compliance with obligations under the WTO. The question of WTO compliance has been at the forefront of Congress' consideration of ACSA's import measures.[29] The debate potentially implicates many aspects of the WTO Agreements, but centers around two core concepts: (1) the "national treatment" principle of Article III of the General Agreement on Tariffs and Trade ("GATT"), which, in essence, obligates WTO Members to ensure that imported goods are subjected to regulatory and tax treatment no more burdensome than the treatment to which the same goods, produced domestically, are subjected;[30] and (2) the GATT Article XX defense, which allows WTO Members to take discriminatory action against imports where "necessary to protect human, animal or plant life or health"—but *only* where such action does not constitute "arbitrary or unjustifiable discrimination" [31] or represent a disguised trade restriction.[32] GATT Article XX, the plain language of which does not seem to perfectly capture the concerns surrounding GHG emissions, is as close as the WTO Agreements come to permitting trade restrictions based on climate change mitigation.[33] It remains unclear—and the source of considerable concern—whether U.S. laws such as ACSA would be vulnerable to attack from WTO Members alleging that ACSA discriminates against their exports to the United States, but that it does not meet the narrow GATT Article XX tests permitting such trade discrimination.[34]

In the most recent relevant case, involving a Brazilian ban on imports of retreaded tires, the WTO Appellate Body found that, while Brazil's import ban constituted a permissible means of protecting human health, the fact that Brazil also permitted imports of retreaded tires from neighboring MERCOSUR countries resulted in trade discrimination not rationally connected to the human health objective of the import ban.[35] Because of this absence of a rational connection between the objective of the import ban and the manner in which it was applied, the import ban did not satisfy the narrow GATT Article XX test. This most recent WTO decision—in particular the rational connection test applied by the WTO Appellate Body—provides an important roadmap for U.S. lawmakers crafting climate change legislation, but by no means answers whether ACSA or other such legislation, once implemented, would pass the GATT Article XX test if challenged. As noted in the congressional White Paper discussed above, "while Congress has control over which trade-related measure to include in a climate bill, the determination of such a provision's legitimacy under WTO rules is out of U.S. hands."[36]

The retaliation issue matters, because a loss at the WTO could mean the conferral on U.S. trading partners of substantial retaliation rights. Previously stung by WTO losses providing substantial retaliation rights to the complaining WTO Members,[37] U.S. law- and policy-makers are justifiably nervous about the possible outcome of a WTO challenge to ACSA's import provisions.

ACSA's import measures also are likely to re-activate the longstanding debate about whether the WTO Agreements prohibit or allow trade regulation based on so-called processes and production methods ("PPMs"). The basic terms of the debate can be summarized in the following question: May WTO Members regulate imports based on the way a good is made (i.e., PPMs), or must WTO Members base such regulation on the physical attributes of the good in the condition as imported? It is easy to see why some might characterize ACSA's import provisions as PPMs, as their application arguably hinges on the "emissions footprint" of the imported good, rather than its physical characteristics at the time the good crosses the border.

The WTO jurisprudence to date does not provide a definitive answer on the WTO-consistency of PPMs, and WTO experts are divided on the question. One recent commentator assembled a long list of statements supporting the view that PPMs can never (or almost never) be justified under WTO rules, and then proceeded to "debunk the myth of illegality."[38] The most commonly cited standards in WTO case law for analyzing PPMs are in the multiple decisions in the *Shrimp-Turtle Case,* in which India, Malaysia, Pakistan, and Thailand challenged a U.S. ban on the importation of shrimp caught in a manner that adversely affected threatened sea turtles. These complaining WTO Members alleged, *inter alia,* that the ban violated the U.S. obligation under the WTO to ensure non-discriminatory treatment of imports from these countries.[39] The U.S. defense turned on the application of GATT Article XX, described above.

One aspect of the WTO Appellate Body's ultimate decision in the *Shrimp-Turtle Case* could be central to any future case challenging ACSA's import provisions as WTO-inconsistent PPMs. In upholding a modified version of the U.S. import ban as consistent with GATT Article XX, the WTO Appellate Body concluded that a WTO Member can show that an import restriction does not constitute "arbitrary or unjustifiable discrimination" for purposes of GATT Article XX if that WTO Member

attempts to negotiate an international agreement ensuring equal treatment of all affected trading partners. As the WTO Appellate Body explained, the key is not whether such an agreement is actually reached, but whether the WTO Member asserting a GATT Article XX defense has made a "serious, good faith effort" to reach such agreement.[40]

Given the ongoing interplay of U.S. legislative efforts to impose a national scheme to limit GHG emissions and the international UNFCCC process, it is too soon to say if the United States would be able to rely on the "international negotiation" defense of the *Shrimp-Turtle Case*. Notably, ACSA section 6003 would require the United States to engage in international negotiations with the objective of coordinating global GHG emissions reductions in a manner consistent with the goals of ACSA. However, at this point we can only speculate if ACSA will even be enacted into law.

The Bush Administration also expressed concern that import restrictions like those proposed in ACSA pose trade policy problems beyond possible inconsistency with U.S. WTO obligations. As recently expressed by U.S. Trade Representative Susan C. Schwab, unilateral U.S. trade restrictions designed to compel reductions in foreign emissions of GHGs are "a blunt and imprecise instrument of fear" that could poison commercial relations and trigger retaliatory measures by U.S. trading partners.[41] Such mirror actions could quickly harm U.S. exports, and could take years to resolve if challenged at the WTO.[42]

Rather, the consistent message from U.S. Trade Representative Schwab has been that, instead of crafting import restrictions that will somehow ensure a competitive, level playing field as countries commit to GHG reductions, the priority of the United States should be to harness trade liberalization to enhance the global distribution of goods and services that contribute to climate change mitigation. At the core of this effort are the ongoing WTO negotiations toward an Agreement on Trade in Environmental Goods and Services ("EGSA").[43] The mandate for these negotiations, set out in the 2001 WTO Doha Declaration,[44] is the "reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services."[45] When originally conceived, this mandate did not expressly include climate change. Nor did the mandate provide any guidance on what goods and services should be deemed "environmental." But the United States and many other WTO Members now view a multilateral EGSA as an important tool in combating climate change, and state that this effort complements the UNFCCC process. As recently explained by U.S. Trade Representative Schwab, the current framework for such an agreement, as jointly proposed by the United States and the EU, would increase global trade in climate-friendly technologies (such as wind turbines and photovoltaic solar panels) by as much as fourteen percent, thereby contributing significantly to global reductions in greenhouse gas emissions.[46]

As of this writing, the Administration and Congress appear to be headed for a show-down this year on ACSA's import provisions. As a practical matter, the debate seems likely to carry forward into a new Congress and Administration in 2009.

ACSA and U.S. Trade Remedy Law

Notwithstanding the possibility of claims that ACSA's carbon leakage provisions may violate U.S. WTO obligations and send signals to U.S. trading partners inconsistent with current U.S. trade policy, the carbon leakage provisions may also be viewed as consistent in spirit with long-accepted norms under U.S. trade remedy laws.

Like many WTO Members, the United States maintains antidumping and countervailing duty laws that permit domestic industries to petition the government (or allow the government on its own initiative) to impose import duties to redress injurious import practices. Under the U.S. antidumping law, the U.S. Department of Commerce ("DOC") may order CBP to impose on imports antidumping duties in an amount equivalent to the difference between the actual import values, as adjusted under the statute, and their deemed "fair value."[47] Similarly, under the U.S. countervailing duty law, DOC may impose duties to offset subsidies provided by foreign governments to the extent they confer an unfair benefit on imports and certain other conditions are satisfied.[48] These laws are expressly permitted by WTO rules,[49] and are widely seen as a necessary escape clause from the presumption of trade liberalization that permitted the WTO Agreements to be reached in the first place.[50]

The trade-restrictive provisions of ACSA may be seen as expanding the universe of import practices that should be deemed "unfair" under U.S. law. As noted, international trade law, as reflected in both U.S. domestic law and the WTO system, recognizes that import pricing below certain levels (whether due to "dumping" by foreign exporters or subsidies provided by foreign governments) is a form of unfair trade that, when causing harm to domestic industries, may be redressed through import duties. This notion of unfair trade is based purely on how an imported product is *priced*. ACSA would arguably expand this accepted notion of unfair trade to take into account how imported products are *made*—specifically, the volume and nature of the GHGs associated with their manufacture. ACSA would, in essence, dictate that the price of U.S. imports reflects the externalized environmental costs of GHG emissions. Just as the U.S. antidumping law provides a remedy to domestic manufacturers that must compete against unfairly low-priced, or "dumped," imports, ACSA would provide a remedy to domestic manufacturers that must compete against imports that were manufactured under less stringent GHG emissions standards—in other words, a remedy against a newly recognized form of environmental dumping.

However, unlike the U.S. antidumping and countervailing duty laws—which cover approximately one percent of the total value of U.S. imports—ACSA could potentially apply to a very substantial percentage of U.S. imports. As explained above, "covered goods" under ACSA include iron, steel, aluminum, cement, bulk glass, and paper, as well as many other unspecified manufactured goods accounting for "comparable" levels of greenhouse gas emissions.[51] Thus, ACSA (or any comparable legislation to equalize the climate change impact of imports with domestically produced goods) could represent a major expan-

sion of the concept of "unfair trade." Still, the core concept of ACSA's trade provisions are analogous to U.S. trade remedy law in that their purpose is to equalize the competitive impact of imports with the same types of goods produced domestically through recognition of an "unfair" advantage conferred on the imports.

Conclusion

The political will to sharply reduce GHG emissions—at least in the United States and the EU—seems to be strong and intensifying. The major U.S. presidential candidates all support the implementation of a national cap-and-trade system to reduce greenhouse gases, and all support U.S. participation in the UNFCCC process. Senator Baucus has spoken of "the moral imperative to deal with climate change."[52] Further, the introduction of ACSA by Senators Lieberman and Warner signals a bipartisan consensus for ambitious action on climate change.

However, the "carbon leakage" problem that ACSA's trade provisions attempt to address—a critical component of the bill from the perspective of U.S. GHG-emitting manufacturing industries—may also constitute a major hurdle to ACSA's enactment into law. For one, there seems to be significant risk that ACSA's trade provisions, if enacted, could trigger WTO complaints against the United States and, potentially, retaliatory action to the detriment of U.S. exporters. This risk is one reason the current Administration is wary of proposals to penalize importers of GHG-intensive goods, and is instead promoting other mechanisms, such as a multilateral EGSA, that would rely upon trade liberalization, rather than trade restriction, to combat climate change. However, these objections to ACSA's trade provisions cannot be expected to lessen the concerns of U.S. GHG-intensive manufacturing industries which, absent such provisions, would likely face declining competitiveness vis-à-vis their foreign rivals not subject to GHG emissions restrictions of the same magnitude as imposed in the United States. These U.S. industries can be expected to press for equalizing measures, akin to the trade remedy laws, to ensure "fair" competition with imported goods manufactured under less stringent GHG emissions standards.

The controversy surrounding ACSA's trade provisions also underscores the imbalance between U.S. domestic and multilateral efforts to reduce GHG emissions. GHG emissions and climate change are a problem of the "global commons," and therefore require a globally coordinated approach as embodied in the UNFCCC process and Bali Roadmap. Yet, as explained above, the Bali Action Plan does not expressly commit developing countries to undertake reduction in GHG emissions. In the face of this asymmetry of commitments between developed and developing countries, it is reasonable to expect the United States (and the EU) to explore domestic laws and other mechanisms that would unilaterally attempt to compel countries with less stringent GHG emissions standards to tighten them. That is what ACSA seeks to do—first through a mandate for the Executive Branch to negotiate a global agreement to reduce GHG emissions in a coordinated fashion, and second, through import requirements that would redress any competitive imbalance experienced by foreign manufacturing industries exporting to the United States.

It remains unclear how much of the burden developing countries will accept as the Bali Roadmap process produces a successor to the Kyoto Protocol (if it does). But it is clear that, the less they do, the greater will be the pressure on U.S. and EU lawmakers to ensure, through unilateral trade measures like ACSA's import provisions, that their industries are protected from imports produced under less costly emissions standards. Political realism suggests that trade mechanisms will be tools of choice in this effort—whether or not they are found to comply with current WTO rules, the Administration's trade policy preferences, or the "shared vision" principles espoused in the Bali Action Plan.

Endnotes: International Trade Law

[1] As set forth in Article 2 of the UNFCCC, its purpose is:

> [S]tabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.

United Nations Framework Convention on Climate Change art. 2, Mar. 21, 1994, *available at* http://unfccc.int/resource/docs/convkp/conveng.pdf (last visited Mar. 11, 2008). The United States signed the UNFCCC on June 12, 1992, and ratified it on October 15, 1992. United Nations, United Nations Framework Convention on Climate Change Status of Ratification website, http://unfccc.int/files/essential_background/convention/status_of_ratification/application/pdf/unfccc_conv_rat.pdf (last visited Mar. 11, 2008). The UNFCCC entered into force with respect to the United States on March 21, 1994, and currently has 192 signatories. *Id.*

The 1997 Kyoto Protocol expanded on the UNFCCC by obligating developed country signatories to stabilize greenhouse gas emissions, and entered into force on February 16, 2005. *See* United Nations, Kyoto Protocol website, http://unfccc.int/kyoto_protocol/items/2830.php (last visited Mar. 14, 2008).

[2] The principal document memorializing the "Bali Roadmap" process is the Bali Action Plan. United Nations, Bali Action Plan (Decision -/CP.13), http://unfccc.int/meetings/cop_13/items/4049.php (last visited Mar. 1, 2008).

[3] The United States signed the Kyoto Protocol, but never ratified it for domestic political reasons—in large part because the Kyoto Protocol exempted developing countries from the same emissions reduction obligations as developing countries. *See* Susan R. Fletcher & Larry Parker, Cong. Research Serv., CRS Report: Climate Change: The Kyoto Protocol and International Actions at CRS-2 (Updated June 8, 2007), *available at* http://www.nationalaglawcenter.org/assets/crs/RL33826.pdf (last visited Mar. 11, 2008).

Endnotes: International Trade Law
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[4] At the conclusion of the Bali Conference, the White House expressed cautious support for the Bali Roadmap, noting that it might lead to a "global consensus" on reductions in greenhouse gas emissions provided that certain "serious concerns" could be adequately addressed. These concerns include the importance of recognition that "the problem of climate change cannot be adequately addressed through commitments for emissions cuts by developed countries alone." Press Release, White House Office of the Press Secretary, Statement by the Press Secretary (Dec. 15, 2007), *available at* http://www.whitehouse.gov/news/releases/2007/12/20071215-1.html (last visited Mar. 11, 2008). The three major U.S. presidential candidates all support U.S. participation in a post-Kyoto Protocol global agreement on greenhouse gas emissions reductions.

[5] Bali Action Plan, *supra* note 2, para. 1(a).

[6] Bali Action Plan, *supra* note 2, para. 1(a).

[7] Bali Action Plan, *supra* note 2, para. 1(b)(ii).

[8] Richard Black, BBC News, Trade Can 'Export' CO_2 Emissions (Dec. 19, 2005), *available at* http://news.bbc.co.uk/2/hi/science/nature/4542104.stm (last visited Mar. 11, 2008) (internal quotation marks omitted).

[9] The carbon leakage problem is exacerbated by the tendency to shift production of greenhouse gas-intensive goods to countries where production is less efficient and therefore consumes more energy, leading to even higher greenhouse gas emissions than would otherwise be the case. Black, *id.*

[10] *See* Joe MacDonald, Associated Press, *China's Trade Surplus Surges to Record* (Jan. 11, 2008), *available at* http://abcnews.go.com/Business/wireStory?id=4118619 (last visited Mar. 11, 2008). For recent information concerning China's carbon emissions, *see, e.g.*, World Resources Institute, EarthTrends Environmental Information, December 2008 Monthly Update: China's Future in an Energy Constrained World, *available at* http://earthtrends.wri.org/updates/node/274 (last visited Mar. 11, 2008).

[11] America's Climate Security Act, S. 2191, 110th Cong. 1st Sess. (2007). Supporters of ACSA are currently working to secure sixty votes in the Senate—the number required to overcome an expected filibuster of the bill. *See* Posting of Joseph Romm to Climate Progress website, http://climateprogress.org/2007/12/06/lieberman-warner-survives-committee/ (last visited Mar. 13, 2008) (Dec. 6, 2007, 11:54 EST).

[12] *See generally* ACSA, S. 2191, § 1201, 110th Cong. 1st Sess. (2007).

[13] *See generally* ACSA, *id*. §§ 3101-3904.

[14] *See* ACSA, *id*. § 6003.

[15] ACSA, *id*. § 6006(c)(2)(A). The allowances at issue would be generated pursuant to an International Reserve Allowance Program ("IRAP") as prescribed in ACSA section 6006(a)-(d). The IRAP would operate separately from, but parallel to, the Emission Allowance Account Program established for domestic industries under ACSA section 1201. Importantly, under ACSA section 6006, the international allowances that would be made available for sale to U.S. importers would not be permitted to be sold at prices exceeding the value of domestic allowances covering the same period.

[16] ACSA, S. 2191, § 6006(c)(2)(B), 110th Cong. 1st Sess. (2007). ACSA defines "comparable action" at section 6001(2).

[17] *See* ACSA, *id*. §§ 6001(5) (defining "Covered Good"), 6001(10) (defining "Primary Product").

[18] U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON ENERGY AND COMMERCE, CLIMATE CHANGE LEGISLATION DESIGN WHITE PAPER: COMPETITIVENESS CONCERNS/ENGAGING DEVELOPING COUNTRIES (2008), *available at* http://energycommerce.house.gov/Climate_Change/White_Paper.Competitiveness.013108.pdf (last visited Mar. 11, 2008) [hereinafter CLIMATE CHANGE WHITE PAPER].

[19] CLIMATE CHANGE WHITE PAPER, *id*. at 10-11.

[20] CLIMATE CHANGE WHITE PAPER, *id*.

[21] *Climate Change: Competitiveness Concerns and Prospects for Engaging Developing Countries, Hearing on S. 2191 Before the H. Energy & Air Quality Sub Comm.*, Energy & Commerce Comm., 110th Cong. 13 (2008) (written testimony of Jim Slattery, Partner, Wiley Rein LLP, counsel to Nucor Corp., appearing on behalf of the American Iron and Steel Institute and the Steel Manufacturers Association), *available at* http://www.steel.org/AM/Template.cfm?Section=Climate_Change_Focus&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=23019 (last visited Mar. 11, 2008). Mr. Slattery also explained why, from the perspective of the U.S. steel industry, producers in developing and developed countries should be subject to the same greenhouse gas emissions standards:

> The major steel producers in 'developing' countries like China, India, and Brazil are among the largest—and in many cases the newest—in the world. They have the same access to capital, to markets, and to technology that the U.S. steel industry has. They should be subject to the same requirements regarding greenhouse gas emissions that we are, instead of being handed a windfall that will increase global greenhouse gas emissions.

Id. at 14-15.

[22] CLIMATE CHANGE WHITE PAPER, *supra* note 18, at 11-12.

[23] CLIMATE CHANGE WHITE PAPER, *supra* note 18, at 11-12.

[24] *See generally*, Commission of the European Communities, Proposal for a Decision of the European Parliament and of the Council on the Effort of Member States to Reduce their Greenhouse Gas Emissions to Meet the Community's Greenhouse Gas Emission Reduction Commitments up to 2020 (2008/0014 (COD)) (Jan. 23, 2008), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0017:FIN:EN:PDF (last visited Mar. 11, 2008).

[25] *See generally* EUActiv.com, *Commissions weighing up options on CO_2 border tax* (Feb. 27, 2008), *available at* http://www.euractiv.com/en/climate-change (last visited Mar. 19, 2008).

[26] *See* Susan C. Schwab, U.S. Trade Representative, Remarks to the U.S. Chamber of Commerce (Jan. 17, 2008), *available at* http://www.uschamber.com/press/speeches/2008/080117_schwab.htm (last visited Mar. 11, 2008).

[27] *See* Commission of the European Communities, Proposal for a Directive of the European Parliament and of the Council on the Promotion of the Use of Energy from Renewable Sources (2008/0016 (COD)) (Jan. 23, 2008), *available at* http://ec.europa.eu/energy/climate_actions/doc/2008_res_directive_en.pdf (last visited Mar. 11, 2008) [hereinafter Proposed Directive]. The Proposed Directive would indirectly restrict imports into the EU of certain biofuels by dictating that the only biofuels that may be taken into account in calculating compliance with EU renewable energy and emissions reductions targets are those that represent greenhouse gas emissions savings of "at least 35 [percent]," as compared to fossil fuels. Proposed Directive, *id*. art. 15, para. 2.

[28] Bruce Stokes, *Going Green in Trade Policy*, NAT'L J., Feb. 9, 2008, at 55.

[29] *See* Climate Change White Paper, *supra* note 18, at 3.

[30] General Agreement on Tariffs and Trade, art. III.2, Apr. 15, 1994, 33 I.L.M. 1153 [hereinafter GATT].

[31] GATT, *supra* note 30, art. XX.

[32] Articles III and XX of the GATT are part of the original GATT agreement reached in 1947. The WTO Agreements, which entered into effect in 1995, incorporate the 1947 GATT agreement.

[33] The ongoing WTO Doha Round negotiations may culminate in substantial revisions to the current WTO Agreements. However, with the exception of the negotiations toward a possible Agreement on Trade in Environmental Goods and Services, discussed below, the Doha Round negotiations are unlikely to lead to any new agreement that would clarify the operation of GATT III and XX as to import restrictions linked to efforts to reduce greenhouse gas emissions. At any rate, it remains unclear whether the Doha Round will result in *any* revisions to the WTO Agreements currently in effect.

[34] WTO Members could conceivably attack ACSA's import restrictions on other WTO grounds. For example, a complaining WTO Member might allege that ACSA's import provisions are inconsistent with GATT Article II, which does not permit WTO Members to impose "duties or charges of any kind imposed on or in connection with the importation in excess of" bound tariff rates. GATT art. II.1(b).

[35] Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (Dec. 3, 2007), *available at* http://docsonline.wto.org/DDFDocuments/t/WT/DS/332ABR.doc (last visited Mar. 12, 2008).

[36] Climate Change White Paper, *supra* note 18, at 13.

[37] A particularly well-known example is the retaliatory measures against the United States approved under the WTO dispute settlement process in the case of *United States – Tax Treatment for "Foreign Sales Corporations."* In that case, an arbitrator convened under Article 22.6 of the DSU determined that the European Communities could impose "countermeasures" against the United States in the form of a hundred percent *ad valorem* duties amounting to over $4 billion per year. *See, e.g.,* Decision by the Arbitrator, *United States – Tax Treatment for "Foreign Sales Corporations,"* WT/DS108/ARB (Aug. 30, 2002), *available at* http://docsonline.wto.org/DDFDocuments/t/WT/DS/108ARB.doc (last visited Mar. 12, 2008).

[38] *See* Steve Charnovitz, *The Law of Environmental 'PPMs' in the WTO: Debunking the Myth of Illegality, in* WTO Jurisprudence and Policy: Practitioners' Perspectives 717 (Cameron May ed., 2004).

[39] *See* Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* WT/DS58/R (May 15, 1998), *available at* http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm#r58 (last visited Mar. 12, 2008); Appellate Body Report, WT/DS58/R (Oct. 12, 1998), *available at* http://www.wto.org/english/tratop_e/dispu_e/58abr.pdf (last visited Mar. 12, 2008); Panel Report, WT/DS58/R (June 15, 2001), *available at* http://www.wto.org/english/tratop_e/dispu_e/58rw_e.pdf (last visited Mar. 12, 2008); Appellate Body Report (Recourse to Article 21.5 of the DSU by Malaysia) (Oct. 22, 2001), *available at* http://www.wto.org/english/tratop_e/dispu_e/58abrw_e.pdf (last visited Mar. 12, 2008) [hereinafter *October 2001 Appellate Body Report*].

[40] *See October 2001 Appellate Body Report, id.* paras. 122-24.

[41] Letter from Susan C. Schwab, U.S. Trade Representative, to Rep. Joseph L. Barton, Ranking Member, U.S. House of Representatives Committee on Energy and Commerce at 1-2 (Mar. 4, 2008), *available at* http://republicans.energycommerce.house.gov/Media/File/News/030408_Schwab_Letter_toBarton.pdf (last visited Mar. 14, 2008) [hereinafter Schwab Letter].

[42] Schwab Letter *id*. at 2.

[43] *See, e.g.*, Press Release, Office of the U.S. Trade Representative, USTR Schwab to Announce New Climate Initiatives for WTO, Including a New Environmental Goods and Services Agreement (EGSA) (Nov. 30, 2007), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2007/November/USTR_Schwab_to_Announce_New_Climate_Initiatives_for_WTO,_Including_a_New_Environmental_Goods_Services_Agreement_(EGSA).html (last visited Mar. 14, 2008).

[44] World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002), *available at* http://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_e.pdf (last visited Mar. 14, 2008) [hereinafter WTO Declaration].

[45] WTO Declaration, *id*. para. 31(iii).

[46] Schwab Letter, *supra* note 41, at 1.

[47] *See* Tariff Act of 1930, Title VII, Subtitle B, 46 Stat. 741 (1930) (current version at 19 U.S.C. §§ 1673-1673h (2000) ("Imposition of Antidumping Duties")).

[48] *See* Tariff Act, *id*. Title VII, Subtitle A, 46 Stat. 741 (current version at 19 U.S.C. §§ 1671-1671h (2000) ("Imposition of Countervailing Duties")).

[49] *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Multilateral Agreements on Trade in Goods, 33 I.L.M. 1140 (1994), *available at* http://www.wto.org/english/docs_e/legal_e/19-adp.pdf (last visited Mar. 14, 2008); Agreement on Subsidies and Countervailing Measures, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Multilateral Agreements on Trade in Goods, 33 I.L.M. 1140 (1994), *available at* http://www.wto.org/english/docs_e/legal_e/24-scm.pdf (last visited Mar. 14, 2008).

[50] *See, e.g.*, Ronald A. Wirtz, *Anti-Dumping: The Free-Trade Antacid,* The Region (Federal Reserve Bank of Minneapolis), *available at* http://www.minneapolisfed.org/pubs/region/01-12/wirtz.cfm (last visited Mar. 14, 2008).

[51] *See* ASCA, *supra* note 11, § 6001.

[52] Press Release, U.S. Senator Max Baucus, Baucus Takes Strong Stance on Global Warming (Oct. 24, 2007), *available at* http://baucus.senate.gov/newsroom/details.cfm?id=286038 (last visited Mar. 14, 2008).