THE WTO IMPLICATIONS OF TITLE VI OF AMERICA'S CLIMATE SECURITY ACT, S. 2191

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WTO IMPLICATIONS OF LIEBERMAN-WARNER CLIMATE CHANGE LEGISLATION (S. 2191)

Introduction[1]

Any effort to control greenhouse gases (GHGs) must confront the issue of how to address the problem known as "leakage"—the risk that tighter regulation of GHGs within one's own borders will place domestic industry at a competitive disadvantage, driving production—and GHG emissions—to other jurisdictions where GHG regulation is less stringent or nonexistent, and therefore the costs of production are lower.[2] While the regulation of any pollutant may present a potential leakage problem, the issue is especially significant in the case of GHGs because the emission of GHGs in any one location has global impacts (unlike, say, mercury, whose impacts are more localized). Consequently, any country (or state) that chooses to regulate GHG emissions will enjoy limited benefits in the absence of global reductions.

One way to reduce leakage is to impose a cost on imports to equalize the competitive disadvantage of regulating carbon emissions. This approach is adopted in America's Climate Security Act of 2008 (), co-sponsored by Senators Joseph Lieberman (I-Conn.) and John Warner (R-Va.) (the "Bill" or "S. 2191"), which is the first climate change bill to be reported favorably out of the Senate Committee on Environment and Public Works (on December 5, 2007)[3] and has been endorsed by some environmental groups.[4] Title VI of the Bill would require U.S. importers

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[1] The primary authors of this report are Barry S. Neuman, Judith Wallace and Audley Foster.

[2] The legislation discussed in this paper refers to leakage as flaws in offset or sequestration projects, which is not how this term is typically used. *Compare* § 4(7) of S. 2191 *with* Joost Pauwelyn, Nicholas Institute For Environmental Policy Solutions, Duke University, *U.S. Federal Climate Policy And Competitiveness Concerns: The Limits And Options Of International Trade Law*, NI WP 07-02 (Apr. 2007) at 4, *available at* http://www.nicholas.duke.edu/institute/internationaltradelaw.pdf.

[3] Pew Center for Global Climate Change, *Status of Senate Bill 2191The Lieberman-Warner Climate Security Act*, *available at* http://www.pewclimate.org (last visited Apr. 15, 2008) (summarizing the debate and vote).

[4] *See, e.g.,* Press Release, Environmental Defense, Environmental Defense Hails Landmark Vote on Lieberman-Warner Climate Change Bill (Dec. 5, 2007), *available at* http://www.environmentaldefense.org/content.cfm?contentID=7404 (last visited Apr. 10, 2008).

of "primary" products, such as iron, steel, glass and paper, to obtain emission allowances for such imports to reflect the GHG emissions generated in the manufacture of those products. Under the current version of the Bill, this requirement would become effective in 2020, eight years after commencement of the program to regulate domestic GHGs under Title I.

This proposed solution to the leakage problem may stretch the limits of permissible environmental regulation under the General Agreement on Tariffs and Trade (GATT), which generally prohibits trade barriers such as tariffs and import restrictions, subject to some exceptions (including an exception for environmental measures in certain circumstances). The problem is brought into sharp focus when fuel consumed in production is a substantial portion of a product's price, as is the case, for example, with steel produced in countries such as China (and the United States) that do not require manufacturers to internalize the cost of greenhouse gas emissions. These products have long been the focus of trade disputes,[5] so measures that affect their competitiveness would likely be challenged in the World Trade Organization (WTO) dispute resolution process. [6]

Title VI therefore should concern both those who support GHG regulation and those who wish to insure America's competitiveness in the international economy. If the Bill passes but some of the elements affecting imports are ultimately found to violate international trade agreements, the United States would need to discontinue the offending aspects of the program or

[5] *See, e.g.,* Steven R. Weisman, *U.S. Trade Panel Rejects Tariffs on Chinese Paper*, INTERNATIONAL HERALD TRIBUNE, Nov. 21, 2007, *available at* http://www.iht.com/bin/printfriendly.php?id=8417246 (last visited Apr. 17, 2008); Associated Press, *European Steel Producers Seek Sanctions Against Chinese Imports*, INTERNATIONAL HERALD TRIBUNE, Oct. 29, 2007, *available at* http://www.iht.com/bin/printfriendly.php?id=8095766 (last visited Apr. 17, 2008).

[6] *See, e.g.*, Pauwelyn, *supra* note 1 (which focuses on the example of Chinese steel in discussing ways for the U.S. to regulate or tax greenhouse gas emissions in a way that complies with the GATT).

face trade sanctions, possibly in an unrelated sector.[7] The United States could then be left with a system that fails to address the GHG emissions created by United States consumption of goods, and in which United States industries would pay for the cost of greenhouse gas emissions while some competitors overseas do not.

The legality of Title VI is also important because some senators have sought to make the Bill's domestic cap-and-trade program contingent on whether Title VI passes muster under GATT.[8] Enacting Title VI could also have political implications for United States exports, because some critics of the United States' refusal to sign the Kyoto Protocol have advocated that similar charges be applied to U.S. exports in light of the latter's failure to sign on.[9] Indeed, the European Union recently proposed to impose on U.S. exports the same type of restrictions that Title VI would impose on U.S. imports.[10] Enactment of Title VI could make it difficult for the United States to object to a border tax imposed by countries that have taken the lead on climate change during the time before the U.S. domestic GHG reduction program under Title I begins, or until the U.S. program requires reductions comparable to those in other countries.

As is discussed below, Title VI may run afoul of GATT in several significant ways. Section I of this paper summarizes the basic provisions of S. 2191. Section II addresses potential

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[7] World Trade Organization, *Understanding the WTO: Settling Disputes*, *available at* www.wto.org/English/thewto_e/whatis_3/tif_e/displ_3.htm (last visited Apr. 3, 2008).

[8] For example, one proposed amendment, that would void the domestic regulatory program if the WTO invalidates Title VI, was reportedly withdrawn by it sponsor only when he was assured that the Senate Finance Committee would hold hearings on the issue. The promised hearing was held before the Senate Finance Committee on February 14, 2008. Pew Center for Global Climate Change, *supra* note 2.

[9] John Hontelez, *Time to Tax the Carbon Dodgers*, BBC NEWS, Apr. 5, 2007, *available at* http://news.bbc.co.uk/2/hi/science/nature/6524331.stm (last visited Apr. 10, 2008) (advocating border tax adjustments imposed on exports from the United States to the European Union); Joseph E. Stiglitz, *A New Agenda for Global Warming*, THE ECONOMISTS' VOICE, July 2006, at 1.

[10] *EU Ponders Carbon Tariff on Imports*, BUSINESS WEEK, Jan. 8, 2008, *available at* http://www.businessweek.com/globalbiz/content/jan2008/gb2008018_121679.htm?chan=globalbiz_europe+index+page_top+stories (last visited Apr. 17, 2008). *See also* Pauwelyn, *supra* note 1, at 7-8.

GATT violations, and Section III analyzes whether some or all of the program's components would pass muster under GATT Article XX, which authorizes environmental measures under certain circumstances that would otherwise violate GATT.

I. Overview of the Lieberman-Warner Bill

A. Basic Overview of the Domestic Emissions Trading Scheme

Title I of the Bill would impose restrictions on, and create a cap-and trade program for, GHG emissions from domestic industrial facilities and producers and importers of fossil fuels. Specifically, under Section 4(7) of the Bill, a "covered facility" subject to regulation under Title I includes facilities that:

- use more than 5,000 tons of coal in a year;
- are a natural gas processing plant or produce natural gas in the State of Alaska or import natural gas;[11]
- produce or import petroleum or coal-based liquid or gaseous fuel;
- produce or import certain minimum amounts of certain GHGs; [12] or
- emit a threshold quantity of hydrochlorofluorocarbons as a byproduct of the manufacture of hydrofluorocarbons.[13]

A cap-and-trade program for GHG emissions from these facilities would be phased in between 2012 and 2015. Covered facilities would be required to acquire tradable emissions allowances or credits for the GHGs they emit. The total amount of emissions allowances issued

[11] As drafted, § (4)(7) is unclear as to whether natural gas processing plants are subject to the emissions allowance requirement only if they are located in Alaska.

[12] Carbon dioxide, methane, nitrous oxide, sulfur hexafluoride and perfluorocarbons in quantities EPA determines have an effect equivalent to 10,000 metric tons of carbon dioxide (1 GHG). *See* §§ 4(5), (7), (14).

[13] § 4(7) (defining "covered facility"). For hydrofluorocarbons, the threshold is 10,000 carbon dioxide equivalents.

each year would decrease by 15% between 2012 and 2020, and by a total of 32% by 2050.[14] While most of the allowances would be granted at no cost in the early years, the percentage of emissions allowances to be auctioned rather than given away would increase each year from 21.5% in 2012 to 69% in 2050.[15] Some of the allowances would be given away to specific industries, such as fossil fuel-fired electric power generating facilities and owners and operators of energy intensive manufacturing facilities.[16] Facilities would also be able to buy or earn offsets in several different ways, including by reducing GHG emissions associated with agriculture, preventing international deforestation and other land-use products such as altered tillage practices, winter cover cropping, conversion of cropland to rangeland or grassland, reduction of nitrogen fertilizer use and forest management, among others.[17] The Bill would also give the EPA discretion to regulate vehicle fleets that meet an emissions threshold.[18] Small businesses that emit fewer than 10,000 carbon dioxide equivalents per year would be exempted.[19]

B. Title VI: International Reserve Allowance Program

As noted above, Title I of the Bill requires emissions allowances for, among other things, imports of certain fossil fuels and chemicals, thereby imposing an indirect cost on U.S. manufacturing. In contrast, Title VI of the Bill would impose such costs *directly* on certain products that are imported from countries that the United States determines are not taking

[14] § 1201(d) (allowances for each calendar year).

[15] § 3102. For a critique of free emissions allocations, see *Clean Air Watch, Should Big Polluters Own the Sky?* (June 2007), *available at* http://www.cleanairwatch.org/Documents%20&%20Reports/Should_big-polluters_own_the_sky_final.pdf (last visited Apr. 15, 2008). During the committee debate, an amendment was proposed to require auctioning of 100% of allowances, which its successful opponents characterized as a "poison pill." Pew Center for Global Climate Change, *supra* note 2.

[16] § 3901.

[17] *See, e.g.,* § 2401; 3801, *et seq.*

[18] § 1102(1)(A)(iii).

[19] § 1102(1)(B).

sufficient action to reduce GHGs. Title VI would accomplish this by establishing an "International Reserve Allowance Program" that is parallel to and separate from the Title I program. U.S. importers would be required to obtain emissions allowances in connection with the import of "covered goods," which are defined to include any good (identified by the EPA Administrator by rule) that is (1) a "primary product," (2) generates during its manufacture a substantial quantity of direct and indirect GHG emissions and (3) is closely related to a good whose production in the United States is affected by a requirement of the Bill.[20] The term "primary product" is defined to include iron, steel, aluminum, concrete, bulk glass, paper, or any other manufactured products sold in bulk for further manufacture and whose production generates GHGs that are comparable (on an emission-per-dollar basis) to GHG emissions generated in the manufacture of products by domestic industrial facilities covered under Title I.[21] Title VI would exempt imports from countries that (1) the United States unilaterally determines have taken actions "comparable" to those of the United States to regulate GHG emissions, (2) emit only a *de minimis* amount of global GHG emissions, or (3) are among the least developed countries.[22] The International Reserve Allowance Program must be in place by 2019.

The pool of Title VI emissions allowances for these imports would be separate from the pool established under Title I, although the maximum price for Title VI allowances would be keyed to the auction price.[23] Each year, the EPA, pursuant to a formula yet to be developed, would calculate the quantity of emissions allowances required for each category of goods and country, adjusted for the quantity of allowances allocated at no cost to that industry sector, the

[20] § 6001(5).

[21] § 6001(10).

[22] § 6006(b)(2) and (c)(4)(B).

[23] § 6006(a)(2-3).

GHG emissions of that industry sector, and the level of economic development of the covered foreign country where the goods were produced. [24]

Although there may be good arguments why these categories of "primary products" are appropriate or fair targets of an emissions allowance requirement, a system that imposes costs on imports based on the country of origin, and upon industry sectors that are not directly addressed when produced in the United States, may conflict with GATT and very likely will be challenged on that grounds under the WTO's dispute resolution process, which would afford any WTO member an opportunity to challenge any aspect of a program established under the Bill as a violation of GATT. The steps in that process are consultation, evaluation by a panel established by the WTO Dispute Settlement Body, and appeals to an Appellate Body. A country must comply with the WTO's disposition or face sanctions, which are typically imposed on the same sector as the dispute or, if that would not be practical or effective, on another sector.[25] Because the WTO dispute resolution process typically requires a country only to halt the offending program and does not impose penalties for past violations, countries may tend to test the boundaries of what is permissible. Some commentators seem to argue that countries *should* push the envelope in its efforts to combat climate change.[26]

II. Prohibitions in GATT

A. Overview of Applicable GATT Requirements for the Treatment of Imports

The GATT addresses trade barriers in several ways that are relevant to the Bill. Articles I and III essentially require like products to be treated alike—Article I requires countries to treat

[24] § 6006(d).

[25] *See* WTO, *Dispute Settlement*, *at* http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (last visited Apr. 15, 2008); Steve Charnovitz, *Trade and Climate: Potential Conflicts and Synergies*, *in* BEYOND KYOTO: ADVANCING THE INTERNATIONAL EFFORT AGAINST CLIMATE CHANGE, (Pew Center for Global Climate Change), 141, 144, *available at* http://www.pewclimate.org/docUploads/Trade%20and%20Climate.pdf (last visited Apr. 17, 2008).

[26] *See, e.g.,* Charnovitz, *supra* note 24, at 144.

imports from all WTO member countries alike (the "most favored nation" requirement), [27] and Article III prohibits discrimination against imports generally as compared to domestic products (the "national treatment" requirement). Title VI may conflict with Article I of GATT because it would distinguish between countries that address GHGs in a manner that is "comparable" to U.S controls and those that do not; based on the amount of GHG emissions generated in the exporting country; or based on whether the exporting country is among the least developed nations. It may violate Article III because it would require emissions allowances to be purchased for some products when imported but not when they are produced domestically. Moreover, Article XI of GATT generally prohibits quantitative import restrictions that are not taxes, duties or other charges. Therefore, if the emissions allowance requirement of Title VI were not deemed a tax, duty or other charge, Title VI might well violate GATT Article XI. Since there would be a limited number of allowances available for imports of "primary products" under Title VI, one could argue that Title VI imposes quantitative import restrictions. that could not be considered taxes, duties or other charges.

However, even if Title VI were found to violate Article I, III or XI of GATT, its proponents will seek refuge under GATT Article XX, which authorizes certain environmental measures. This provision is discussed in Section III of this Article.

B. Article I Requirement for Most Favored Nation Status

Title VI potentially conflicts with Article I's requirement to treat imports from all WTO member countries alike because it distinguishes imports based on whether an exporting nation (1) has a climate change program that the United States considers "comparable" to its program;

[27] GATT Article I:1 requires that "any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

(2) is a *de minimis* contributor to global emissions (defined as less than 0.5%); or (3) is among the least developed countries. GATT Article I (and Article III) requires a determination of whether the products are "like" and then whether the measure is discriminatory.[28]

1. Likeness

A threshold question in determining whether GATT applies to a measure at all is whether the affected imported and domestic products are "like products."[29] The breadth or narrowness of this term will determine how much leeway a country has to differentiate between imported and domestic products. Although GATT does not define this term, WTO decisions have set forth four factors to consider: (1) the product's end-uses in a given market; (2) consumers' tastes and habits, which change from country to country; (3) the product's properties, nature, and quality; and (4) tariff classifications.[30] WTO decisions also make it clear that "likeness" is a fact-specific evaluation that will expand or contract like an "accordion"[31] based on the circumstances and on which GATT provision is at issue. One commentator characterizes likeness under the

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[28] NATHALIE BERNASCONI-OSTERWALDER ET AL., ENVIRONMENT AND TRADE: A GUIDE TO WTO JURISPRUDENCE 16 (2006), *available at* www.ciel.org/Publications/Environment_and_Trade2006.pdf.

[29] *Id*. at 7-8.

[30] *See* GATT Report of the Working Party on Border Tax Adjustments, L/3464, (Dec. 2, 1970), GATT B.I.S.D. 18S/102 at ¶ 18, *available at* www.worldtradelaw.net/reports/gattpanels/bordertax.pdf (last visited Apr. 10, 2008). ("likeness" is to be determined on a case-by-case basis based on the product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the product's properties, nature, and quality); GATT Panel Report, Japan – *Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages,* L/6216, (Nov. 10, 1987), GATT B.I.S.D. 34S/83 at 23, ¶ 5.5(d), (hereafter "*Japan-Alcoholic Beverages (1987)*"), *available at* http://www.worldtradelaw.net/reports/gattpanels/japanliquor.pdf (last visited Apr. 18, 2008) (pre-WTO decision by GATT panel adding fourth factor, tariff classification, in evaluation under Article III:2, and finding that Japanese shochu and vodka were "like" products because both were white/clean spirits, made of similar raw materials, and their end uses were virtually identical as "straight" or mixed beverages); *See also* Bernasconi-Osterwalde, *supra* note 27, at 13, 18, 24.

[31] *Japan – Taxes on Alcoholic Beverages*, DSR 1996:1, 97, H.1.a, (Nov. 1, 1996), (Japan, United States, Canada, European Communities) (hereafter, "*Japan-Alcoholic Beverages (1996)"*), *available at* http://www.wto.org/english/tratop_e/dispu_e/ab_reports_e.htm (last visited Apr. 10, 2008) (The Appellate Body found that "[t]he concept of 'likeness' is a relative one that evokes the image of an accordion . . . The width of the accordion in any one of those places must be determined by the particular provision in which the term 'like' is encountered as well as by the context and the circumstances that prevail in any given case"). *See also* Bernasconi-Osterwalder, *supra* note 27, at 8, 40-47.

WTO decisions as typically a question of whether the products are competitive.[32] If so, then the issue of likeness may simply be a corollary of whether a GATT panel deems a measure to be anticompetitive.

It would be difficult to argue that primary products such as steel, glass, and paper from countries without GHG regulations are not "like" domestic steel, glass, and paper. Whether a production process generates more GHGs likely will not materially affect the final product's end uses or characteristics. Nor would there appear to be a significant consumer preference for "green" steel—even the leading green building standards do not indicate a preference for these items if produced through a less carbon-intensive process.[33]

2. Process and Production Methods

It is uncertain whether products employing different production and process methods (PPMs)—for example, PPMs that result in different levels of GHG emissions—would be considered "like" products for purposes of GATT Article I where the different PPMs do not materially affect the characteristics of the finished product.[34] In the *Indonesia – Automobile* case,[35] Japan, the European Community and the United States complained that Indonesia applied higher customs duties and sales taxes to imported products that did not utilize a sufficient

[32] Pauwelyn, *supra* note 1, at 29 n.80.

[33] U.S. Green Buildings Council, Leadership in Energy and Environmental Design (LEED) for New Construction and Major Renovations 2.2, *available at* www.usgbc.com (last visited Apr. 14, 2008). Nevertheless, recycled items are preferred.

[34] *See, e.g.,* Steve Charnovitz, *The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality*, 27 YALE J. INT'L L. 59 (2002) (describing the law on PPMs under Article I to be "unsettled").

[35] GATT Report of the Panel, *Indonesia – Certain Measures Affecting the Automotive Industry,* CWT/DS54/R, WT/DS55/R, WT/DS59/R and WT/DS64/R, July 2, 1998 *available at* http://www.wto.org/english/tratop_e/dispo_e/cases_e/ds64_e.htm (last visited Apr. 17, 2008). *See also* Bernasconi-Osterwalder, *supra* note 27, at 57-58.

amount of Indonesian parts and labor. In the *Canada – Automotive Industry*[36] case, the complaint was that Canada provided an import duty exemption for an eligible corporation conditioned on its having a manufacturing presence and sufficient value added in Canada. In both cases, the panels found a violation of GATT Article I. In the Indonesian case, the panel stated categorically that an advantage "cannot be made conditional on any criteria that is not related to the imported product itself."[37] In the Canada case, the panel took a more nuanced view, suggesting that PPM-based distinctions might be acceptable as long as they are origin-neutral.[38] It should be noted, though, that neither of these cases involved distinctions based specifically on the method of production.

3. Discrimination by Country of Origin

There is, however, a fundamental problem in characterizing Title VI as a nondiscriminatory measure addressing PPMs. Title VI would explicitly require allowances for imports based on the *country* of production, not the PPM that is used to make the specific product. So, for example, the imported product could be made using hydropower or nuclear energy, thereby generating no GHGs, but would nonetheless be subject to Title VI based on whether the exporting country adopted GHG regulations satisfactory to the United States or otherwise qualified for a national exemption.

As early as 1952, a GATT panel held that an import control measure based on the regulations of the country of origin is a violation of Article I. In the case of *Belgian Family Allowances*, the GATT panel determined that a Belgian import tax, which exempted goods

[36] WTO Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AD/R and WT/DS142R, at 10.29, June 19, 2000, *available at* http://www.wto.org/English/tratop_e/dispu_e/cases_e/ds142_e.htm (last visited Apr. 17, 2008). *See also* Bernasconi-Osterwalder, *supra* note 27, at 218.

[37] *See* Bernasconi-Osterwalder, *supra* note 27, *at* 207-08.

[38] *See* Bernasconi-Osterwalder, *supra* note 27, at 207-08.

imported from countries having similar requirements concerning family allowances for employees, was a violation of Article I.[39] Distinctions based on the regulations of an exporting country may be viewed as an attempt to coerce other governments and may penalize manufacturers who are voluntarily taking every possible safeguard but happen to be located in a country that does not require them to do so.[40] In fact, Title VI may create a perverse incentive for individual manufacturers *not* to voluntarily reduce emissions, because producers from countries subject to Title VI would be paying for those carbon emissions unless its competitors in the same industry and country also reduced emissions.[41]

In addition to the explicit discrimination between countries that regulate GHGs and those that do not, S. 2191 could also be criticized as a *de facto* discrimination targeting specific products such as Chinese steel, despite the fact that climate change is a global problem that implicates virtually all manufacturing, agriculture, and transportation sectors. The WTO Appellate Body, in the 2000 report on *Canada – Automotive Industry*, found that a measure that granted import duty exemptions on the basis of characteristics of the manufacturer rather than the product was discriminatory.[42] Similarly, Title VI would discriminate based on country of origin rather than the nature of the product.

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[39] *Belgian Family Allowances*, G/32, (Nov. 7, 1952), GATT B.I.S.D. 1S/59, *available at* www.worldtradelaw.net/reports/gattpanels/belgianfamilyallowances.pdf (last visited Apr.10, 2008); Bernasconi-Osterwalder, *supra* note 27, at 217. Here, the family allowances program was one of general applicability, not limited to any product category.

[40] Charnovitz, *supra* note 33, at 68-69.

[41] It is noteworthy that Professor Pauwelyn, in laying out the case for allowing border tax adjustments for carbon, assumed that such import measures would not discriminate based on country of origin. *See* Pauwelyn, *supra* note 1, at 28.

[42] *Canada – Certain Measures Affecting the Automotive Industry*, *supra* note 35 (evaluating motor vehicle duty exemption that was available only to imports from certain countries). *See also* Bernasconi-Osterwalder, *supra* note 27, at 218-19.

In light of the above, it would seem that an origin-neutral emissions allowance requirement—like the provision under Title I of the Bill that would require emissions allowances for all imports in various categories, including natural gas and petroleum—would be more likely to be found consistent with GATT because it does not distinguish based on the source of the import.[43] However, such a fundamental revision to Title VI would substantially undercut (if not entirely vitiate) its primary purpose—to compel China (and India) to control GHG emissions.

C. Article III Requirement for National Treatment

GATT Article III requires "national treatment" for imports with respect to internal taxation and regulation—that is, imports must be treated the same as "like products" made domestically. If the products are "like," a requirement that applies only to imported products would seem to be discriminatory.

The issue of likeness under Article III also might implicate the issue of PPMs. As with Article I, it is uncertain whether distinctions based on PPMs are acceptable under Article III. In *US – Superfund,* the panel upheld a U.S. program that taxed domestically produced petroleum and other chemicals, and also taxed imported products whose manufacturing processes *used* those chemicals, but the panel did not specify whether those chemicals had to be present in the imported product.[44] However, Title VI is not necessarily analogous to the tax at issue in *US – Superfund*, as Title VI would apply only to *imported* primary products. Comparable domestic products would be affected only indirectly under Title I of the Bill, primarily through fuel use

[43] *See* Bernasconi-Osterwalder, *supra* note 27, at 205.

[44] *United States – Taxes on Petroleum and Certain Imported Substances,* June 17, 1987, GATT B.I.S.D. 34S/136, L/6175 – 34S136, at ¶ 2.5, 5.1.1, 5.2.4, 5.2.10, (hereafter, "*US – Superfund"*), *available at* www.worldtradelaw.net/reports/gattpanels/superfund.pdf (last visited Apr. 10, 2008). *See also* Pauwelyn, *supra* note 1, at 20 n.49; Bernasconi-Osterwalder, *supra* note 27, at 26-27; J. Andrew Hoerner, Center for Sustainable Economy, *The Role of Border Tax Adjustments in Environmental Taxation* (March 1998), *available at* http://www.rprogress.org/publications/1998/BTA_1998.pdf (last visited Apr. 15, 2008).

associated with their production. In the *US – Shrimp/Turtle* and *US – Tuna/Dolphin* disputes, the imposition of import restrictions based on processes to minimize inadvertent by-catch of endangered sea turtles and dolphins, respectively, were found to be prohibited by Article III, and then evaluated under Article XX.[45] Thus, WTO jurisprudence points to the likelihood that a standard that discriminates based on how a product is produced would fall squarely within the prohibitions of Article III.[46] Moreover, as discussed above, it will be hard for the United States to characterize Title VI purely as a PPM-based restriction because it distinguishes based on the country of origin rather than the method by which a particular import was manufactured.

1. Article III:1

Under GATT Article III:1, internal taxes, charges, laws, regulations and requirements may not be applied "so as to afford protection to domestic production." In the *Chile-Alcoholic Beverages (2000)* dispute, the WTO Appellate Body stated that this test requires evaluation of "a measure's purposes, objectively manifested in the design, architecture and structure of the measure."[47] Under this criterion, it may be relevant if—whatever the Bill's stated purposes—Title VI seems designed to and does in fact ensure that the United States' trade competitiveness is not disadvantaged by its regulation of carbon emissions.

2. Article III:2

GATT Article III:2 contains two tests—prohibiting even a *de minimis* burden on imports of "like" products and prohibiting a more than *de minimis* burden on "directly competitive and substitutable" products.

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[45] Stephen L. Kass & Jean M. McCarroll, *Fidel, Saddam and the World Trade Organization*, N.Y.L.J., Dec. 29, 1998. These disputes are discussed more fully in section III, *infra.*

[46] Charnovitz, *supra* note 33, at 85-92.

[47] Bernasconi-Osterwalder, *supra* note 27, at 59-60. *See also, Chile-Taxes on Alcoholic Beverages*, WT/DS/87/AB/R, Jan. 12, 2000, at ¶ 71, *available at* http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (last visited Apr. 10, 2008).

GATT Article III:2 states that imports shall not be subject to taxes or charges[48] "in excess of" those levied on "like domestic products." Likeness would be determined under the same factors described above, although, as noted, the definition of "likeness" will vary according to circumstances and the provision of GATT at issue.[49] Nonetheless, Article III:2 is a "strict" prohibition.[50] If the products are "like," even a *de minimis* excess charge on imports would be "in excess of" that imposed on domestic products and violate Article III.[51]

Assuming that the "likeness" criterion were met and Article III:2 thus applies, a 1996 WTO Appellate Body decision in *Japan – Alcoholic Beverages (1996)* indicates that the indirect charges for carbon imposed on U.S.-manufactured primary products under Title I of the Bill could be a factor militating in favor of the emissions allowance requirement for imports.[52] However, the indirect charges on domestic producers under Title I likely would have to be determined to be nearly perfectly aligned with the direct charges imposed on imports under Title VI. This could be very difficult to demonstrate. Titles I and VI would create largely separate processes for deriving the charge on domestic and imported primary products, respectively. Because the charge for carbon emissions would be imposed at different points in the production process, and because U.S. manufacturers have the option to reduce their need for emissions

[48] For a detailed consideration as to whether a program requiring the purchase of allowances would qualify as a "tax or other charge," *see* Pauwelyn, *supra* note 1, at 21-23.

[49] *See* note 30, *supra* and accompanying text.

[50] *Japan - Alcoholic Beverages (1987)*, *supra* note 29 at ¶ 5.8 (observing that the prohibition in the first sentence of Article III:2 is "strict," quoting *US - Superfund, supra* note 43, ¶ 5.8 which held that Article III:2 prohibited "even very small tax differentials amounting to US dollar 0.0002 per litre of imported petroleum."

[51] *Id.*

[52] *Id.*

allowances by reducing the use of fossil fuels at their own facilities, it would be difficult to show that the charges imposed on imports and domestic products are virtually the same.[53]

Under Article III:2, even if the domestic product and import are not "like," as long as they are "directly competitive or substitutable," they must be "similarly taxed."[54] A measure affecting directly competitive or substitutable products would violate GATT III:2 if it imposes a burden on the import that is more than *de minimis.*[55] The decision in *Japan – Alcoholic Beverages* found that "directly competitive or substitutable" is a "broader" category than "like," and involves a case-by-case determination of the "competitive conditions in the relevant market."[56] Such products would not need to be perfectly substitutable, and here, it does not appear that the market for primary products such as steel is sensitive to distinctions between production processes used to create the product.[57] For example, in *Chile – Alcoholic Beverages*, the panel found that a tax that was based on the alcohol content of beverages violated GATT

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[53] Whether there is tax discrimination depends not only on "the rate of the applicable internal tax but also . . . the taxation methods (*e.g.* different kinds of internal taxes, direct taxation of the finished product or indirect taxation by taxing the raw materials used in the product during the various stages of its production) and of the rules for the tax collection (*e.g.* basis of assessment)." *Japan - Alcolholic Beverages (1987), supra* note 29, at ¶ 5.8. However, "there may be objective reasons" that could justify such a difference in approach. *Id*. at ¶ 5.9(c).

[54] The second sentence of Article III:2 states that countries may not "otherwise" impose taxes and charges that violate Article III:1. The Ad Note to Article III:2 interprets this to require that "directly competitive or substitutable product[s]" must be "similarly" taxed.

[55] *Chile-Taxes on Alcoholic Beverages*, WT/DS/87/AB/R, Jan. 12, 2000, at ¶ 49, ("Chile – Alcoholic Beverages)," *available at* http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (last visited Apr. 10, 2008)**.** *See also Japan – Alcoholic Beverages (1987), supra* note 29*,* at 5.11.

[56] *Japan-Alcoholic Beverages (1996)*, *supra* note 30, at H.2.1. *See also* Bernasconi-Osterwalder, *supra* note 27, at 22, 46.

[57] See *Canada – Certain Measures Concerning Periodicals,* WT/DS31/AB/R/, July 30, 1997, ("*Canada-Periodicals"*) at VI.B.1, *available at* http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm. (finding that split-run imported periodicals were like Canadian periodicals) (last visited Apr. 10, 2008); *see also* Bernasconi-Osterwalder, *supra* note 27, at 51-54.

Article III:2 because products with different alcohol contents were directly competitive or substitutable and the Chilean measure imposed a more than *de minimis* burden on the imports.[58]

3. Article III:4

Article III:4 contains a requirement that imports be accorded "treatment" that is "no less favorable" than that accorded to like products of domestic origin with respect to all *laws, regulations, and requirements*. If the Title VI allowance program were deemed to be a regulation rather than a tax or charge,[59] Article III:4 could apply, in which case all of the factors discussed above in connection with Article III:1 and III:2 would bear on whether the "no less favorable" standard is met.

D. Article XI Ban on Import Quotas

GATT Article XI prohibits quantitative import restraints, or import quotas, other than "duties, taxes or other charges."[60] If the costs levied under the Title VI program were deemed not to constitute "duties, taxes, or other charges," the *Ad Note* to GATT Article III provides the basis for distinguishing between quantitative restrictions that fall under Article XI and domestic regulations that fall under Article III. The *Ad Note* states that:

> any law, regulation or requirement . . . which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as . . . a law, regulation or requirement . . . subject to the provisions of Article III.

Thus, "even if US climate legislation were to restrict imports at the border, if it is applied also domestically in respect of US products, it should, in principle, fall under the more flexible

[58] *Chile – Alcoholic Beverages*, *supra* note 33 , at ¶ 52.

[59] For a fuller discussion of this issue, *see* Pauwelyn, *supra* note 1, at 21-23.

[60] "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party." GATT Article XI.

GATT Article III (permitting regulations for as long as they are not discriminatory) rather than the stringent GATT Article XI (generally prohibiting quantitative import restrictions)."[61]

However, as drafted, Title VI might well fall under GATT Article XI because Title VI requirements may not necessarily be viewed as the same "law, regulation or requirement" that applies to U.S. products. Title VI applies a direct carbon charge on production, whereas Title I applies an indirect charge. The universe of covered products are not equivalent under Title I and VI; in fact, some end products may bear costs under both Titles. Finally, Title I allowances may be subject to a variety of offsets and credits that may not be available to imported products. In other words, if Title VI were deemed to be a regulation rather than a "duty, tax or other charge," the very disparities in treatment that could lead to a finding under Article III that imports are not being treated similarly to domestic products might take Title VI out of the realm of Article III altogether and place it instead within the purview of Article XI.

If Article XI rather than Article III of GATT were applicable, it could be very difficult for the United States to show that the Title VI program is not a prohibited quantitative restriction on imports. The quantity of emissions allowances available under the program will necessarily be limited; otherwise, the market for auction allowances would not be competitive, drive up prices, and encourage reductions of GHG emissions. It is difficult to see how the limit on allowances could simultaneously create high enough prices to correct for the adverse economic impacts on domestic industry, yet not limit imports so as to violate GATT Article XI.

III. GATT Article XX

If Title VI of the Bill were deemed to violate GATT Articles I, III or XI, proponents of Title VI could invoke Article XX, which provides limited accommodation for other policy goals

[61] Pauwelyn, *supra* note 1, at 24.

that may conflict with trade. The exceptions most relevant to Title VI are set forth in paragraphs (b) and (g) of Article XX, which cover measures that are:

> (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.

In addition, however, a measure must also comply with the introductory clause of Article XX (known as the "Chapeau)," which prohibits a measure from being "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 . . . ."

Although Article XX thus confirms the right of WTO members to address environmental issues, it remains a less than ideal vehicle since it is generally viewed as an exception to a country's obligations under GATT, and thus the proponent of the exception carries the burden of proof.[62] The extent to which the WTO's Appellate Body will accommodate environmental concerns through a broad construction of Article XX, especially in the context of global warming, remains to be seen. Several recent decisions provide some insight as to how these provisions might be applied to legislation such as S. 2191.

A. Paragraph XX(b)[63]

It would seem plain that measures intended to reduce global warming would relate to the protection of human, animal and plant life or health. To pass muster under paragraph (b),

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[62] *But see* Charnovitz, *supra* note 33, at 81 (arguing that the WTO Appellate Body has interpreted Article XX not as an exception but rather as standing on equal footing with other Articles of GATT).

[63] As a threshold matter, the Appellate Body has determined, somewhat counter-intuitively, that it must first determine whether one of the specific exceptions is satisfied and only then examine whether the Chapeau's requirements set forth in that introductory clause are met. Report of the Appellate Body, *United States – Import Prohibitions on Certain Shrimp and Shrimp Products,* WT/DS58/AB/R, Nov. 6, 1998, ¶¶ 116, 121, (hereafter "*US – Shrimp/Turtle I"), available at* www.worldtradelaw.net/reports/wtoab/us-shrimp(ab).pdf (last visited Apr. 3, 2008). *See also* Bernasconi-Osterwalder*, supra* note 27, at 251-53.

however, the measure in question must be "necessary." In the *US – Tuna/Dolphin II* case, the panel ruled that in order for the measure to be "necessary" to protect human, animal, or plant life or health, the party invoking Article XX(b) must show that *no other GATT-consistent measures were reasonably available.*[64] The *US – Tuna/Dolphin II* panel rejected the United States' ban on tuna to protect dolphin abroad, finding that such restrictions were not "necessary" for purposes of Article XX(b).[65] As the panel had observed in *US – Tuna/Dolphin I*, "[i]f the broad interpretation of Article XX(b) suggested by the United States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the GATT. The [GATT] would then no longer constitute a multilateral framework for trade among all contracting parties . . . ."[66]

For proponents of Title VI, a more hopeful sign may be found in the more recent Appellate Body decision in *EC-Asbestos* case.[67] There, the Appellate Body dismissed a Canadian complaint against a French ban on asbestos-containing construction materials based on health concerns, thereby upholding a health measure under Article XX(b) for the first time. The decision turned largely on the interpretation of "necessary."[68] The Appellate Body focused on

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[64] Report of the Panel, *United States – Restrictions on Imports of Tuna,* DS29/R, June 16, 1994, *not adopted*, at ¶ 5.35, (hereafter "*US – Tuna/Dolphin II"*), *available at* www.worldtradelaw.net/reports/gattpanels (last visited Apr. 3, 2008). *See also* Bernasconi-Osterwalder, *supra* note 27, at 164-65.

[65] *US – Tuna/Dolphin II, supra* note 62, at ¶ 5.39.

[66] Report of the Panel, *United States – Restrictions on Imports of Tuna,* DS21/R-39S/155, Sept. 3, 1991, not adopted, at ¶ 5.27, (hereafter "*US – Tuna/Dolphin I"*); *see also* Bernasconi-Osterwalder, *supra* note 27, at 244.

[67] Report of the Appellate Body, *European Communities – Measures Affecting Asbestos & Asbestos-Containing Products*, WT/DS135/AB/R, Apr. 5, 2001, *available at* http://www.wto.org/English/tratop_e/dispu_e/cases_e/ds135_e.htm (last visited Apr. 17, 2008) *("EC –Asbestos").*

[68] *EC –Asbestos, supra* note 6*5,* at ¶¶ 164-75.

whether there were "reasonably available alternatives" in light of existing scientific evidence, and found that the measure was justified under Article XX(b).[69]

More recently, the Appellate Body stated that the determination of whether a measure is necessary requires a consideration of, among other things, the importance of the interests or values at stake; the extent of the contribution to achieving of the measure's objectives; and the measure's trade restrictiveness. If that analysis yields a preliminary conclusion that the measure is necessary, the measure must than be compared with possible alternatives that may be less trade restrictive but provide an equivalent contribution to the achievement of the objective. [70]

B. Paragraph XX(g)

Paragraph (g) of Article XX does not require that a measure be "necessary," but only that it "*relate to*" the conservation of "exhaustible natural resources . . . ."[71] There is a strong possibility, if not likelihood, that Title VI of the Bill would be found to meet these criteria.

1. "Exhaustible Natural Resources"

The term "exhaustible natural resources" has been interpreted to include dolphins,[72] salmon fisheries[73] and clean air.[74] The Appellate Body has interpreted the term to include living, renewable and non-renewable resources. In *US – Reformulated Gasoline*, the panel accepted the

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[69] *Id.*; *see also* Bernasconi-Osterwalder, *supra* note 27, at 304-05.

[70] Report of the Appellate Body, *Brazil – Measures Affecting Imports of Retreaded Tyres* (hereafter, "*Brazil – Retreaded Tyres*", WT/DS332/AB/R, Dec. 3, 2007, at ¶ 178, *available at* http://wto.org/English/tratop_e/dispu_e/cases_e/ds332_3.htm (last visited Apr. 17, 2008).

[71] GATT Art. XX.

[72] *See US – Tuna/Dolphin I and II, supra* note*s 62, 64*.

[73] *See* Report of the Panel, *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon,* March 22, 1988, B.I.S.D. 355/98.

[74] *See* Report of the Appellate Body, *United States – Standards for Reformulated Gasoline* (hereafter "*US – Reformulated Gasoline*"), WT/DS2/AB/R, May 20, 1996, at 14-19, *available at* www.worldtradelaw.net/reports/wtoab/us-gasoline(ab).pdf (last visited Apr. 3, 2008); *see also* Bernasconi-Osterwalder, *supra* note 27, at 79, 100-03.

United States' position that Article XX(g) does not require that the natural resource be exhausted or depleted, but only that it is *capable* of exhaustion or depletion.[75] In *US – Shrimp/Turtle I,* the Appellate Body rejected the argument of India, Pakistan and Thailand that the phrase "exhaustible natural resources" refers to finite resources such as minerals, rather than biological or renewable resources.[76] The panel found that living resources are just as "finite" as petroleum, iron or and other non-living resources.[77] The Appellate Body noted that the words in Article XX(g) "must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment."[78] After reviewing numerous international environmental agreements and the opinions of environmental experts, it concluded that there was sufficient evidence that endangered species are "exhaustible" despite the ability of individual members of the species to reproduce.

2. "Relating To"

The term "relating to" under paragraph (g) is easier to satisfy than the term "necessary" under paragraph (b). In *US – Reformulated Gasoline,* the Appellate Body explained that the two phrases are not equivalent and rejected the restrictive interpretation of a prior panel report which held that "relating to" means "primarily aimed at."[79] In *US – Shrimp/Turtle I*, the Appellate

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[75] Report of the Panel, *US – Reformulated Gasoline*, WT/DS2/R, Jan. 29, 1996, at ¶ 6.37, *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds2_e.htm (last visited Apr. 3, 2008) ("The fact that the depleted resource was defined with respect to its qualities was not, for the Panel, decisive. Likewise, the fact that a resource was renewable could not be an objection. A past panel had accepted that renewable stocks of salmon could constitute an exhaustible natural resource. Accordingly, the Panel found that a policy to reduce the depletion of clean air was a policy to conserve a natural resource within the meaning of Article XX(g).").

[76] *US – Shrimp/Turtle I, supra* note 61, at ¶¶ 127-32.

[77] *US – Shrimp/Turtle I, supra* note 61, at ¶ 128.

[78] *US – Shrimp/Turtle I, supra* note 61, at ¶ 129.

[79] Appellate Body Report, *US – Reformulated Gasoline, supra* note 73, at 18-19 (discussing *Canada –Measures Affecting Exports of Unprocessed Herring and Salmon,* at ¶ 4.6); *see also* Bernasconi-Osterwalder, *supra* note 27, at 80.

Body further explained that to determine whether a measure "relat[es] to" the conservation of exhaustible natural resources, "the treaty interpreter essentially looks into the relationship between the measure at stake and the legitimate policy of conserving exhaustible natural resources."[80] Further, in *US – Reformulated Gasoline,* the Appellate Body stated that the relevant focus is not on the specific trade restriction but on the legislation as a whole.[81]

3. "Restrictions on Domestic Production or Consumption"

The third prong of paragraph XX(g) requires that the measures in question be made effective in conjunction with restrictions on domestic production or consumption. This is essentially a requirement of even-handedness and impartiality, to ensure that the importing country is not engaging in double standards in its trade relations.[82] At the same time, one need not demonstrate that effects on domestic and imported products will be the same, since it may take time for a measure's impacts to become apparent.[83]

Whether the WTO would find that Title VI meets the requisite standard of even-handedness is at best uncertain since, as discussed above, the indirect charges imposed under Title I are fundamentally different from the direct charges imposed on products under Title VI.

C. The Chapeau

Title VI must also qualify under the "Chapeau" of Article XX, which prohibits a measure from being applied in a manner that would constitute "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or a "disguised restriction on

[80] *US – Shrimp/Turtle I, supra* note 61, at ¶ 135.

[81] Appellate Body Report, *US – Reformulated Gasoline, supra* note 73, at 19; *see also* Bernasconi-Osterwalder, *supra* note 27, at 102-03.

[82] *See* Appellate Body Report, *US – Reformulated Gasoline, supra* note 73, § III.C; *see also* Bernasconi-Osterwalder, *supra* note 27, at 81.

[83] *See* Appellate Body Report, *US – Reformulated Gasoline, supra* note 73, § III.C; *see also* Bernasconi-Osterwalder, *supra* note 27, at 81.

international" Thus, the Chapeau establishes three standards—arbitrary discrimination, unjustifiable discrimination and disguised trade restrictions. The Chapeau deals only with the application of measures, rather than whether they are justified under Article XX.[84] It recognizes the need to maintain a balance between the right of a member to invoke an exception and the obligation of that member to respect the rights of other members.[85]

In focusing on the application of a particular trade measure, the Appellate Body has made clear that a trade restriction must be applied in an open and transparent way, with due publication and notification. It has also emphasized the importance of a country's willingness to cooperate and engage in serious good faith negotiations before enacting trade-restrictive measures. These considerations, which are discussed more fully below, provide perhaps the most serious grounds for concern that Title VI will not qualify under GATT Article XX.

1. Unilateralism and Cooperation

International cooperation is generally considered to be preferable to unilateral trade policy measures as a means to address global and trans-boundary threats. GATT rules traditionally have been viewed as having, as one key purpose, to "constrain . . . attempts by one or small number of countries to influence environmental policies in other countries not by persuasion and negotiation, but by unilateral reductions in access to their markets."[86] Until recently, WTO panels generally had interpreted Article XX as prohibiting any use of unilateral measures. That approach was changed by the Appellate Body's decision in *US – Shrimp/Turtle*

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[84] *See* Appellate Body Report, *US – Reformulated Gasoline, supra* note 73, at § IV; *US –Shrimp Turtle I* at ¶ 158; Bernasconi-Osterwalder at 82.

[85] *US – Shrimp Turtle I, supra* note 61, at ¶ 184; Bernasconi-Osterwalder, *supra* note 27, at 82.

[86] Steve Charnovitz, *GATT and the Environment: Examining the Issues*, 4, Int'l Envt'l Affairs, 203-233 (1992), *available at* Columbia University Center for International Earth Science Information Network, http://www.ciesin.org/docs/008-061/008-061.html (last visited Apr. 7, 2008).

I, which held that unilateral measures that conditioned market access on the policies of exporting countries may be justifiable.[87]

However, unilateral measures are not allowed unconditionally. The Appellate Body has imposed on the importing country a duty to cooperate in good faith with its trading partners before imposing unilateral trade restrictions under Article XX. In *US – Reformulated Gasoline,* foreign refiners challenged a U.S. requirement that all conventional gasoline be at least as clean as a 1990 baseline for a number of pollutants, such as lead and benzene. Most U.S. refiners were allowed to use an individualized baseline that was based on the quality of their own output in 1990, whereas the baseline for foreign refiners was based on the average quality of U.S. gasoline in 1990. The Appellate Body found that this constituted unjustifiable discrimination and a disguised restriction on international trade that was neither inadvertent nor unavoidable.[88] The Appellate Body reasoned that the United States had not explored adequately the possibility of cooperating with the Venezuelan and Brazilian governments to find a way to establish individual baselines for their refiners.[89]

In *US – Shrimp/Turtle I,* India, Pakistan, Thailand and Malaysia challenged a U.S. prohibition of imports of shrimp from any country that lacked a turtle-conservation program comparable to that of the United States. The Appellate Body determined that the United States had not engaged in a broad-based effort to cooperate with WTO members to address the harm caused to endangered sea turtles by shrimp trawlers. Instead, the United States had negotiated seriously with some, but not all, of the complainants. Consequently, the Appellate Body

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[87] *US - Shrimp Turtle I, supra* note 61, at ¶ 187-88.

[88] *See* Appellate Body Report, *US – Reformulated Gasoline, supra* note 73, at § IV; Bernasconi-Osterwalder, *supra* note 27, at 100-01, 109.

[89] *See* Appellate Body Report, *US – Reformulated Gasoline, supra* note 73, at § IV; Bernasconi-Osterwalder, *supra* note 27, at 100-01, 109.

concluded that the U.S. measures amounted to unjustifiable discrimination and thus did not meet the requirements of the Article XX Chapeau. In the second round of litigation, in *US – Shrimp/Turtle 21.5,* the Appellate Body concluded that the United States had brought its efforts into compliance with Article XX by making good faith efforts to reach international agreements that are relatively consistent from one forum to another and by providing financial support for the negotiations—even if environmental treaties were not necessarily concluded.[90]

2. Flexibility

Whether a trade measure constitutes unjustifiable discrimination depends in part on whether the measure is applied with sufficient flexibility to account for the particular conditions that may occur in other countries. In *US – Shrimp/Turtle I,* the U.S. measures were found to create a "rigid and unbending" standard that failed to account for other specific policies and measures that exporting countries might have undertaken to protect the sea turtle.[91] The Appellate Body concluded that it is "not acceptable" to "*require* other Members to adopt essentially the same comprehensive regulatory program."[92] In its second review, the Appellate Body held that the Chapeau allows an importing country to "condition market access on exporting Members putting in place regulatory programmers *comparable in effectiveness* to that of the importing Member . . . ."[93]

It should also be noted that the Chapeau's direction to take account of the conditions applying in specific countries might well provide sufficient flexibility to allow Title VI's

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[90] Report of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/RW, adopted Nov. 21, 2001 ("*US – Shrimp/Turtle 21.5"*), at ¶¶ 115-24, *available at* http://www.worldtradelaw.net/reports/wtoab/us-shrimp(ab)(21.5).pdf (last visited Apr. 17, 2008); *see also* Bernasconi-Osterwalder, *supra* note 27, at 127.

[91] *US –Shrimp Turtle I , supra* note 61, at ¶ 163; Bernasconi-Osterwalder, *supra* note 27, at 110-127.

[92] *US –Shrimp Turtle I , supra* note 61, at ¶ 164 (emphasis original); Bernasconi-Osterwalder, *supra* note 27, at 84.

[93] *US –Shrimp Turtle 21.5, supra* note 90*,* at ¶ 144 (emphasis original); Bernasconi-Osterwalder, *supra* note 27, at 84-85.

exemption of imports that are produced in the least developed countries, even though such distinctions would otherwise be prohibited under GATT Article I.

3. Transparency and Due Process

The Chapeau's prohibition against arbitrary discrimination also requires that the importing country's restrictions be transparent and provide due process. *See, e.g., US – Shrimp/Turtle I,* where the Appellate Body criticized the absence of a transparent and predictable certification process, the partisan nature of the inquiries and certifications, the absence of formal opportunity for a country under investigation to be heard or respond to arguments made against it, the absence of formal written reasoned decisions or of notices of denial, and the absence of procedures for review or appeal of a denial of an application.

D. Will Pass Must Under Article XX ?

If the United States were called upon today to defend Title VI before the WTO, it would face a very steep uphill battle in justifying those provisions under GATT Article XX. The United States' refusal to sign the Kyoto Protocol and its perceived obstreperousness with regard to international efforts to control GHG emissions would not be consistent with the international cooperation required to justify unilateral action under Article XX. China in particular will certainly argue that Title VI is a (very thinly) disguised restriction on its exports that may or may not bear any significant relationship to the carbon footprint of a particular product, and an inappropriate attempt by the U.S. unilaterally to dictate China's internal policies. Under Title VI, it would be left to the United States to determine whether the measures of any particular country are "comparable" to its own measures, to calculate whether the GHG emissions of a particular country are "*de minimis*" and the like.

The Bill, and Title VI in particular, might provide a catalyst for the United States to reverse its international standing in this respect. Title VI declares it to be U.S. policy "to work proactively under the United Nations Framework Convention on Climate Change and, in other appropriate forums, to establish binding agreements committing all major greenhouse gas-emitting nations to contribute equitably to the reduction of global greenhouse gas emissions."[94] It further announces Congress's intent "that the negotiating objective of the United States shall be to focus multilateral and bilateral international agreements on the reduction of greenhouse gas emissions to advance the achievement of the purposes described in [Title VI]."[95] If these policies and negotiating objectives are implemented within the next several years, then by 2019 (when Title VI must be implemented), perhaps the U.S. will have undertaken sufficient efforts to reach international agreements to comply with this aspect of GATT Article XX.

In light of these considerations, the proposals of industry officials and unions to accelerate the date when the import requirement would become effective (from 2020 to a date that is closer to the effective date of the Title I program for domestic GHG emissions),[96] although motivated by an understandable desire to ensure U.S. competitiveness, could significantly undermine the legality of Title VI under GATT by reducing or eliminating the amount of "lead time" the U.S. has to demonstrate its own commitment to reach international agreements *in lieu* of imposing unilateral border adjustments. As one means to address this problem, Environmental Defense has suggested that the time lag between domestic and import controls can be lessened but not eliminated, and that in the interim the impact on domestic

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[94] S. 2191 § 6003.

[95] *Id.*

[96] *Inside EPA*, Feb. 22, 2008, p. 5. A proposed amendment to move up the date for implementing Title VI to 2012 rather than 2020 was tabled when it was agreed to consider the timing issue at a later date. Pew Center for Global Climate Change, *supra* note 2.

industry could be lessened by a more robust allocation of allowances to vulnerable industries. Whether such an approach would be optimal from the standpoint of GHG emission reductions is beyond the scope of this paper, but it would reduce the risk that Title VI would be struck down under GATT.

The manner in which the U.S. implements various aspects of Title VI will also significantly affect whether it passes muster under GATT Article XX. For example, Title VI's standard of "comparable action" clearly is intended to parrot the Appellate Body's decision in *US – Shrimp/Turtle 21.5,* but such decisions are inherently case-specific and the devil will reside in the details. Whether the Title VI program contains sufficient flexibility to account for the specific conditions of exporting countries will depend a great deal on how the government defines "comparable action" to limit GHG emissions, and the criteria that it will use to make that determination. Clearly, the concept of "comparable action" is potentially subjective.

Closely related to those concerns is the issue of transparency and due process. Title VI will require EPA, the President and other government agencies to make many discretionary decisions about conditions and activities in foreign countries. The legislation does not call for rulemaking or any other public process in determining which countries have taken "comparable action," and which countries shall be deemed to constitute "*de minimis*" contributors to GHGs and therefore exempt.[97] To the extent that these decisions emerge from "black box" decision-making, they will be less likely to serve as a basis for upholding U.S. import restrictions under GATT Article XX. As was suggested in *US – Shrimp/Turtle I*, the administrative process

[97] Section 6006(b)(2)(B) of the Bill would define a "de minimis" contribution as less than 0.5% of the total global GHG emissions, but the United States would make such determinations unilaterally, based on methods and assumptions left to its discretion.

should include opportunities for participation by domestic and foreign stakeholders and include an appeal mechanism.

The manner of implementation could also substantially affect whether Title VI satisfies the requirement, contained in paragraph XX(g) of GATT, that conditions must be applied in an even-handed fashion. Under Title VI, the price of an international reserve allowance may not exceed the clearing price for current compliance year allowances established at the most recent auction for domestic allowances under Title I of the Bill. Again, the details will matter. For example, regulated domestic businesses may take advantage of a variety of credits and offsets. It is unclear whether those offsets and credits would be available to imported products under Title VI. If not, it may be harder to demonstrate that imported goods are being treated fairly in relation to domestic goods.

Another potential problem with respect to the issue of even-handedness arises from the fact, discussed above,[98] that Title VI import restrictions would apply based not on the specific imported good, but on the identity of the exporting country. Thus, the measure would penalize a "green" product that happens to be manufactured in a "dirty" country. The operating assumption appears to be that in countries without effective controls on GHG emissions, there will be few or no businesses that minimize carbon emissions on their own. However, this may be an erroneous assumption. Apart from the fact that hydro and nuclear power may provide the energy source for producing a given import, "green" projects increasingly are undertaken in developing countries as a way to generate credits that are sold to industrial facilities in Europe and elsewhere. While the validity and effectiveness of such projects may often be suspect, the same likely will be true of projects that qualify for offsets under Title I of the Bill. Therefore, the case might be made

[98] *See* Appellate Body Report, *US – Reformulated Gasoline, supra* note 73.

that the entire approach of Title VI is essentially arbitrary and not even-handed. This problem is exacerbated by the fact that the direct carbon charges imposed on products under Title VI are not necessarily the same as the indirect charges imposed on domestic producers under Title I.

For purposes of GATT compliance, a better approach might be to allow manufacturers to demonstrate the carbon emissions created by their manufacturing process, with a regulatory baseline for that industry and country as a default, similar to what was recommended in *US – Reformulated Gasoline.*[99] *C*oncerns that international offset projects are illusory could be addressed by improving monitoring and verification of domestic *and* international offset projects, perhaps coupled with penalties for misrepresentations about such projects. Even if there are no producers from such countries that voluntarily reduce their carbon footprint and therefore qualify for treatment better than the baseline, the potential to opt out of the baseline could help to rebut the perception that the program is improperly discriminatory. However, the administrative resources that would be needed to make the complex factual determinations about the carbon footprint of various industries and countries; to make the economic analyses to demonstrate that the carbon costs under Title I and VI are equivalent; and to provide the requisite due process and transparency, might be prohibitively cumbersome and expensive.

Ultimately, it is highly uncertain whether any regime that imposes a direct cost on certain imported products from selectively targeted countries, while imposing only an indirect cost on their domestically produced counterparts based on their fuel use, can survive a GATT challenge. Some supporters of the Bill may be willing to roll the dice concerning Title VI's legality, but such a gamble may be counterproductive for all stakeholders. If Title VI is ultimately overturned by the WTO, one can imagine how the domestic political fallout from such a decision might lead

[99] *See* Appellate Body Report, *US – Reformulated Gasoline, supra* note 73, at § IV.

to calls for a wholesale revision and restructuring—or perhaps abandonment—of the Title I program for regulating domestic GHG emissions. Even if the legislation is not amended to make Title I dependent upon WTO approval of Title VI, the recent efforts of some senators to impose such conditions provide a hint of the backlash that could occur if Title VI is invalidated by the WTO—perhaps a decade from now, when the impacts of GHG emissions will be even more difficult to address.

The backlash that Title VI might create in the international community may be as important as whether it can survive a legal challenge under GATT. Does the United States. currently have the credibility and influence on climate change such that it can seek to unilaterally whip other countries into line on this issue through the imposition of import charges? Even if it does, Title VI would launch the United States on a risky path. As noted, the European Union recently considered a proposal to impose on U.S. exports the same type of charges that Title VI would seek to impose on other countries. That proposal reportedly was shelved following intense discussions with U.S. representatives.[100] Even if S. 2191 becomes law, what is to stop the European Union, or any other country or group of countries, from seeking to impose similar restrictions on U.S. exports on the grounds that the United States' GHG controls are not "comparable" to their own?

To the supporters of GHG regulation, S. 2191 is precisely the vehicle by which the United States can reverse its past inaction and become an international leader in the fight against climate change—thereby immunizing itself from the type of trade restrictions threatened by the

[100] Business Week, *supra* note 9. As another example, Professor Joseph Stiglitz and others have suggested that the European Union should bring a WTO claim alleging that the United States' failure to impose GHG emission controls on its own industries constitutes an illegal subsidy under GATT. *See*, Hontelez, *supra* note *8*; Stiglitz, *supra* note 8. Regardless of the legal tenability of such a claim, *see, e.g.,* Pauwelyn, *supra* note 1, at 7-8, it further exemplifies the United States' current vulnerability in the international community concerning climate change.

European Union. The case can be made that, once the United States has taken strong and effective action to control GHG emissions within its own borders, it can and should do everything possible to ensure that its domestic industries are not thereby placed at an economic disadvantage in the global economy. It is virtually certain that Title VI will not withstand legal scrutiny in the WTO if the United States fails to implement its provisions in a transparent and substantively fair manner, fails to engage the world actively and constructively on issues of climate change, and fails to aggressively implement the provisions of Title I of the Bill at home. However, it is doubtful that even those important and necessary steps can or will suffice to save Title VI from a successful GATT challenge.

Conclusion

Title VI as presently drafted runs a very substantial risk of being struck down by the WTO as violating GATT. A system that imposes a charge on all imported products (not just products typically imported from China and India), based on the product's contribution to GHG emissions regardless of where it is produced, would be much more defensible than Title VI, which blatantly discriminates based on the country of origin. However, such a fundamental change in approach would vitiate the primary goal of Title VI, which is to pressure China and India to adopt GHG requirements.[101] A system (like Title VI) that regulates GHG emissions indirectly for domestic products and directly for imports will be much more difficult to justify than one that approaches domestic products and imports in the same way. A system (like Title VI) that allows covered domestic products to take account of offsets that apparently will not be available to regulated imports will be more difficult to justify than one that allows imports to

[101] Further, a system that applied equally to all countries would mean that European products would be subject to European carbon regulation or taxes as well as the U.S. requirements, giving European manufacturers a strong incentive to oppose or challenge Title VI or press for equivalent measures in their own countries affecting U.S. exports.

take advantage of the same benefits that are available to domestic producers. And, of course, a system is particularly vulnerable under GATT where it allows the President to impose import penalties on specific countries that he/she determines, through non-transparent decision making, fails to meet subjective criteria — especially if the United States itself has failed to attempt in good faith to reach bilateral or multilateral cooperative agreements with such countries.

While the impetus for measures like Title VI are understandable, and something like it may be necessary as a political matter to ensure passage of Title I, it may be counterproductive to enact an import program that is likely to be struck down by the WTO.

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International Environmental Law Committee
Association of the Bar of the City of New York

The International Environmental Law Committee is comprised of the following members:

John Rousakis (Chair)
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Patricia Christine Hick
Kevin J. Klesh
Sarah L. Tarlow
Irene P. Atney
Craig A. Hart
Jason Wiener

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